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DIARY FOR JANUARY.

1. SUNDAY	*1st Sunday after Christmas.* Circumcision. Taxes to be computed from this day.
2. Monday.....	County Court Term begins. Surrogate Court Term begins. Recorder's Court begins. Heir and Devisee Sittings commence. Municipal Elections.
5. Thursday	Toronto Winter Assizes begin.
6. Friday.....	Epiphany.
7. Saturday.....	County Court and Surrogate Court Term ends.
8. SUNDAY	*1st Sunday after Epiphany.*
11. Wednesday	Election of School Trustees.
14. Saturday.....	Heir and Devisee Sittings ends.
15. SUNDAY.....	*2nd Sunday after Epiphany.*
21. Saturday.	Articles, &c., to be left with the Secretary of Law Society.
22. SUNDAY.....	*3rd Sunday after Epiphany.*
23. Monday	Last day for notice for Examination, Toronto.
29. SUNDAY.....	*4th Sunday after Epiphany.*
31. Tuesday	Last day for Cities and Counties to make returns to Government. Day for Grammar School Trustees to retire.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JANUARY, 1860.

OUR CALENDAR.

We have to apologize for the delay in the issue of this number. The delay is thus explained:—it is our practice to issue the Law Journal Calendar for each year with the first number of the year. We had prepared the Calendar for 1860 in the usual manner, and sent it to our Printers for publication. When partly in type, the Court of Chancery made new rules, entirely altering the periods for hearing and examination terms. This rendered necessary a corresponding alteration of our Calendar, which alteration has been attended with much delay. We hope, in future numbers, to make up for lost time.

MORTGAGES.—POWER TO DISTRAIN.

The most common security for money loaned in Upper Canada is a mortgage on real estate.

Almost every man in this section of the Province is the owner of some real estate, and is either a mortgagor or mortgagee.

When land is bought it is usual to pay only a portion of the purchase-money and to give a mortgage for the balance. The mortgagee converts his mortgage into cash at a discount, and by this means receives cash for his land.

So in the case of direct loans, the security generally taken is a mortgage on land. Now that the usury laws are abolished the direct loans on mortgage are more frequent than the indirect, by the sale of mortgages made for sale In every aspect the mortgage is an important mode of conveyance, and one which ought to be well understood.

It is an object with the capitalist to ensure regular and prompt payments, more especially of interest—in all probability the source whence his living is derived. Formerly this was sought to be accomplished by a threat of the known powers of a mortgagee, such as to eject to for money due and to foreclose. In later times mortgagees receive greater powers, that is of sale upon default, without any recourse to Courts either of Law or Equity. Still delays are created, either by defences, for time, or specious promises of performance, and still lenders are without their interest.

It has often occurred to us that where the parties are willing a power of distress might be given, and by this step more gained towards regular collection of monies due than by any other course usually adopted. English capitalists must have regular payments of interest, and owing to the irregular mode of paying interest in Canada are frequently deterred from risking their money among us. This is a misfortune to them and to us. Were we to acquire more exact business habits, especially in money engagements, money would be less scarce than it is at present. Abroad there would be more confidence in us, followed by a flow of capital from the Mother Country seeking investment here.

We have had occasion to examine the cases as to distress, and, in the expectation of our research being of some benefit to others, proceed to note the results.

To enable a mortgagee to distrain on the mortgagor in possession, Coote, in his work on mortgages, says an agreement to that effect should be inserted in the mortgage deed, and a sum certain be stated by way of rent. Let us refer to the cases:

The first is *Doe Dem Garrod* v. *Olley et al*, 12 A. & E. 481.

It was an action of ejectment on the part of the plaintiff, who produced and proved the Court Rolls of the manor of which the *locus in quo* was copyhold of inheritance. The rolls contained a presentment of the admittance of Garrod, the lessor of the plaintiff, on the conditional surrender, therein vested, of Burgess, a copyholder out of Court. On the part of the defendants a mortgage deed between Burgess of the one part and Garrod of the other, was put in evidence and recited the title of Garrod to the copyhold in question, and an agreement for a loan of £850 by Garrod to him to be secured by a sur-

render of the copyhold and an assignment of other property therein mentioned.

The deed contained a covenant by Burgess to surrender the premises to Garrod, subject to the proviso that if Burgess should, on 11th July then next, repay the sum of £850, with interest at 5 per cent, then the deed and surrender should become void It also contained a power of sale—after default in payment—of principal and interest.

Then followed this provision :—It is declared and agreed between the parties that he the said John Burgess, his heirs or assigns, shall, during his or their occupation of the said copyhold, messuages, &c., yield and pay for the same to the said John Garrod, his heirs, &c., the yearly *rent*, or sum of £50, free from all deductions whatsoever, by equal half-yearly payments on, &c.; and that it shall be lawful for the said J. Garrod, his heirs, &c., to have and use such remedies by distress and otherwise for recovery of the said yearly rent of £50 or any part thereof when in arrear, as landlords have for recovering of rents upon common demises, provided that the reservation of such rent should not prejudice the right of the said J. Garrod to enter into and take possession of the said hereditaments, &c., and to evict the said Burgess, his heirs, &c., at any time after default shall be made, &c.

Burgess made default in the repayment of the loan, and became a bankrupt. The defendants were his assignees under the fiat.

Afterwards the lessor of the plaintiff distrained on the premises for £50 "for arrears of *rent* due from the said J. Burgess to the said J. Garrod, for the same house and premises upon and up to 11th July last."

No notice to quit had been given before the action by the lessor of the plaintiff to the defendant.

There was a verdict for the lessor of the plaintiff, with leave to the defendant to move to enter a nonsuit.

A motion was afterwards made to enter a non-suit, pursuant to leave reserved, and it was contended that the clause as to distress created the relation of landlord and tenant, so as to make a notice to quit necessary; and though the sum reserved was not the precise amount of the interest, the Court refused to enter the nonsuit.

Thus it will be seen that the validity of the power was in no manner questioned. The only question raised was as to its effect in regulating the position of the parties.

The case was singular in this, that the power of distress was not for either interest or principal *eo nomine*, but for a sum of money described as rent.

The next case to which we shall refer was free from these difficulties; It is *Chapman* v. *Beecham*, 3 Q. B. 723.

On 24th August, 1832, the defendant having lent to the plaintiff the sum of £800, the latter to secure repayment, executed a mortgage, and in the mortgage covenanted that he would repay the sum of £800, with interest for the same at the rate of 5 per cent. on days named; and for better securing the payment of the interest granted to the defendant—that as often as it should happen that the interest should be in arrear for the space of 21 days it should be lawful for the defendant into and upon the said land, &c., to enter and distrain for the same *interest* and the arrears thereof, and the distress and distresses then and there found, to impound and to detain, and in due time to appraise and dispose of the same according to the course of law in the same manner in all respects as landlords are, by Act of Parliament or otherwise, authorized to do in respect of distresses for arrears of rent upon leases for years, to the intent that the defendant should by the same distress or distresses be paid and satisfied all arrears of the said interest and all costs occasioned by the non-payment thereof.

The interest having fallen in arrear, the defendant distrained and the plaintiff replevied.

It was contended by the plaintiff that there was not the relation between the parties that authorized a distress, that after default the land in law became absolutely the defendant's, and that a man cannot distrain on his own lands, and that after default the legal interest of the plaintiff expired, and the rent merged in the estate of defendant.

The Court held that the clause was a simple agreement between the parties that *interest* should be levied by distress, and that plaintiff had the power of granting the right of distress, his possession of the land being undisputed. In other words the meaning of the agreement was held to be that in the event of the money not being paid, the defendant might satisfy himself by securing goods on the premises, and per Coleridge, J. "The whole stands on the agreement of the parties. The title is immaterial. The party in possession says the other may distrain *eo nomine*. You may call it what you please; the words make no difference."

The opinion of Coleridge, J., thus wisely and clearly expressed, appears to be the law. The parties agree that interest should be collected by distress. That agreement neither makes the interest rent nor the parties landlord and tenant. If the party who gives the right of distress is in possession no question of title or estate can be raised. The agreement is one that can be legally made, and when made is, like other agreements, construed so as to further the intention of the parties.

In one case where the clause was thus expressed :—And for the better securing the said principal money and all in-

terest and expenses and in contemplation and part discharge thereof, the said Thomas Thein (mortgagor) doth hereby *allow* to the said John Baker, (mortgagee) his executor, for all the said premises at the full and clear quarterly *rent* for each quarter, and to be recoverable by distress and sale, &c.;" but the mortgage also contained a power of immediate entry and sale in the event of default, the Court held that no notice to quit or demand of possession was necessary. It was in effect held that whatever might be the means of attainment, as the mortgage contained a clause for immediate entry in case of default, that the case came within the authority of *Doe Dem Garrod* v. *Olley*.

These are the leading cases, and so far as they go the law seems to be well settled. In England it is the practice of conveyancers to insert a distress clause in mortgages. The practice is not only sanctioned by long continued usage, but, as we have seen, by express judicial decisions.

How far the right of distress extends to goods and chattels of a stranger on the premises at the time of distress, we do not undertake to say. The question, so far as we can learn, is yet to be determined. (See *Freeman et al* v. *Edwards et al.* 2 Ex. 732.)

JUDGE CAMPBELL.

It grieves us to notice the death of this able and much respected County Judge. He was not only one of the oldest, but most reliable of the County Court Judges. He always manifested a lively interest in the welfare of the *Law Journal*, and did much to promote its success. Often has he contributed to our columns, and, sad to relate, wrote to us on the day on which he breathed his last—little expecting that his career of usefulness was so near its end. He died at Niagara, on 18th January, 1860, aged 53 years, 10 months and 23 days. The deceased was a brother-in-law of Mr. Justice Burns. We subjoin a short memoir of the lamented Judge taken from the *Niagara Mail*:—

The father of Judge Campbell, Donald Campbell, Esq., was a native of Islay, Argyleshire, Scotland, who emigrated to the late Province of North Carolina, previous to the American revolution. He took up arms for the Royal cause, and entered as Ensign in the "North Carolina Volunteers"—his name is mentioned among the list of the U. E. Loyalists, published by Lorenzo Sabine, in Boston, 1847. In the North Carolina volunteers he served under Lord Cornwallis. He was then made Lieutenant in Sir John Wentworth's Nova Scotia Regiment, and from that was transferred to the 7th Regiment or Royal Fusileers which was commanded by the late Duke of Kent, the father of Her present Majesty. From the Fusileers he became Captain in the 5th Foot, and afterwards was made Fort Major, of Fort George, Niagara, which office he held for several years. He died on the 1st December, 1812, and his remains are interred in the south west bastion of Fort George.

Edward Clarke Campbell, the late lamented Judge, was the eldest son of Major Campbell, and was born at Niagara 26th February, 1806. After his father's death, Mrs. Campbell, his mother, removed with her family to Nova Scotia where her relations all lived. The late Judge was christened in Nova Scotia, and there received the name of Edward from his Royal Highness the Duke of Kent, who stood sponsor for him at his baptism. He received his education in the ancient College of Windsor, Nova Scotia. In 1824 he returned to his native town, Niagara, to enter upon the study of the law, and was articled in the office of the late Hon. Robert Dickson. He was called to the Bar Dec. 28, 1829. In 1832 he entered into partnership with Mr. Dickson, which continued until Mr. Dickson retired from business.

At the outbreak of the rebellion in 1837, he raised a fine company of volunteers, and proceeded to join the force assembled at Chippawa, and continued there doing military duty for some months. After that he was appointed Captain in the 1st Lincoln Militia, and became Major in 1849. In his military capacity, Judge Campbell manifested the same spirit of order, kindness, and punctual discharge of duty, that distinguished him in civil affairs.

In 1841, at the time of the Union, he was a candidate for Parliamentary honors, and was elected by a majority of one over the Hon. H. J. Boulton, to represent Niagara, in the first Union Parliament held at Kingston, where he sat during the first Session. At that Session, the Act creating the Division Courts in Upper Canada was passed, previously to which time the Judge of the County Court was the present Mr. Justice Burns, who resigned the Judgeship on the passage of that Act. Mr. Campbell, with the unanimous consent of his constituents, resigned his seat in Parliament, and accepted the office of District Judge, and was appointed December 23, 1841. His jurisdiction at first comprised the three present Counties of Lincoln, Welland, and Haldimand, subsequently, when the other Counties were separated for judicial purposes, he was Judge of Lincoln only.

In 1845 or 1846 he was elected Bencher of the Law Society. He was also one of the five judges appointed by the Act of 1853, to frame rules for the practice and proceedings of the Division Courts of Upper Canada. He devoted much time to this duty, and with Mr. Gowan, Judge of Simcoe, was instrumental in placing the transactions of these Courts upon the present satisfactory and efficient system.

Judge Campbell was a most active member of various societies. He filled the office of president of the Agricultural Society of the united Counties of Lincoln and Welland, and subsequently of the County of Lincoln for many years with rare zeal and efficiency. He was also president of the Niagara Electoral Division Society, Horticultural Society, and Mechanics Institute, which latter office he held almost from its establishment some 12 or 13 years ago. He was elected, last year, president of the Provincial Fruit-growers' Association, a Society particularly congenial to his favourite leisure pursuits, for, as a florist and agriculturist, Judge Campbell ranked among the very foremost in the country. The Provincial Association also enrolled him among its most active and intelligent directors, and his death will cause a sad blank in the meetings of that body.

Judge Campbell married the eldest daughter of the late Rev. John Burns of Niagara, and sister of the present Mr. Justice Burns. He leaves behind him a widow, and two sons, and three daughters.

The health of the Judge had, many of his friends thought, been declining for some time, still nothing to excite apprehension. He had been confined to his house some days in consequence of a severe cold, caught by sitting in his office, in the Court house, the room not been properly heated. This however was not the immediate cause of his death, which was the rupture of one of the arteries connected with the liver. There

is little doubt but that aneurism of the artery had been going on for some years, brought on probably by too much sedentary labor, and then at times taking exercise too violent for the system. On Wednesday morning last he thought he felt somewhat better, and would breathe some fresh air, which he was told he might do, he went out of doors for a few minutes and fell in the yard, he was carried into the house, and died in half an hour afterwards.

As a Judge, the soundness of his judgment, his rigid impartiality, and minute care to arrive at a right decision, gained, him the unbounded respect of the Bar, and the most implicit confidence of all classes of suitors. His punctuality to all engagements and close attention to every minutiæ of his official duty, was the theme of wonder and admiration. In all respects the late Judge was a man such as Canada possesses few equal, and the like of whom is not often found.

Upper Canada owes an immense debt of gratitude to him, for the solid acquisition which it has made through him, in the departments of horticulture and floriculture, which add so much to the enjoyments and elegancies of human life—arts which he cultivated with unwearied industry, devotion and success.

His townsmen in Niagara, will sadly miss his tall and stately form along their streets, and none who knew him will ever cease to revere his memory; and recall his kind offices, and constant good will to his native town. His funeral took place on Saturday, and was attended by an immense concourse of people from all parts of the County. The members of the Niagara Mechanics' Institute attended in a body, also the Niagara Fire Department, of which he used to be an active member, and many eyes unused to the melting mood, filled with tears, when all that remained on earth of this good and noble character was committed to its last resting place.

CHANCERY.

The Rules of 23rd December, 1857, as to the terms for examination of witnesses, and hearing of causes, have been lately much altered. The new Rule of 26th December, 1859, which we subjoin, is now to be observed. It will be noticed that Sandwich, Brantford, and Whitby, are added to the places formerly appointed for the examination of witnesses. No mention is made of Niagara, though named in the Rules of 1857. Whether it is to continue as a place for the examination of witnesses, or is intentionally dropped we are not informed.

MONDAY 26TH DECEMBER, 1859.

The following Terms are fixed for the examination of witnesses, at the undermentioned places, viz.:

TORONTO.—The first Tuesday of February; and the first Tuesday of September.

SANDWICH.—The third Tuesday of February; and the third Tuesday of September.

CHATHAM.—The fourth Tuesday of February; and the fourth Tuesday of September.

LONDON.—The first Tuesday of March; and the first Tuesday of October.

BRANTFORD.—The third Tuesday of March; and the second Tuesday in October.

HAMILTON.—The fourth Tuesday of March; and the third Tuesday of October

BARRIE.—The first Tuesday of April; and the fourth Tuesday of October.

GODERICH.—The second Tuesday of April; and the first Tuesday of November.

WHITBY.—The third Tuesday of February; and the third Tuesday of September.

COBOURG.—The fourth Tuesday of February; and the fourth Tuesday of September.

BELLEVILLE.—The first Tuesday of March; and the first Tuesday of October.

KINGSTON.—The third Tuesday of March; and the second Tuesday of October.

BROCKVILLE.—The fourth Tuesday of March; and the third Tuesday of October.

OTTAWA.—The first Tuesday of April; and the fourth Tuesday of October.

CORNWALL.—The second Tuesday of April; and the first Tuesday of November.

The following terms are fixed for the hearing of causes:

From the fourth Monday of April, to the Saturday of the following week.

From the third Monday of November, to the Saturday of the following week.

THE UPPER CANADA LAW JOURNAL IN ENGLAND.

The Editor of the *Solicitors' Journal*, London, England, concludes an article, headed "Legal Education in the Colonies," with the following tribute to ourselves:

"We are unwilling to conclude this article without mentioning that *the Upper Canada Law Journal*, to which we are indebted for anything we know on this subject, is a publication of great merit. The character of the contributions to its columns is a cheerful proof of the high intellectual culture of the profession in that Province, and affords of itself, perhaps, as good evidence of the beneficial results of the academic training to which we have referred, as could possibly be adduced."

Never unmindful of the good opinion of others, we are particularly obliged to our able contemporary, for the handsome, but, we think, too flattering manner in which he has noticed our efforts. In a Colony, compared with the Mother Country, there are many difficulties in the way of successfully publishing a first class legal periodical. The chief difficulty is the want of a sufficient number of subscribers to make the project remunerative. The next is the dearth of competent men sufficiently at leisure to contribute to its columns. Notwithstanding these and similar difficulties which we need not notice, our efforts shall always be directed towards maintaining the reputation which we appear to have acquired among our London contemporaries.

COMMON LAW REPORTS.

Our thanks are as usual due to the obliging Reporters of of the Courts of Queen's Bench and Common Pleas. Owing to their courtesy we are enabled in this number to publish some important cases in advance of the regular series. The Chamber cases in this number are also unusually full. It is our intention to make them as correct and reliable as possible. In future the proofs of these cases will be corrected by one of the Editors of this journal.

DIVISION COURTS.

THE NINETY-FIRST CLAUSE.

In a late number of the *Daily Colonist*, we find the subjoined remarks, pointed and decided, as becomes a leading organ of public opinion.

When a well informed journal expresses an opinion, it is entitled to great weight, and we gladly avail ourselves of such valuable testimony in support of our own views.

"We are glad to see the *Law Journal* come out boldly in defence of the 91st Clause. We have no sort of sympathy with those people who place the personal feelings of the debtor above the just claims of the creditor, and we believe that the 91st clause exercises a very wholesome influence over a class of debtors whose pockets could not well be reached by any other equally lenient process. The facts given by the *Journal* in support of its views are unanswerable, and ought to put an end to any further agitation on the subject. We regard this article as so important on all points that we shall give it in full in a future issue. The Legislature has gone quite far enough in the expression of sympathy with unfortunate debtors. Let us have something now of the same feeling for *unfortunate creditors.*"

OFFICERS AND SUITORS.

Remuneration to Clerks.

The article in our last number, referring to the enormous income enjoyed by some three or four Division Court Clerks — an income out of all proportion to the labor required of them—has been noticed by one of the leading organs of public opinion in Toronto. The *Colonist* argues with us on all points. We copy a portion of the article.

"A little enquiry on the subject by the Legislature would do no harm," says the Editor. So say we,—and further, that we believe it would show a state of things calling for legislative remedy. In consequence of the recent depression in business transactions, it will be found that the fee fund of last year will be far below that of previous years; that instead of there being a surplus over the disbursements required for the courts, there will be a deficiency; and the overplus, after paying officers fairly for their time, labor and responsibility, should go to make up this deficiency.

If any one doubts the fact that Clerks in cities are overpaid, let him ascertain the number of suits entered for the year, and, counting $1 60c. for each suit (a fair average in such divisions), see what the result will be, and satisfy himself. The *Colonist* says:

"As to Division Court clerks, we quite agree with the *Law Journal* in the opinion, that those functionaries are a most respectable, and intelligent body of men, and that their duties are responsible and require to be discharged with great care and diligence. The fact, however, that some of them are under the present system, very much overpaid, is, we believe, equally incontrovertible, and a little enquiry into the subject by the Legislature would do no harm. Perhaps, too, if the enquiry were extended to the Sheriffs' Offices it would be as well. We have a very good opinion of the system which prevails in many Government offices of doing business entirely by deputy. Why should Sheriffs, Registrars, or any other officers receive such a large salary as to be enabled to make their offices an entirely honorary one to themselves by paying a deputy to do the work, and still leaving themselves a handsome income? It would be far better to make the office an honorary one in reality or else to fix the salary so that the responsible officer should be the working man also.

The Toronto Board of Trade have thought the subject deserving of notice, and speak of it as a matter of notoriety that some of the Clerks and Bailiffs are better paid than the Judges, and they are of opinion that some change is necessary. To use their own words, they say—

"It is the opinion of your Council that it would be advantageous to the public interest if the fees paid the officers of our Courts were reduced and funded and a fixed salary given instead thereof."

Clerks' Association.

We have received several letters on the subject of an Association being formed in each county by the Division Court Clerks, and regular yearly or half-yearly meetings being held for mutual improvement, and securing concert of action. As we are not sure that these letters were intended for publication, we do not feel at liberty to give them. In our last number (referring to the Association in the county of Simcoe), we expressed a favorable opinion of the movement, and we continue to think it would prove beneficial in a variety of ways. Such associations exist in most of the counties in England, and work well.

At the meetings in each county, one of the body might be chosen as corresponding secretary, and one as a delegate to "*the Division Court Clerks' Society for Upper Canada;*" for we see no reason why the movement should not end in such a society being formed, to meet once a year; and the expense of delegates attending such a meeting would be very trifling, divided in just proportion between the Clerks in each county. But there is very little use in talking about a thing, the benefits of which are manifest. Let Clerks in each county act, and form an Association, and discuss the proposition of *a Society for Upper Canada.*

It would require but a small outlay to have the proceedings, including questions settled on discussion at the general meeting, published in pamphlet form; but all these are matters of detail. Again we say, let Clerks *act;* and so far as lies in us, we shall assist and foster the movement, and willingly open our columns to communications on the subject. If the officers of Division Courts, now, desire to submit a petition, or take any other step as a body, the matter, if done at all, must be undertaken by some one who, for the time, takes charge of the movement,—a most unsatisfactory plan, in every respect. With such societies as we refer to in existence, intercommunication would be easy: the opinion of all could be ascertained, and the whole body could speak as one man.

The Division Courts' Act.

In the October number, speaking of the Consolidated Statutes, we expressed ourselves that "all officers of courts of justice *ought* to be provided with the body of the law which is to guide them;" and in particular referred to Division Court officers; for, as we then said, we did not see how the Government could avoid supplying the Division Court Consolidated Act, at least. We have now the

satisfaction of being able to state, that an order in Council has been passed for the supply of copies of the Division Court Act to the *Judges*, *Clerks* and *Bailiffs* of the Courts, and that they have been sent to the County Judges for distribution. It will be a very great convenience, indeed, to have an authorized copy of the Act, in pamphlet form; and the attention to this matter is an additional proof that the interests of the local Courts are not lost sight of by the Attorney-General for Upper Canada.

CORRESPONDENCE.

OWEN SOUND, November, 1859.

To the Editors of the Law Journal.

GENTLEMEN,—With you I think it likely, that Government will supply *Clerks* with a copy of the Consolidated Division Court Act. And as the Legislature has not accorded to Bailiffs, a tariff of fees commensurate with their paying for such a Law Library as they—to be efficient officers—ought to have, and as they have many times greater need for a knowledge of the law generally, than Clerks have, I do not see that Government—to be consistent—can avoid supplying Bailiffs with a copy of *all* Statutes affecting their duties.

'Tis true, you have provided for Bailiffs having all the information contained in the *Law Journal;* but then, the *Journal*, containing as it does, the Bailiff's Manual—which would be all the more valuable and complete, if it contaned a full list of exemptions from seizure—together with the Division Court Acts, does not contain all, or nearly all that it is highly needful for Bailiffs to know. For example, who would suppose, from the all sufficient way in which "the Acts" and "the Manual" are spoken of, that it would be requisite for a Bailiff to study "Militia Law," in order to determine if an old mare, found at a Farmer's Barn, or running loose on the road, is exempt from seizure? Yet such is the fact, and the like is the case with many other Acts.

Indeed, I do not believe that any lawyer could, without a critical examination, announce a list of all the Statutes that do not affect a Bailiff's duties, and if such is the case, how absurd to expect a correct discharge of those duties by such means as the existing remuneration—forbiding, as it does, the purchase of such expensive tomes—is calculated to retain?

In a circular accompanying the last issue of the *Law Journal*, I see that the Consolidate Statutes are $7 50. If I attempt to economise I must—I presume—at least order the following "codes." "The Acts relating to the administration of justice in Upper Canada." "The Municipal Acts of Upper Canada." "The Acts relating to Bills of Exchange." "The Acts relating to Criminal Law of Upper Canada." "The Militia Acts," and most likely some others. Here is $3 40, and to this should be added, the cost of such works as I take, "The Municipal Officer's Reckoner" to be (for without great care and assistance, the conversion of pounds, shillings, and pence, into dollars and cents—now made necessary—by persons all their lives accustomed to the former only, will be accompanied with many "awful errors"). And then think of the number of "services" at 4d. each, the "seizures" and "arrests" at 1s. 6d. each, and the number of miles at 2½d. per mile, to be travelled—through mud, in these back Townships, of undefinable depth—to effect those duties, in order to earn the above unavoidably necessary books, and then let it be said if in fairness the Government should leave Bailiffs to pay for them.

Yours truly,
PAUL DUNN,
Bailiff of D. C., Co. of Grey.

[We have omitted some words from Mr. Dunn's letter, erroneously imputing to us some suggestions which we did not make. He certainly makes out a strong case in favor of the class to which he belongs.—EDS. L. J.]

WILTON, 7th January, 1860.

To the Editors of the Law Journal.

GENTLEMEN,—The zeal and ability with which you have advocated many reforms in our laws, tending to the benefit of the community, and the retention of others that a repeal of would be injurious, prompts me to abandon a foregone conclusion, that I would not take the trouble to make out another return for the information of the Government and Legislature.

As I, with all the other Division Court Clerks, was required last year by the Goverment, to make out a laborious return of 18 months' proceedings, to which was added the time and expense of going to the Judges Chambers with our books, for the purpose of having it tested. And for which we received no remuneration. Albeit, the Government pays liberally to other persons for work done, either directly, or in the shape of casual advantages.

I, therefore, in compliance with your repeated request, send a return of proceedings taken under the celebrated 91st clause of the Division Court Act, in a form as condensed as possible: viz., whole number of suits entered during 18 months ending 1st July, 1859, 608; including, Judgment Summonses, 16; aggregate amount for which same issued, $450 80; paid on same, $218 17; orders made, 11; withdrawn, 2; dismissed, 1; no subsequent action taken, 3; indefinitely stayed, 3; commitments issued, 2; returned paid, 1; returned *non est*, 1; committals, none.

I am satisfied that fully three quarters or more, of the amount realized in this Court, under the effect of said clause, would have been lost to the plaintiffs, had that clause of the Act not been in operation. And having a very good knowledge of the working of that clause in the other Divisions, in these counties, I entertain no fear that my assertion would not be maintained by the other Clerks, as applicable to the whole counties. I am also satisfied, that there has been no case of unjust oppression in these counties, as the Judge very wisely, and very justly, guards against any oppressive measures being taken advantage of under that clause; while at the same time, he manifests an equal desire to protect parties seeking redress under that clause, for their just claims. And I do not hesitate to say, that the so called amendment of last session to the 91st clause, will be the means of greater oppression by the unnecessary accumulation of costs, than could or would have been felt in these counties, under its original form. I am not charging the fault upon the party who moved that amendment, but upon the parties by whom that amendment was passed.

I remain, yours truly,
H. PULTZ, *Clerk.*
D. C. No. 11, *U. Co. of Frontenac, Lennox. and Addington.*

[Letters such as the above, fully corroberate the remarks made by us on the 91st clause, in our last number of the *Law Journal*. Were each Division Court Clerk in Upper Canada, to address us on the subject, we quite think that the result would be much the same. The repeal of the 91st clause by the Legislature, would be a rash and imprudent step. The abuses are more fancied than real.—EDS. L. J.]

OWEN SOUND, 16th January, 1860.

To the Editors of the Law Journal:

GENTLEMEN,—I beg to state the following case, and, if proper and convenient for you to do so, you will oblige me by giving your opinion upon it, in the next issue of the *Journal:*

On the 28th October last, an execution was issued to me, under which I the next day seized and advertised a few stacks of hay. At the time of sale (9th November following), a per-

son present claimed two of the stacks as his property. Of course I did not sell them. The last stack the *defendant* forbid me to sell, alleging that it did not belong to him. I told the company that with my understanding of the statutes (see 13 & 14 Vic. cap. 53, sec. 102; 16 Vic. cap. 177, sec. 7; and the Consolidated Act, sec. 175), I could not properly attend to the unsupported claim of the party against whom the execution had issued; but that if any other person would claim for himself, or if any person, including even the defendant, would claim as agent for the absent, said to be claimant, I would respect the claim. No one did so; and as the defendant's statement appeared to me to be a fiction, I sold the hay. On the 12th instant, the said stack, or the value of it (a very liberal sum), was, for the first time, by a third party, claimed from me. The hay grew where it was seized and sold, on the defendant's farm. You will see that it was advertised for an ample length of time, and no claim was made other than as above stated.

I should like your opinion on the case generally, but more particularly, first, as to whether the above would be a proper case to interplead in; and, secondly, if, when property has been seized, bearing such strong appearance of belonging to the party, has been duly advertised, and then sold unclaimed, the officer can be still held accountable to the claimant. It seems to me that there is not a more important point connected with a bailiff's duties, and as such your opinion must be of the first consequence to us all.

Trusting that your former invitations to be communicative will be my sufficient apology for troubling you.

I am your most obedient servant,

PAUL DUNN.

[We think our correspondent right in declining to act on the mere statement of the defendant.

There is nothing in the circumstances of the case which would debar a *bona fide* owner of "the last stack" from seeking a remedy against the bailiff, though they are such as to raise a strong presumption that the defendant was in truth the owner of the hay; and in any action brought by the claimant, or on an interpleader issue, the burden of proof would be upon him, to show that the property was his.

The bailiff may at once sue out an interpleader summons, if he consider it necessary for his safety to do so.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*

THE MUNICIPALITY OF EAST NISSOURI V. HORSEMAN, CARR AND JOHNS.

Commission under 12 Vic., ch. 81. sec. 181—Duty of reeve and councillors to facilitate the enquiry—Obstructing commissioners and keeping back evidence—Action therefor—Judgment by default against one defendant—Right to call him for the others—Damages.

In an action against three members of a municipal corporation. one being the reeve. for combining to delay and obstruct the proceedings of commissioners appointed to enquire into the affairs of the township, under 12 Vic., ch. 81, sec. 181—

Held. 1. That one defendant, who had suffered a judgment by default. could not be called as a witness on behalf of the others 2. That the jury were properly told. that it was the duty of defendants. and more especially of the reeve. to direct the clerk to produce before the commissioners his books. and to facilitate the enquiry 3. There being evidence to go to the jury to shew that the clerk had absented himself. and kept back the books, &c., in collusion with defendants, and that in consequence the costs of the commission. which otherwise would not have exceeded £75 or £100, were increased to £328, that £250 damages was not excessive.

The first count of the declaration alleged "that the defendants, during the year 1856, were township councillors for East Nisouri, and then and during the time hereinafter mentioned respectively held, occupied and enjoyed the said offices, and upon the petition of one-third or upwards of the members of the municipal corporation of the township of East Nissouri, and sufficient cause being shewn, His Excellency the Governor General of this Province, by order in Council, dated on or about the 1st of July, 1856, directed to be issued, and thereupon was issued, according to the statute in such case made and provided, a commission under the great seal of this Province, directed to David Shank McQueen, Esquire, James Ingersoll, Esquire, and George Washington Whitehead, Esquire, the Commissioners therein named, directing them, the said Commissioners, or as many of them as were therein empowered to act, to enquire into the financial and monetary affairs of the Municipal Council of the township of East Nissouri, and all things connected therewith, and the said commissioners were thereby, and by force of the statute in such case made and provided, empowered to act in the execution thereof, and had all such powers vested in them as are by law vested in commissioners of enquiry appointed under the Act of the Parliament of this Province, passed in the ninth year of the reign of Her Majesty Queen Victoria, chapter thirty-eight, intituled, "An Act to empower commissioners for enquiring into matters connected with the public business to take evidence upon oath," and the said commissioners, or such of them as were empowered to act as aforesaid, were by virtue of the said commission, and of the said statute, empowered to summon and require to come before them any party or witnesses, and to require them to give evidence on oath, orally or in writing, and to produce such documents and things as such commissioners as aforesaid should deem requisite to the full investigation of the matters into which they were so appointed to examine. And the said commissioners. in pursuance of their said powers, did on the said 1st day of July, 1856, meet and assemble together to enquire into the financial and monetary affairs of such municipal corporation and all things connected therewith, and did then summon and require to come before them, the said commissioners, the said defendants, as witnesses, to give evidence on oath, and to produce certain documents which the said commissioners deemed requisite, and which were in fact requisite to the full investigation of the matters into which the said commissioners were appointed to examine—that is to say, the assessment rolls and the collectors' rolls of the said township of East Nissouri, the minute books and entries of the proceedings of the meetings of the said municipal corporation, the resolutions, and by-laws of the said municipal corporation, and the receipts, vouchers, accounts, and other writings relating to the financial and monetary affairs of the said township and connected therewith, and which were required by the said commissioners in the said enquiry. And the defendants well knowing the premises, but contriving and maliciously intending to obstruct, hinder and delay the said commissioners in the discharge of their duties, and in making the said enquiry, and to cause great expense and damage to the plaintiffs, by reason of the expenses of the said commissioners, and in and about the execution of the said commission, and to obstruct, hinder, and prevent the said commissioners from obtaining the said evidence, and to obstruct, hinder and delay the production of the said documents before the said commissioners, the defendants on, to wit, the day and year last aforesaid, wickedly and maliciously among themselves did conspire, contrive, confederate and agree together to obstruct, hinder and delay the said commissioners as aforesaid in the discharge of their duties as such commissioners, and in making the said enquiry, and to cause great expense and damage to the plaintiffs, by increasing the costs and expenses of the said commission as aforesaid, and to obstruct, hinder and prevent the said commissioners from obtaining the said evidence, and to obstruct, hinder and delay the production of the said documents respectively before the said commissioners as aforesaid, and to obstruct, hinder and prevent the said inquiry into the financial and monetary affairs of the said municipality; and the defendants maliciously contriving and intending as aforesaid, afterwards, and during the continuance of the said commission, and on the said 1st day of July, and on divers other days and times between that day and the 1st day of July, 1857, and in pursuance of and according to the said conspiracy, combination, confederacy and agreement, and in order to carry the same into effect, did then, and on the said other days and times, refuse and neglect to attend before the said commission as witnesses as aforesaid, and did neglect and refuse to give evidence to the commissioners as aforesaid, and did neglect and refuse to produce to the said commissioners the said documents respectively, although the said defendants might, and could, and ought to have so attended and

given such evidence, and produced such documents respectively; and did procure one Gregg Nealon, the clerk of the said municipality, and who as such clerk had the custody and possession thereof, to part with the possession and custody of the said documents, or a portion of them, to some person or persons to the plaintiffs unknown, or to the defendants, or some of them, or to conceal himself, or to remove himself to some place to the said commissioners unknown, for a long time, to wit, for the space of six months, to avoid being summoned or attending as a witness before the said commissioners, and to avoid, obstruct, hinder, delay and prevent the production of the said documents before the said commissioners as aforesaid, and did otherwise cause and procure the said documents to be concealed and kept concealed from said commissioners during the period aforesaid, whereby the enquiry of the said commissioners was obstructed, hindered, and delayed, and the plaintiffs were in consequence made liable to pay a large sum of money, to wit, the sum of £300, over and above what the plaintiffs would otherwise have been compelled to pay, if it had not been for the said acts and conduct of the defendants in pursuance of the said combination, confederacy, conspiracy and agreement of the defendants as aforesaid. And the plaintiffs say that the necessary expense of executing the said commission, as provided by statute in that behalf, would not have exceeded the sum of £50, except for the unlawful and malicious acts, conduct, combination, confederacy, conspiracy, and agreement of the defendants as aforesaid; but in consequence and by means thereof, and of the premises, the expenses of executing such commission of enquiry amounted to the sum of £350, and the same were after the execution thereof, and before the commencement of this suit, settled and allowed by the Inspector-General of this Province for the time being, according to the statute, at the sum of £350, being the sum of £300 more than would otherwise have been incurred or allowed, and which said sum the plaintiffs have paid to the said commissioners before the commencement of this suit; and by means of the premises the plaintiffs have been and are otherwise greatly prejudiced and damnified."

The second count was for money due and payable by defendants to plaintiffs, and for money paid to the defendants' use.

Besides demurring to the first count the defendants Horseman and Carr pleaded thereto—1st. Not guilty. 2 That the commision mentioned in the count was not issued upon the petition of one-third or upwards of the members of the said corporation. 3. To so much of the first count as charged that defendants did neglect and refuse to give evidence to the commissioners, and neglect and refuse to produce documents, and to so much of the alleged conspiracy, combination, confederacy, and agreement, as relates thereto, that the defendants did, within a reasonable time, and as soon as they could do the same after they were required by the commissioners, attend before them, and did give evidence and produce documents. 4. That the commissioners had no power to summon the defendants, or call for the production of books. 5. That the sum of £350 was not settled or allowed by the Inspector-General, as alleged. Issue joined thereon.

Plea to the second count—Not indebted.

The defendant Johns suffered judgment by default.

At the trial at Woodstock, before Robinson, C. J., it was proved that more than one-third of the ratepayers of the township, members of the corporation, had petitioned the Governor to issue a commission of enquiry, under the provisions of the 181st section of 12 Vic., ch. 81 and that on the 12th of June, 1856, a commission of inquiry was issued, directed to the judge of the county court and two other gentlemen, commanding them to make diligent enquiry and investigation into all and singular the financial and monentary affairs of the corporation, and all things connected therewith, giving such power and jurisdiction as shall and may be necessary to carry into effect the objects of the commission, and which under the act may be given; the report to be made within six months. Full power and authority was given by the commission to the commissioners, for the better discovery of the truth, to call before them, as well the head of the corporation, as such and so many of the members, officers, clerks and servants thereof, as also such other persons engaged or in any wise employed in or about the said corporation, or the affairs thereof, as well as all other persons whom the commissioners might judge necessary; and for the purpose of such enquiry full power and authority to administer oaths and affirmations, and to cause the head of the corporation and all others to produce upon oath all charters, records, deeds, muniments, statutes, rules, or ordinances, books, documents accounts, papers or other writings of what nature or kind soever belonging to the corporation.

A second commission issued on the 12th of November, 1856, extending the time for the commissioners to report for three months from the 10th of December, 1856.

A third commission issued on the 9th of March, 1857, extending the time still further for two months from the 10th of March.

The commissioners made their report on the 6th of May, 1857.

The amount of the expenses of the commission, as audited and allowed by the Inspector-General of the province, was £328 6s 1d., and this was paid from the corporation funds by the treasurer of the township.

A number of witnesses were examined to establish that the defendants impeded the investigation of the commissioners by the non-production of books and papers which were required, though it appeared that the defendants themselves did attend the meeting, and gave evidence: that they put off from meeting to meeting giving such information as was sought at their hands, and that the clerk, who was under their influence, withdrew himself to another part of the country, where he could not be found, and thus prevented the commissioners from obtaining the minute-book of the proceedings of the council, and other books, papers, and information: that the three defendants systematically acted together in all matters of the affairs of the township, without allowing the other two councillors to have any voice whatever, during the year 1856. Two of the commissioners were examined, who testified that if the defendants had promptly afforded them the information required they could have completed the investigation in a week or so, and that the whole expenses of the commission would not in such case have exceeded £75 or £100, instead of £328 6s. 1d. which it amounted to.

Under the second count, the plaintiffs proved that on the 16th of January, 1857, the day before these defendants would retire from the office of councillors, the defendant Horseman drew an order on the treasurer for £10 10s. in favour of Gregg Nealon, or bearer, for services as township clerk in 1856, and that order was indorsed "pro Gregg Nealon, Dennis Horseman." This order was produced to the treasurer on the 17th of January, and paid to Carr in Horseman's presence. The clerk, Nealon, was then absent, and had not been in the township for some months, and at that time he had township moneys in his hands not accounted for. (See *Municipality of East Nissouri* v. *Horseman*, 16 U. C. Q. B. 576.)

On the part of the defendants, witnesses were examined to prove their attending the commissioners and giving evidence, and their willingness and readiness to afford the commissioners information. After closing their other evidence, they offered Johns, against whom there was judgment by default, as a witness on their behalf. The Chief Justice rejected him as not competent, for though not a party to the issue being tried, yet he was a party to the record, and damages were being assessed against him at the same time.

The Chief Justice remarked to the jury, that the action was of a special and unusual character, and should not be supported except upon clear and satisfactory evidence of misconduct on the part of the defendants. That they need not necessarily find both guilty, but might separate them. That as to the defendant Horseman, who was reeve, though he could not be expected to take the books and papers, which properly were in the custody of the clerk, out of such custody, and bring them himself to the commissioners, yet it was his duty, as head of the corporation, to have directed the clerk to produce them to the commissioners, and it was incumbent upon him to facilitate the means of enquiry. That if he or the other defendants, on the other hand, concluded with the clerk to keep back the papers and documents, that would clearly be *positive* misconduct. If the jury found there was such misconduct in both or either of the defendants, then the enquiry would further be what damage the corporation had sustained thereby. That must be measured by the conduct of the defendants, and how far and to what extent they had obstructed the inquiry of the commissioners, and what expenses this had caused in the investigation which had been paid from township funds.

The Jury gave a verdict for the plaintiff for £250.

Beard obtained a rule *nisi* for a new trial—1. On the law and evidence. 2. For misdirection, in ruling that there was any evidence to go to the jury, and that the defendants, were bound as councillors to have produced before the commissioners the books of the township, the same not having been proved to have been in in their possession. 3. For the improper rejection of the evidence of Johns. 4. For excessive damages.—He cited *Austin* v. *Willward*, Cro. Eliz. 860; *Thorpe* v. *Barber*, 5 C. B. 675; *Haddrick* v. *Heslop*, 12 Q B. 284; *Amey* v. *Long*, 9 East 473.

D. G. Miller and *Anderson* shewed cause

McLean, J.—On examination of all the evidence, I cannot say that the first objection is well founded. I do not think the verdict contrary to law, for the law will undoubtedly warrant such a verdict on sufficient evidence; and as to the evidence, I must say I think it very strong against the defendants, and shows that they were endeavouring to escape from an enquiry which was calculated to bring out against them very gross and fraudulent acts of misconduct while placed in the position of councillors and guardians of the interests of their township. It is not perhaps surprising that they should try to avoid such an exposure as took place before the commissioners, but if in their efforts to prevent their misconduct from being known they caused to the township, which it was their duty to protect, a loss and expenditure of money to a large amount, they ought not to complain if they are held responsible for the consequences of their acts. Had they been conscious that their conduct as members of the municipal council was upright and honest, a sense of justice to themselves should have induced them to court and encourage enquiry; but the reverse, as appears by the evidence, appears t have been the case. The books and papers of the corporation, which were necessary to the proper investigation of the financial affairs of the township, were not produced, on the pretence that they were in the possession of a clerk who was conveniently absent at the time, but from the evidence there is every reason to believe that they were within the reach and control of the defendants. The clerk of the council, in whose possession the documents were said to be, was also a clerk of Johns one of the defendants, and after his alleged departure, and while another person was acting as clerk, a sum of upwards of £10 was granted to him by the defendants for alleged services in 1856, the defendant Horseman first signing the order on the treasurer in his character as reeve, and then endorsing it as agent for Nealon, the clerk.

The jury, after hearing all the evidence, were satisfied that if there were documents or books in the hands of Nealon they were there by the consent and desire of the defendants, and could be produced by them at any time, if they desired to do so, and I certainly think the evidence leads strongly to that conclusion. If the charge to the jury on that point had been even stronger than it appears to have been, it would still not be subject to be regarded as misdirection.

As to the rejection of one of the defendants, Johns, as a witness for his co-defendants, it appears to me to have been strictly correct. He would have been a competent witness for the plaintiff, and so would either of the defendants; but he could not be called for the defendants while he as well as they were interested in reducing the amount of damages or preventing any from being recovered. In giving evidence for the others he would, in fact, be giving evidence for himself. I think, therefore, he was not a competent witness for them, his name as a party being still on the record and he being equally interested in the result with the other defendants, so far as the damages were concerned.

The damages are certainly large, but then it appears that had it not been for the obstructions and delays caused by the defendants, the costs of the commission would not have exceeded £75 or £100, but that in consequence of their conduct the expense actually paid amounted to £328 6s. 1d. If the jury took the £75 as the probable amount of costs, if all information had been readily afforded, then their verdict of £250 would scarcely reimburse the plaintiffs for the extra costs occasioned by the defendants, so that the verdict cannot by any means be considered excessive; but if £100, the larger sum mentioned, were taken as the probable cost of the commission, and the jury took into consideration the interest on the actual sum paid out, the verdict could hardly be said to be excessive. They were at liberty to allow what would replace the money expended in consequence of the defendants' misconduct, and it cannot, I think, be fairly alleged that they have done more.

On all the grounds urged for a new trial I think the defendants must fail, and that their rule must be discharged.

Burns, J,—This case has already been before the court upon demurrer, and the declaration is fully set out in 16 U.C. Q.B. 556.

1. As to the rejection of the defendant Johns, against whom there was a judgment by default. The venue in this case is in the usual form after a judgment by default and judgment for plaintiff on demurrer—namely, that it is convenient and necessary that there be but one taxation of damages in this suit, therefore let the giving of judgment against the defendants Horseman and Carr be be suspended until the trial of the issues they have put upon the record; and as well to try those issues as to assess the damages on occasion whereof Horseman and Carr had put themselves upon the judgment of the court, as to enquire against J hns what damages the plaintiffs have sustained, let the jury come, &c. We had a simi iar question to this a few terms ago in an action of assumpsit, in which it was held that one defendant who had suffered judgment by default could not be examined as a witness on behalf of a co-defendant on issues raised by himself. This case is an action of tort, and the case of *Thorpe* v. *Barber*, (5 C. B, 675) shews that in such cases the defendant, still being a party to the record, and interested in the question of damages, is not a competent witness for his co-defendant upon the trial of issues raised against him. Great pains were taken in that case to review and consider the conflicting decisions which had previously prevailed upon the question. In the same year the question was brought before the Queen's Bench, but there it was whether in a similiar case the plaintiff could call as a witness for him in such an action a defendant who had suffered judgment by default, and after reviewing the authorities it it was held the plaintiff might do so. The court upheld the doctrine laid down in *Thorpe* v. *Barber* (*Haddrick* v. *Heslop*, 12 Q. B. 267). The two cases, therefore, establish the principle, and the destinction between the plaintiff and the defendant calling such a witness.

The defendants counsel endeavoured to draw a distinction in the present case, that the damages might and ought to be assessed against the defendant Johns separately from the others, and that would have the effect of rendering him a competent witness for the others, and he relied upon some old cases on the subject of severing the damages to establish this proposition. The argument seems specious, but when examined will not bear the light. The declaration charges these defendants with conspiring, combining, confederating, and agreeing together to obstruct, hinder, and delay the commissioners in the discharge of their duties in making the enquiry, and to cause great expense and damage to the plaintiffs by increasing the costs and expenses of the commission, and to prevent the commissioners from obtaining the evidence. The defendant who has suffered judgment by default has thus admitted all that is charged, and admits his complicity with the others. The point was much discussed in *Hill and another* v *Goodchild* (5 Burr. 2790), and the doctrine laid down by Lord Mansfield in giving the judgment of the court is, that where a joint trespas is stated, and the jury find two or more defendants of that joint trespass, they cannot sever the damages against each. In *Sabin* v. *Long* (1 Wils. 30), where one of two defendants allowed judgment by default, it was held the jury must assess the same amount of damages against him that they gave against the other.

There was, in my opinion, no misdirection to the jury in respect of the evidence. It was proved sufficiently clear, beyond all doubt that if the defendants had promptly afforded the commissioners the information required, they would have been enabled to have completed their report in some eight or ten days, at an expense of some £75 or £100. The jury were not told that it was the duty of the defendants to take the books, papers and documents out of the custody of the clerk, and produce them to the commissioners, but were told that the defendant Horseman as the head of the corporation, and the other defendants as councillors, had a right to direct the clerk to obey in furnishing that information, and it was their duty to give such directions. There can be no question but that such was their duty. The clerk, it appears, got out of the way, and it was a question for the jury to say whether that pro-

ceeded from the connivance and collusion with the defendants to frustrate the means of enquiry. If it were so, then there was an active act of obstruction to the commissioners, as well as passive acts by their not doing what was their obvious duty to do under the circumstances. It appears the commissioners did not rely upon the defendants producing the books, &c., but took steps to summon the clerk, who, after being summoned, had communications with defendant Carr, and then the clerk informed the officer summoning him that Carr would produce the books to the commissioners. It was proved that something like a book, which was supposed to be the-minute book of the council, was concealed by Carr under his coat when he appeared before the commissioners, but he did not produce it. The defendants made a show of complying with the requirements of the commissioners, by causing the clerk to send a quantity of papers and documents to the commissioners; but when they were examined they were found to have nothing whatever to do with the enquiry the commissioners were to make. In point of law the action was held to be sustainable by the determination of the demurrer, and all that remained after that was to see that the facts stated in the declaration were sustained by the evidence. I think it impossible to read the evidence, and not see that the corporation had abundant reason to complain of the conduct of the defendants, and that it sustained a right of action against them for putting the corporation to extra and unnecessary expense. If the corporation should be put to extraordinary expenses in consequences of those who are chosen to be their guardians falling into an error in the discharge of their duty, or such duty be conscientiously discharged at a greater expense than some might consider right, of course no action can be maintained by the corporation to be reimbursed. In this case the defendants were charged with misconduct in the management of the financial and monetary affairs of the township, and they knew that the investigation which was being proceeded with was to ascertain whether such misconduct could be established or not. Not only every principle of duty as guardians of this corporation should have prompted them to be ready and active in rendering their assistance to the commissioners, but the dictates of their own consciences as honest men, irrespective of office, should have actuated them in being willing to repel with indignation the charges made against them if there were no truth in them, and it should have been their desire to urge on the enquiry as fast and as speedily as possible. Instead, however, of doing so, the evidence but too plainly establishes, not only the absence of desire to facilitate the enquiry, but absolutely an obstruction to the proceedings of the commissioners. And not content with that, the very day before they go out of office they pay that same clerk, or rather pay themselves in his name, a sum of money, at a time when he had left that part of the country, as we must infer, for no other inference can really be drawn, to avoid an examination before the commissioners, and at a time, too, when he had moneys in his hands belonging to the township unaccounted for. With respect to the damages being excessive, when the facts are looked at, and we see that the expenses of the commission were £328 6s. 1d., and the jury have reimbursed the corporation to the extent of $250, it is quite impossible to say the defendants have any right, either legal or moral, to complain.

Rule discharged.

COMMON PLEAS.

ROBERT GASKIN V. WILLIAM WALES.

(Reported by E. C. JONES, Esq., Barrister-at-Law, Reporter to the Court.)

Building Contract—Regulated Damages—Penalty.

Held under the facts of this case, 1, that there was a covenant on the part of the defendant to pay £4 per week for so long as his contract should remain unperformed after the day limited. 2. That an action would lie at the suit of the plaintiff, to recover this sum from the defendant. 3. That the £4 per week is to be regarded as liquidated damages, and not as a penalty.

(Trinity Term, 23 Vic.)

Declaration that defendant, by deed, in consideration of £795, to be paid him by plaintiff, agreed to do the excavations, and mason and plasterer's work necessary for building a dwelling house for plaintiff, in a substantial and workmanlike manner, according to certain plans and specifications, on or before 1st September, 1854, when defendant was to give plaintiff possession, and in default defendant agreed to pay plaintiff £4 per week, as rent or compensation for each week the said agreement remained unperformed after the 1st September, 1854. Averment that defendant did not complete and finish the work on or before the 1st September, 1854, and that plaintiff did not receive possession until the 1st March, 1855, being 24 weeks; nor did defendant pay plaintiff £4 per week for the said 24 weeks, or any of them.

PLEAS.—1. *Non est factum.* 2. That defendant did fulfil his agreement. 3. That he did not finish the work by the 1st September, 1854, by the leave and license of the plaintiff. 4. That plaintiff did not perform and did not pay the £795, according to the tenor and effect of the deed. 5. Payment of £4 per week for 20 weeks. 6. That after the breach and before the commencement of this suit—in a final settlement of accounts between plaintiff and defendant—plaintiff was indebted to defendant in $100, and in consideration that defendant had agreed to give plaintiff three months for the payment thereof, plaintiff agreed to waive all claim for damages by reason of the breach. 7. That by the deed it is provided that the £4 per week should be deducted from the last payment to be made by plaintiff, and that defendant, after the making of the deed, and in pursuance of the terms of the contract finished the whole of the work by him to be finished, and that after completion, defendant delivered the work to plaintiff in full satisfaction, discharge and performance of the contract by defendant, and plaintiff accepted the same in full satisfaction, &c.; and plaintiff thereupon, after such acceptance, paid defendant the full amount of the last payment which was to be made by him to defendant, in pursuance of the contract. Issue was taken on these pleas.

The trial was had at Kingston, in May, 1859, before Burns, J. The contract dated 14th February, 1854, made between plaintiff of the first part, defendant of the second part, and W. R., as surety, for defendant of the third part, was put in and proved. By it, defendant agreed to do the excavations, masons and plasterer's work necessary for building a dwelling house for plaintiff, on a lot in the City of Kingston, belonging to the plaintiff, in a good, substantial and workmanlike style, in accordance with and agreeable to the plans and specifications thereto annexed, and signed and sealed by plaintiff and defendant. The plaintiff covenanted to pay defendant £795 in manner stated. And for the faithful performance by defendant, according to the plans and specifications, the surety covenanted with plaintiff that defendant should keep the covenants and agreements therein on his part to be kept, and should do the work in every respect as contained in the said plans and specifications.

At the end of the specifications were added—"CONDITIONS.—The whole of the before specified works, together with any other not herein specified, which might be necessary to complete the entire building agreeable to the true intent and meaning of the plans or the architect's explanations and working drawings, to be hereafter furnished, shall be done by the contractor in a perfectly sound, clean, and workmanlike manner, to the entire satisfaction of the architect; and the contractor shall provide all and every description of labor, and materials of the best quality of their respective kinds, sufficient for the full completion of his contract. Should any portion of the work be done contrary to plans or directions, the same shall be altered without delay, and made in accordance with drawings or explanations, and the expense of such alterations to be borne by the contractor." There were several other conditions as to alterations of the plan, authority of the superintendent over workmen or materials, extra work, &c., &c., not material to be set forth. Then followed,—"The work to be progressed with as fast as practicable and no delay caused to the carpenters; and the entire buildings, including fence, walls, finished, and the premises cleared and levelled off, and undisturbed possession given thereof on or before the 1st day of September next ensuing, and in default thereof you shall pay a rental for excess of time over and above the 1st day of September next, at the rate of £4 cy., per week—the amount of such rent to be deducted from your last payment on the contract. The contractor to find good and sufficient surety to be bound with himself in the sum of £200 cy., for the due performance of his contract." "In witness whereof we have hereto set our hands and seals this 14th February, 1853." Signed and sealed by plaintiff and defendant.

The plaintiff gave evidence shewing that the work specified was not finished until long after the 1st September, 1854—not till the Spring, the latter part of April, 1855. About Christmas, 1854, the plaintiff told the carpenter, who was engaged to do that portion of the work, that he need not hurry, for he (plaintiff) would not put his family in it. The architect, who superintended it, swore that the defendant could have completed his work by the 1st September, if he had put on men enough. The defendant's counsel objected—that the contract was a joint contract and not several, and that as defendant did at last complete the work, the presumption was, that the £4 per week was deducted by the plaintiff out of his last payment, and that the damages were not fixed. The learned judge overruled the objections The defendant gave evidence that plaintiff had said to a man employed by the carpenter, in reference to the work, that he did not care about his house being finished till he came back from England, but that plaintiff did not go to England with the idea that the house was to be delayed till his return. The learned judge reserved leave to the defendant to move on his objections if the Court should think there was anything in them, and that the damages were not liquidated, and the jury found for plaintiff damages, £96.

In Easter term, *Richards, Q. C.*, obtained a *rule nisi* for a new trial, on the ground the verdict was against evidence; that there was no right to sue for the penalty, but that the plaintiff's remedy was limited to deducting the £4 per week from the last payment accruing to defendant on the contract, and that the damages were not liquidated by the contract, or for non-suit upon the leave reserved.

Read, Q. C., shewed cause in Trinity term. The contract was the several contracts of the defendant. [*Richards* gave this up, as also the objection, that it was to be presumed the plaintiff had deducted the £4 per week from the last payment.] The damages are clearly liquidated. *Denton* v. *Richmond*, 1 C. & Mee. 784, in which Vaughan, B. refers to *Astley* v. *Weldon*, 2 B. & P. 350; *Birch* v. *Stevenson*, 3 Taunt. 469. It has been asked where was the agreement to pay £4 per week? It is true, it is not in the articles of agreement, but it is in the specifications annexed to the agreement, which though drawn up in January 7, 1854, as information to those who might desire to contract, must be treated as incorporated with the articles as part of what defendant had agreed to do. He agreed to do a certain work by a certain day on plaintiff's land; he was lawfully in possession of the land up to that day for the performance of the work, and he agreed, that if he continued in possession after that day to complete the work, he would pay a rental for the land. The contract and the whole of the specifications are to be read together, and there is at least an implied covenant to pay this rent. *Earl of Shrewsbury*, v. *Gould*, 2 B. & A 487; *Duke of St. Albans* v. *Ellis*, 16 East, 352; *Sampson* v. *Easterby*, 9 B. & C., 505, affirmed in Exch. Ch. 6, Bing. 644; *Courtney* v. *Taylor*, 6 M. & G., 851. Bull, N. P 156.

Richards, Q. C., referred to the fact that the specification was drawn up in Jan. 7, 1854, and the contract was not executed until 14th February following. The specification was a mere proposal. The contract is to do the work according to the plans and specifications annexed, and says nothing about paying rent, damages, or penalty, if it is not done by the day fixed; therefore, the contract negatives the idea that this part of the proposal was accepted. But if this be binding on defendant as an agreement, it must be taken as an express contract, specifying also the mode of payment, *i. e.*, by deducting from the last amount the defendant was entitled to receive. The fixing £4 per week is no more a part of the contract than the fixing the mode of payment is, *i. e.*, by deducting: and no action will lie as the parties have agreed upon another remedy, which remedy the plaintiff waived by paying the full balance due. He cannot change the nature of the contract by his neglect to take advantage of the express terms.

Draper, C. J.—During the argument, the *nisi prius* record and the exhibits produced at the trial were not in Court, and the learned Counsel argued under the disadvantage of not certainly knowing their contents. We have them before us now, and find that the articles of agreement were executed on the 14th of February, 1854, and that the specifications, though purporting to be drawn up in the month of January preceding, were signed and sealed by plaintiff and defendant, though not by the surety, on the day the articles were executed; and were at the time of the execution of those articles, annexed thereto—at least the articles so state.

The questions arising are,—1. Whether there is any covenant on the part of defendant to pay £4 per week, for so long as his contract should remain unperformed after the 1st September, 1854. 2nd. Whether, if so, an action will be for this sum or whether the plaintiff has no other remedy but to deduct it from the last payment—and 3rd. whether the £4 per week is to be regarded as a penalty, or as liquidated damages.

I do not feel any difficulty as to the last two questions. No authority was cited to establish that the plaintiff can have no remedy for the £4 per week except to deduct it from the last sum due to the defendant. Assuming for the moment the right to recover the £4 per week; the case of *Fletcher* v. *Dyche*, 2 T. R. 32 shews that if the non-defendant had brought an action for the price of the work—this stipulated sum might have been set-off. But in order to make it the subject of set-off, it must be a debt, and if a debt it would be capable of being set off—not merely against the last payment accruing but against any other debt which the plaintiff had a right to claim from the defendant. I do not regard this expression used as confining the plaintiff to this remedy, it is rather to be looked on as the defendants assent to a ready mode of the plaintiff obtaining the stipulated damage for defendant's nonperformance. It might easily have happened that all that actually remained due to defendant, when the work was completed, would be insufficient to pay for the quasi demurrage and if so according to the defendants agreement, the plaintiff would be without remedy for the excess.

As to the question of liquidated damages the cases cited by Mr. Read, establish the proposition contended for by him or the part of the plaintiff. *Fletcher* v. *Dyche*, already referred to, *Reynolds* v. *Bridge*, 2 Jur. N. S. 1164, and *Gilmour* v. *Hall* 10 U. C. Q. B., 309, are all to the same effect.

The first question is the only one, on which I have felt a serious doubt. It was put by Mr. Read, on the foot of an implied covenant. I am not prepared to hold that it can be sustained on that ground. The rule as laid down by Parke, B., in the *Great Northern R. R. Co.*, v. *Harrison*, 12 C. B, 576, is, that the whole of a specification is not to be considered as incorporated with the deed or contract but only so much of it as that deed refers to. Here the question is, whether the terms of the deed are sufficient to refer to, and include the whole of the writing annexed, that part of it headed "conditions" as well as that part which consists of what may more properly and strictly be treated as specifications. I think this must depend on the intention of the parties to be collected from the two instruments, but more especially of course from the deed containing the defendants covenant.

It must be conceded that their so called specifications were prepared some weeks before the contract was made in order no doubt to obtain tenders for the work, and that in them is expressed not merely those things which are usually understood by the term specifications, but also those of other terms and conditions which the contractor was expected to submit to and be bound to fulfil. If the term specifications as used in the contract can be properly held to mean, all that is contained in the instrument annexed thereto, then the covenant to do the mason work, &c., of the dwelling house, "in accordance with and agreeably to the plans and specifications thereto annexed," would include the payment of the £4 per week as much as it would include any matter strictly falling within the more limited but usually accepted meaning of the word specification, and the covenant would be express, and not merely implied.

The instrument annexed is divided into two parts, specifications and conditions. If all the "conditions" are held to be excluded from the covenant, upon the ground that they are not specifications, and therefore are not referred to in the contract, then there is no express covenant as to the workmanship being done to the satisfaction of the architect, nor as to the quality of the materials, nor as to many other things, which though under this heading of conditions, of a character belonging to a specification of what the contractor was to perform, or to submit to in the doing the work itself, such as alterations of the plan, the authority of the architect

to object materials, or the performance of extra work. Nor is there any stipulation as to the terms when the contract is, on the part of the defendant to be fulfilled Without importing these into the contract, it would be very imperfect and would not be what it is plain was within the intention of both plaintiff and defendant in entering into it.

But if for the purpose of giving effect to what the parties certainly intended, it is necessary to give a more extended meaning to the word specifications annexed to the contract, then its common acceptance warrants, or in other words if we cannot but see that such was the meaning in which it was used, and that it refers to the instrument annexed in all its particulars, then can it be said, that while the time at which the work is to be completed is included within the defendants covenant, the condition to pay the £4 per week is not? I cannot help saying that in my opinion the clearly expressed meaning and intention of these parties is to include the whole. Not content with referring to the plans and specifications thereto annexed, as the guide for the performance of the *work*, they refer to the fact that the plaintiff and defendant have signed and sealed them on the same day that the contract itself bears date, and the signing and sealing being at the foot of all that is annexed to the contract, shews as I think that by the term "*specifications*" they included everything to which their hands and seals were annexed, and which were annexed to the contract.

I think therefore on these facts the case comes fully within the principle of the cases of *Great Northern Railway* v. *Harrison*, 12, C. B. 576, and of *Knight* v. *The Gravesend Waterworks Company*, 2 H. & N. 6.

Indeed I am not satisfied though I do not rest upon this, that if a count had been framed upon this annexed instrument alone, executed as it is, under the hands and seals of the two parties, the plaintiff would not have been entitled to recover upon it as importing a covenant in itself, distinct from the aritcles of agreement, though relating to the same subject matter. Or, it is open to consideration, whether we might, not as regards the plaintiff and defendant look at both instruments as together making one contract, in which case the plaintiff's right to recover would be undeniable. This however is only another form of stating the argument first relied upon, as to the incorporation of the whole of the paper annexed.

The Court of Queens' Bench have we understand during the present term given judgment in an action brought by this plaintiff against the surety for the same breach, that in not paying the £4 per week. Possibly among other reasons why the surety should not be held liable, it may have been considered that as regards him the right of the plaintiff to retain from the last payment to be made to the defendant, might be considered as one of the securities. which the surety had a right to look for his protection, and that the surety had an equitable if not a legal right to treat the fact that the plaintiff made the payment in full, without deducting the £4 per week on account of the non-completion of the contract by the stipulated time, as a bar to his enforcing the demand against the surety, or the decision may have turned entirely upon the manner on which the right of action against the surety was presented upon the pleadings. However this may be, I do not see any sufficient ground on which we can hold that the plaintiff has not a right to recver against the defendant. I think the defendant is proved to have covenanted to complete the work by the 1st day of September next after the date of the contract, or to pay £4 per week for each week after that date that the work should be unfinished as liquidated damages.

In my opinion therefore the rule should be discharged.

Per Cur. Rule discharged.

CHAMBERS.

DELISLE V. LEGRAND ET AL.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

Arrest—Cause of action—Intention to quit Canada—Setting aside.

Semble.—A defendant arrested may dispute either the cause of action, or other matters which the plaintiff's affidavit to arrest contains; but, unless in a very clear case that the plaintiff had no cause of action, the court will decline to interfere.

The affidavit of the plaintiff in this case was sustained as against the objections taken to it.

December, 1859.

This was summons to set aside the order of the county judge of the County of Essex for Defendants' arrest, and the writ of capias with costs, and to discharge defendants from custody, on the ground that the affidavit to hold to bail was insufficient: inasmuch as plaintiff had no cause of action to the amount of twenty-five pounds, and the facts and circumstances to satisfy the judge that there was good and probable cause to believe the defendants, unless forthwith apprehended, were about to leave Canada with intent to defraud Plaintiff, were untrue.

The affidavit of the plaintiff, sworn to on the twenty-fourth of October, 1859, upon which the judge of the county court made an order that the defendants should be held to bail in the sum of two hundred and forty-five dollars, twenty-five cents, stated that the defendants were indebted to him in that sum, upon a promissory note, overdue, made by the defendants on the twenty-first day of August, 1857, by which they promised to pay to the plaintiff's order the said sum, twelve months after date, without interest: that defendant, Legrand, four weeks before the date of the affidavit, told plaintiff that he meant to go to France to get money, and pay his debts on his return; that plaintiff was informed that morning by one Gilbert Brisbois and others, that both defendants were preparing to leave Canada; that the family of the father of defendant, Rabidon, of which he is a member, had gone to the State of Michigan, and that on enquiry he was informed both defendants were to follow the family, Legand being married to a sister of Rabidon; that he believed the facts true, and that unless defendants were arrested, he would lose his debt, it being their desire, as he believed, to quit Canada with intent to defraud him of the debt.

The defendants both swore, they believed the action had been brought on a joint promissory note given by them to one Brussie, the plaintiff and one Morrin being endorsers as sureties for money lent to the defendants by Brussie; that they had no intention of quitting the Province. Rabidon swore he believed his arrest was caused through ill-feeling on the part of the plaintiff, and Legrand swore that he believed plaintiff was merely acting as agent for Brussie, as, the day after making his affidavit, the plaintiff asked him for seven dollars to pay Brussie the interest on the note, as Brussie wanted the same; that three months before, plaintiff had acquiesced in his, Legrand, going to France.

Paul Rabidon, a brother of one of the defendants, swore to his belief that neither defendants meant to leave the Province. The defendant, Charles Rabidon, and his brother made a second affidavit of a conversation with Brussie: that he held the note mentioned in the defendants' first affidavit.

Gilbert Boisbois made an affidavit denying the truth of the statement relative to him, contained in the plaintiff's affidavit; that he believed the action was brought on a promissory note given by the defendants to one Brussie, the same having been endorsed by plaintiff; that he believed plaintiff was only acting as agent for Brussie, as plaintiff told him after the arrest of the defendants, that his furniture would be sold to pay that note to Brussie, unless he did something to justify himself.

In answer the plaintiff put in affidavits. He swore that the promissory note in question was redeemed by him before this action was brought; that he was not acting as the agent of any one in the matter; that before commencing the action, James Harken, De la Forrest, and others informed him, that defendants were about to leave the Province.

Emanuel Boisee swore that the note in question was endorsed by the plaintiff, and was in his hands, but that before the commencement of this suit the plaintiff paid him the amount, and took the note back. Antoine P. Reaume swore that defendant, Rabidon, about a month ago, told him he was going to follow his family, who were gone, or then immediately going to the United States. James Revill swore; that about eighteen months ago, plaintiff and defendant, Legrand, gave him instructions to draw a chattel mortgage, to secure to plaintiff payment of a promissory note, which he believed to be the one in question; that he did prepare a chattel mortgage, but Legrand did not execute it.

James Harkin swore; that about two weeks before the issuing of the capias, he heard from various persons that defendants were going away, and told plaintiff of it.

John Williams made an affidavit to nearly the same effect.

Felix A. Lafferty swore that about five weeks ago defendant, Legrand, told him he was going to France.

Joseph De la Forrest swore: that he lived five months with defendant, Legrand, that during this time Legrand spoke frequently of going to France; but, at the same time, said plainly it was not his intention to go to France, but to the United States of America; that two months ago defendant, Legrand, said, that as soon as he could collect money enough to go to the United States, he would leave "this wretched country;" that on two occasions he sent deponent to collect money, directing him to tell parties to pay at once, as he was going away to the United States; that Legrand promised deponent to write a letter to some person in the State of Illinois, to ascertain if it would be a good place for a French doctor, which deponent did and got the answer annexed to his affidavit; that it was understood between him and Legrand, that as soon as the latter went to the United States he should open a drug store, and that in time deponent should join him, to be his apothecary; that Legrand said if he would not take his family at once, he would leave his wife with her brother, Paul Rabidon, and afterwards send for her, and that long before the capias in this cause was taken out, he, deponent, informed plaintiff of the principal facts above stated.

Draper, C. J.—Under the statute, 22 Vic., chap. 96 (1858) s. 2, the plaintiff, in order to procure a judges order must shew:

1. That he has a cause of action to the amount of twenty-five pounds, or has sustained damage to that amount.

2. He must shew such facts and circumstances as shall satisfy the judge that there is good and probable cause for believing that such person, unless forthwith apprehended, is about to quit Canada with intent to defraud his creditors generally, or the plaintiff in particular.

As to the first point the plaintiff's own affidavit states all that is necessary to warrant the order to arrest. The affidavits in support of the defendant's application throw considerable doubt on the matter; but Boisee's affidavit, filed in reply on behalf of the plaintiff, sets the matter at rest, and fully establishes the plaintiff's right to sue.

According to the opinion of Coleridge, J. in *Copeland* v. *Child*, 17 Jur. 507, the if plaintiff's affidavits were sufficient in this respect, the court would on such an application enquire no further, "for," as he observes, "if affidavits were received which go to the right of the matter, there would be this inconvenience, a judge might, by listening to the party who swears most stiffly, come to one decision, the jury on the trial might arrive at another."

In *Pegler* v. *Hislop*, 1 Exch, 437, the Court of Exchequer expressed a contrary opinion, Parke, B., observing that the defendant was not precluded from disputing at this stage of the proceedings, either the cause of action, or other matters which the plaintiff's affidavits contain; but he added, "it must, however, be a very clear case that the plaintiff had no cause of action, or we should not interfere."

In *Hammers* v. *Hughs*, 18 C. B. 52, the Court of Common Pleas adopted the opinion expressed in the Court of Exchequer, and virtually overruled that expressed by Coleridge, J.

Acting on this decision, I have considered the question, but have no doubt that the summons, so far as this part of the question is concerned, must be discharged.

I have as little doubt on the other point. The affidavit of De la Forrest fully sustains the plaintiff's affidavit, and affords good and probable cause for believing that Legrand was about to leave the Province, and that the plaintiff, before the issuing of the capias, was informed of the facts.

The case is not so strong with regard to Rabidon; but, taking all the facts and circumstances together, I do not think it right to interfere.

The case of *Graham* v. *Sandrinelli* 16 M, & W. 191, caused me some doubt, but there, the plaintiff's affidavit, on which the order to arrest was made, was not supported by affidavits on shewing cause, and the defendants own affidavits that they were not about to leave the Province, are, I think, sufficiently met; or indeed I think that they alone would not justify the order prayed under any circumstances.

Summons discharged.

Fowler v. Port Hope, Lindsay and Beaverton Railroad Co.

(Reported by C. E. English, Esq., M.A., Barrister-at-Law.)

Arbitration—Excess of Authority—Indefiniteness of Award—Reference back to Arbitrator.

An award must be certain, definite, and in accordance with the submission.

A. leases a line of Railway, or rather a right of way over a Railway, from B. at a rental to be determined by arbitrators, and covenants to run "at least one train per day, with leave to run more, the maximum number of trains to be fixed by said arbitration."

An award fixing a rental to be paid for ensuring *four* trains a day instead of *one*, is bad and will be referred back for reconsideration.

Hagarty, J.—By lease of 18th November, 1857, the applicant, Fowler and another agreed to build a Railway from Peterborough to Millbrook. The Port Hope and Lindsay Company demised to him the Railway, &c., &c., for a term of 999 years, at a rent of $5 per annum. Fowler covenanted to pay that rent, and to finish the Railway in working order within a specified time, and that he would during the time run at least one train for goods and passengers each way, each working day over the whole line, and would pay a rent or compensation for the use or right of running one or more through trains from Peterboro' (by Millbrook) to Port Hope, and *vice versa*, for goods and passengers as therein provided; such rent or compensation to be ascertained and paid weekly in advance as therein after provided; and it was declared and understood by the parties, that Fowler should have the right to run through trains from Peterborough (by Millbrook) to Port Hope, and *vice versa*, over the line between Millbrook and Port Hope at all times day and night, upon payment of a rent or compensation therefor, to be fixed by arbitrators chosen in the usual way, once in every three years; and that the arbitrators should fix and determine the maximum daily number of such through trains, and the maximum number of cars and engines of which the same be composed respectively.

After the making of the road, the parties appeared to have had other dealings as to rolling stock. No question arises as to the appointment of Mr. Shanly as referee. That gentleman, after hearing the parties, made his award dated 18th May, 1859.

The award recites a resolution of the Company of 18th March, 1859, appointing Mr. Keefer arbitrator, to fix and determine the amount of compensation to be paid to the Company by the Lessee for the use of the road from Millbrook to Port Hope, and the works and premises of the Company at the latter place, under the terms of the lease; and that the Lessee be required to name an arbitrator; and that by another resolution of the Company of 14th April, 1859, he, Walter Shanley, was appointed to arbitrate upon the said matters referred to in the resolution of 18th March, instead of Mr. Keefer, and which resolution was accepted in writing by Foster. Mr. Shanley proceeded to award, that the annual rent to be paid by the said J. Foster to the said Company, &c., under the terms of the lease referred to in the said resolution, should be for the three years next ensuing the execution of the award, $15,000 for each year, the said rent to be paid by weekly payments in advance, as in the said lease is mentioned and set forth:—"And I so further award that the maximum daily number of trains to be run by the said John Fowler, in consideration of the above mentioned payments of $15,000, on the main line of the Port Hope, Lindsay, and Beaverton Railway Company, from Port Hope to Millbrook, or *vice versa*, shall not exceed four on each day, each train of which said trains shall be drawn by one engine, and shall not to exceed 18 cars in number." The award then proceeded to direct, that in consideration of such rent, Fowler should be entitled to the use of the Station ground, time table, &c., at Port Hope, so far as required for the accommodation of his trains—he not unnecessarily interfering with the business of the Company; and further, that for such rent he might have the use of the sidings as well as of the main line, and to the services of suitable men of the Company, and to the platforms, &c., and that if Fowler found it necessary to run more than the four trains per day between Port Hope and Millbrook, and *vice versa*, then, and in that case, he would have the right to put on one or more additional, by first giving notice to the Company, and paying an advance to them of $20 per day for each additional train, consisting of but not exceeding one engine and eighteen cars.

M. C. Cameron, on behalf of Mr. Fowler, obtained a rule to shew the cause why the award should not be set aside

aside, on the grounds, 1st,—That it was uncertain and not final, and did not pursue the submission in this, that by the lease Fowler was to pay a compensation for running one or more trains, and the arbitrator did not determine the compensation for running one train, but for running four, and it was not certain whether he meant four trains back and forward, or two trains each way, and he was to fix the maximum number of trains, and he did not do so, but gave a discretion to Fowler to run any number of trains, paying a certain rate per day for each train over four; that the arbitrator had nothing to do with the working of the Railway, and exceeded his authority in awarding as to the use of sidings, &c., or why the award should not be remitted back to the arbitrator for reconsideration, &c., &c.

Cameron, Q. C., and *Galt*, Q. C., shewed cause.

I do not consider that anything turns on the affidavits filed. It is necessary to read together all parts of the lease bearing bearing upon Fowler's use of the Company's line to understand clearly the matter really submitted. As I understand the case, judging wholly from the lease, submission and award it appears to be this: Fowler gets a lease at a nominal rent of the Company's corporate rights for a long period, and contracts to make a line of road from Peterborough to intersect the Company's road at Millbrook, and to make such portion for his profit, he being, in fact, proprietor for the time of that portion He bargains with them to run at least one train each way daily, between Peterborough and Port Hope. In doing so he would use, of course, that part of the Company's line between Millbrook and Port Hope; to make his portion profitable he would naturally require to use their portion in connexion therewith, and they would naturally expect payment for such use of their portion. He therefore agrees to pay them a rent or compensation for the use or right of running one or more through trains from Peterborough to Port Hope, and *vice versa*, such rent to be ascertained as thereinafter provided.

So far we can understand their position.

He is bound to run at least one train each way daily, and it is to be ascertained what he is to pay therefor; and it is also contemplated to ascertain what he is to pay for running more than one train each way—as he may naturally desire to run more if business requires. In a subsequent part of the lease it is expressly declared that he is to have the right to run through trains between Port Hope and Millbrook, on paying a rent therefor, to be fixed by arbitration, the arbitrators fixing the maximum daily number of trains.

There were therefore two things to be ascertained—1st, The amount which Fowler should pay merely for doing what his contract compelled him to do, viz.: the running of at least one train each way daily. It is obvious that he might not desire to run more, and it might be a loss instead of a profit to do more. 2nd, If he desired to avail himself of the right conferred by his lease of running any greater number of trains, then the arbitrator is to fix the maximum of trains and the rent or compensation to be paid therefor. It appears to me that it is one thing to determine the rent to be paid by Fowler for what he is bound to do under his contract, and another thing, the amount to be paid should he avail himself of the privilege allowed him of doing more.

Mr. Shanley in his award assesses $15,000 as the annual compensation to be paid by Fowler under his lease, without saying for what it is to be paid. He proceeds then to award that the maximum number of trains to be run by Fowler, in consideration of such payment on the Company's line from Port Hope to Millbrook, or *vice versa*, shall not exceed four each day. He further gives him the right of putting on extra trains on giving a certain notice and paying $20 daily for each extra train.

As I read the award the right to run four trains is expressly in consideration of the $15,000; it seems conceded in argument, and is in accordance with common sense, that the wear and tear of a railroad is naturally in proportion to the amount of work, and that two trains each day would not do the same injury that four trains would; I think it just to assume that the arbitrator so understood it and considered the $15,000 at the proper rent for the right of running any number up to four trains. I think the Lessee, Fowler, has the right to have it clearly stated what is the amount of rent that he must pay for running the number of trains which under his contract he is bound to run, and which number he may not desire to exceed.

I think the award must be referred back to the arbitrator for reconsideration on this head. I do not consider the other objections important. The time for making the award stands enlarged until 1st day of next year, with power to referee to enlarge again.

Order granted.

McINNES v. MACKLIN.

Orders for Ca Sa—Application to discharge same—Induction to defraud—Practice.

Quare—When one judge on a statement of facts has granted an order for a Ca Sa to issue, can another Judge taking a different view of the same facts, interfere in the matter without any new matter being shown?

The question whether any debt is due or not will be entertained on an application to discharge an order for a Ca Sa, but unless a very case is made out the court or judge will not interfere.

The affidavit in support of an application for an order to hold to bail should state the name of the parties informant, but if it shew facts sufficient to satisfy the mind of the judge, this is sufficient, it need not copy the words of the statute.

(September 3rd, 1850.)

The defendant had been arrested on a *Ca Sa* issued on the order of Mr. Justice Burns, under 22 Vic., cap. 96.

The affidavit of plaintiff stated that defendant was indebted in two hundred and twenty-four pounds, eighteen shillings and three pence on a judgment. That five days before the day of affidavit, defendant informed plaintiff that it was his intention to leave Upper Canada and to go to the Red River settlement by the way of Lake Superior, and that he did not intend to be absent from Canada for a longer period than six months. That on the same day plaintiff was informed and believed that defendant did not intend to go to the Red River settlement, but intended to go to New Caledonia by way of New York. That the informant told plaintiff he had seen a letter from defendant to a person in New York inquiring for a ship sailing to the Isthmus of Panama and that he believed defendant would sail in the ship "Star of the West" from New York to the Isthmus of Panama, on the twentieth day of the month of June. That plaintiff believed that defendant intended immediately to leave Upper Canada with intent to defraud, and that the informant declined making an affidavit of the facts. That plaintiff believed defendant made the statement as to the Red River to deceive and mislead his creditors, and that he had no intention of returning to Upper Canada.

On the ninth of July Defendant obtained a summons from the Chief Justice of Upper Canada, to shew cause why he should not be discharged from custody and the Bail Bond be cancelled on the ground that the affidavit on which the order had been obtained did not disclose the name of the party from whom the plaintiff received the information, that defendant was going to New Caledonia and on grounds disclosed in affidavits and papers filed.

Defendant supported his application by his own affidavit setting forth an account of his dealings with the plaintiff, that on 9th June he had assigned certain collateral securities to his creditors for their claims that they were not all unpaid, that it was true he was about starting for British Columbia, *via* New York and the Isthmus of Panama, but that his absence was to be only six months, that he was certainly to return within that time, that he was leaving his wife and family behind, that it was publicly known that he was so going away, that he had at first spoken of going by the way of the Red River settlement, by the overland route, and strongly denying all fraudulent designs.

Several other affidavits were filed corroborating these statements. The plaintiff filed numerous affidavits in reply.

The summons was enlarged from time to time, and was argued on the twenty ninth August. The defendant produced further affidavits in answer to those of the plaintiff, and both sides exhibited great industry in producing counter affidavits each eliciting some new matter and answered by the other side. This was done by the consent of the parties, and resulted in producing in all thirty six affidavits, several deponents from time to time producing two or three answering and rebutting charges.

Freeland for defendant, *Sadlier* for plaintiff.

HAGARTY, J.—It is very much to be regretted that this unrestrained license of swearing has been allowed in this case as the result has been the placing on the files of this count a vast mass of slander and irrelevant vituperation, and parties seem to have been permitted and encouraged to indulge in all sorts of personal ill feeling, and malignity, wholly beside the merits of the case and the points really at issue. It seems strange that the consideration of the question whether a man in business in London was about to abscond or not, should induce a large number of persons to work industriously to blacken and defame each other on oath. If their doing so had at all tended to elucidate the matter really in question it would be simply one of the painful necessities of legal disputes. When such abuse is indulged in on wholly irrelevant points it be comes intolerable and deserving of severe reprobation.

On the argument Mr. Freeland for defendant, in addition to the ground set forth in the summons contended that the defendant should be discharged as the debt had been secured and was not in fact due. And that the affidavit to arrest only spoke of a departure from Upper Canada, instead of Canada. He cited *Talbot* v. *Buckley*, 16 M. & W. 173, *Givens* v. *Spalding*, 11 M. & W. 173, *Choate* v. *Stevens*, Taylors' Reports, U. C., 620., *Bradenburg* v. *Needham*, 1 Dowl., P. C. 439, *Baltman* v. *Dunn*, 7 Dowl., 105, *Ross* v. *Balfour*, 5, U. C. O. S. 683, *Larchin* v. *Willan*, 7 Dowl., P. C. 11.

First as to jurisdiction. Our statute following the words of the English Act, 1 & 2, Vic., cap. 110, allows the defendant to apply to a Judge or to the Court in which the action is brought for an order or rule for his discharge, and that either judge or court may make absolute or discharge, such order or rule provided that the order made by a judge may be discharged or varied by the Court.

In *Graham* v. *Sandranelli*, and *Talbot* v. *Buckley*, 16 M. & W. 196, in pronouncing the judgment of the Court, Parke, B., says, That the Judges were not agreed upon the question, whether if the Judge secondly applied to should differ from the first on the same state of facts, he has power or right to order the previous discharge as upon an appeal to the Court. Although Baron Parke speaks of "the same state of facts" in the case before the Court, the second application was as here on new facts shewn by affidavits of defendant and others, negativing an intention of leaving England. It is not necessary further to discuss the question of my jurisdiction in Chambers as I dispose of this case on my view of the merits.

As to the debt being due. It was at first thought that this question could not be raised on motion, and Sir John Coleridge, in *Copeland* v. *Chlld*, 17 Jurist 566, so expressly decided. It is clear however from *Stammers* v. *Hughes*, 18 C. B. 527, *Pegler* v. *Hislop*, 1 Ex. 437, that there is jurisdiction to try if a debt really exist. Mr. Justice Williams adds,—"I never for a moment doubted that the question was an open one, but at the same time, I have always said I would not take upon myself to try a question which was at all doubtful." Parke, B., says, "It must be a very clear case that the plaintiff had no cause of action or we should not interfere."

Now the case before me is anything but a clear case, and the defendant has by no means satisfied my mind that he has been held to bail for any amount not truly due. I therefore pass to the other points taken.

The chief objection to the affidavit seems to be the omission to give the name of plaintiff's informant. From the remarks made by Alderson, B., during the argument of *Talbot* v. *Buckley*, it appears to be the opinion of that learned Judge, that the informant should be named. The same view is strongly laid down by Parke, B., in *Gibbons* v. *Spalding*, 11 M. & W. 173, but is somewhat qualified by the judgment in *Arkenheim* v. *Colegrave*, 13 M. & W. 620.

I do not, however, consider this affidavit to fail on this ground. The plaintiff swears that defendant himself informed him that he was going to the Red River settlement out of the jurisdiction, although to return, as he alleges, in six months. He adds to this, that he was elsewhere informed that defendent was going to British Columbia *via* New York.

I think the information furnished by defendent cannot be overlooked in judging of the sufficiency of the affidavit. In *Hargrsaves* v. *Hayes*, 5 El. & B. 272, the plaintiff swore to have been informed by defendant that he was going with his family to reside permanently in Australia. Campbell, C. J. says,—"The Act requires that the affidavit shall be such as to satisfy the judge, and if it state facts sufficient to lead the Judge to believe that the defendant, unless forthwith apprehended will leave the country, that is enough." Sir J. Coleridge, "It does not follow that the affidavit must copy the words of the Statute; all that is necessary is that it should satisfy the judge that the contingency is at hand." Crompton, J. "It is left to the judge to decide whether he is satisfied that the defendant will leave the country unless forthwith apprehended."

It is to be borne in mind that the Canadian Statute requires the further proof of the departure with intent to defraud.

The technical objection as to the departure from "Upper Canada" instead of "Canada," would have prevailed most probably in the old affidavit, not stating facts as now required. I think that the facts sworn to as to Red River and British Columbia, and other places beyond the Province of Canada, may, in this case, be held to cure the objection at this stage of the proceedings.

As to the general ground that defendant now shews facts to prove that he did not contemplate such a departure as would have warranted his being arrested, I do not consider that I am called on to interfere. The facts of the case are very peculiar. The defendant was confessedly in great pecuniary difficulty, and about to depart for a very remote part of the world, involving even on his own showing, an absence of six months, and possibly for a longer period. It would, of course, be wholly in his own option whether to return to Canada or not.

I abstain from any mention as to the impression on my mind as to his intentions, especially as it is stated that an action is pending for malicious arrest. It is sufficient for me to say that I do consider it to be a case in which, assuming that I have jurisdiction, I am by law required to discharge the defendant from arrest.

I discharge the summons without costs.

The learned judge also referred to the following cases:—*Ross* v. *Montefiore*, 1 H. & N. 722; *Bullock* v. *Jenkins*, 20 L. J. 90, Bail Court; *Burness* v. *Guaranovitch*, 7 D. & L. 285; *Gadsden* v. *McLean*, 9 C. B., 283.

BECKET ET AL V. DURAND.

Costs of the day—Nonpayment thereof—Staying proceedings—Costs.

Nonpayment of cost of the day, is not a sufficient ground for staying proceedings until such costs are paid, especially when such a course would entitle the defendant to sign judgment for his costs, for not proceeding.

There might be an extreme case, when staying proceedings for nonpayment of cost of the day, would be the proper course.

Where a summons moved *with costs* is discharged, it is discharged with costs. A notice to proceed to trial, given by the defendant to the plaintiff under the Statute, is a waiver of any objections that might otherwise have been to a notice of trial regularly given thereafter, and pursuant thereto.

(December, 1859.)

Issue was joined in March, 1858, and notice of trial was served for the Spring Assizes of 1858.

The plaintiffs did not go to trial, and the defendant taxed costs for not proceeding to trial, at £11 5*s*. 8*d*.

The plaintiffs reside out of the Province, and gave the usual security for costs, before issue joined. The defendant demanded the costs so taxed, of the surety, and also of the plaintiffs' attorney.

Since entering the cause for trial, the plaintiffs took no proceeding until the third of October, 1859, when they gave notice of trial for the then ensuing Assizes at Toronto.

On the 8th of September, 1859, defendant served on plaintiffs' attorney, a notice under the 151st section of the Common Law Procedure Act of 1856, to proceed, and thereupon the plaintiffs gave this last notice of trial.

The defendant obtained a summons to stay all further proceedings, until the costs for not proceeding to trial should be paid, and and to set aside the notice of trial, because the plaintiffs had not given a term's notice of their intention to proceed before giving it, upwards of four terms having elapsed since the last proceeding.

The only disputed fact, was as to the plaintiffs' attorney having undertaken to pay the costs, before giving notice of trial. The plaintiffs' attorney denied having given any such undertaking, and stated that he could not proceed to trial, because a commission to examine a witness had been refused, but that the plaintiff expected to procure the attendance of this witness, at the then ensuing Assizes for Toronto.

DRAPER, C. J.—I find no authority for staying proceedings until the costs of the day are paid, though an extreme case might arise, in which such a course would be proper (see *Henzell* v. *Hocking*, 9 Jur. 18). The defendant, if successful in this action, will, I apprehend, be able to recover these costs, and if he fails, will be allowed to set them off against the sum recovered by plaintiffs.

Besides, I do not see how I could properly make such an order, when the defendant has given the plaintiffs notice to proceed, and will be entitled to enter a suggestion and sign judgment for his costs, if the plaintiffs omit either to give notice of trial, or to proceed to trial pursuant thereto, or do not obtain an extention of the time for going to trial.

The giving the notice to proceed, appears to be proceeding in the cause, (see *Knight* v. *Gaunt*, 17 Jur. 189,) and I presume that in strictness the defendant could not have taken it, after the lapse of four terms, without giving a term's notice. But plaintiffs do not object to this, they comply with defendant's notice by giving notice of trial. There has, therefore, been a proceeding in the cause, within four terms next proceeding the giving notice of trial. It certainly would be a strange result if the defendant could call on the plaintiffs to proceed by giving notice of trial, and then move to set aside the notice for irregularity.

The summons must therefore be discharged, and with costs, becuse moved with costs. *Henzell* v. *Hocking*, is exactly in point in this respect.

Summons discharged with costs.

JONES v. HARRIS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

Interpleader—County Court—Certiorari.

A certiorari does not lie to remove an interpleader issue from a County to a Superior Court.

If such a writ do improvidently issue the application should be to quash the certiorari and not for a procedendo.

(27 December 1859.)

This was an an application to set aside a writ of certiorari and proceedings under the following circumstances.

On the twenty ninth of June 1859, the Judge of the County Court of the County of Middlesex, at the instance of the Sheriff made an interpleader order in a suit of *Harris* v. *Andrews*', to try whether certain goods seized by the sheriff under a *fi. fa.* were the goods of the claimant (Jones).

The order directed the parties to try the issue at the then next sittings of the County Court in London and the question of costs, repayment of possession money, and all further questions were reserved until after the trial of the issue.

The execution creditor Harris was made Defendant.

The issue was delivered afterwards on the second of September, the plaintiff sued out a writ of certiorari upon a prœcipe and removed as the writ expresses it, the plaint and proceedings into the Court of Queen's Bench.

Subsequently to this being done the defendant made an application to a judge in Chambers for security for costs, and on the thirteenth of October an order was made *ex parte*.

This application to set aside the certiorari was made by defendant.

BURNS, J.—There is no doubt the proceeding by certiorari is altogether irregular. Such a writ does not apply an to issue directed by the Court or Judge which has possession of the cause out of which the issue to be tried springs. The ordinary writ of certiorari removes the cause to a superior court, and when once removed the Superior court disposes of the cause thoroughly. There is no going back to the inferior court for judgment or anything connected with the suit.

It is obvious that the writ of certiorari does not remove the judge's order for the interpleader issue, for that has been made in the suit of *Harris* v. *Andrews*, which is in no way brought into the superior Court by the writ of the certiorari. Besides this difficulty a judge's order cannot be removed in that way to a higher tribunal.

The writ of certiorari then, if it could issue, would do nothing more than remove the feigned issue which the parties had entered into pursuant to the order of the judge of the County Court, and all that the Superior Court could do would be to let it be tried as a record of the Superior Court. If it were so tried the parties would have to get the matter back again in some way to the County Court to be disposed of finally, for the judge of that Court has reserved all questions until after the issues should be tried. The judge has ordered the issue to be tried at the County Court in London. What becomes of that provision, and where is the issue to be tried when the party has brought it into the superior Court? All these difficulties shew that the writ of certiorari does not apply to removing an issue directed by the Court. The parties must try it in the Court where ordered and under the terms provided for.

The plaintiff resists the application on the ground that the defendant has assented to the case being regularly before the Superior Court because he has obtained an order on the plaintiff to compel him to give security for costs. But the most direct and positive assent of the parties upon the facts as they appear could not possibly give the Superior Court jurisdiction.

The defendant asks for a writ of procedendo to send the matter back to the County Court there to be disposed of. I do not think such a writ can properly issue for that would be recognizing a right to bring the matter up. The only proper order to make is to quash the writ of certiorari as being improvidently issued in a case where it never ought to have issued. If the defendant had applied for that in the first instance he might have obtained the costs of the application but he has led the plaintiff into the belief by his applying for and obtaining an order for security for costs, that he thought all right and therefore there should be no costs.

The order of the Judge of the County Court has never been removed from that Court, and the parties must apply to the judge for time to comply with the terms of it in regard to trying the issue thereby directed.

THE BANK OF BRITISH NORTH AMERICA v. ELLIOTT.

Several actions on Promissory notes—One of Defendants out of Jurisdiction—Costs.

The Consolidated Act of Upper Canada, cap. 42 sec. 23, providing that in case several suits be brought on one bond or on one promissory note, to or against the maker, drawer, acceptor, or indorser of such note, &c., there shall be collected or received from the defendant the costs taxed in one suit only at the election of the plaintiff and in the other suits the actual disbursements only shall be collected or received from the defendant does not apply to the case where one of the parties to the note not sued with the other is at the commencement of the suit out of the jurisdiction of the Court.

(Chambers, Dec. 15th, 1859.)

This was a summons calling on the plaintiff to shew cause why the judgment should not be entered, and the costs if any taxed at Toronto, and why also the plaintiff should not be deprived of all costs except the disbursements in the cause, and a suggestion to that effect be entered pursuant to the statute on the grounds that defendant should have been sued along with the other parties to the note sued on in this cause, when they were sued and not separately.

From the affidavits filed it appeared that this case was brought to recover the amount of a promissory made by Messrs Smith & McNaught and indorsed by Hugh Workman, John Turner and the defendant Elliott. An action had been brought against the other defendants, in which judgment was obtained by default, and full costs taxed against them.

Both summonses in the suits against the defendant and the other parties to the notes were issued on the 11th August last. The writ in this suit was issued against Elliott as an absent defendant.

Defendant for many years past resided in Brantford, and had been a member of the Town Council. It was also stated in the affidavits filed on his behalf, that he was again elected in January last and had acted as a Town Councillor part of this year. But the affidavits in reply stated, that on getting a contract to build a Post Office in Quebec he resigned his office as Town Councillor.

Previous to the month of June last he obtained the contract to build the Post Office and went to Quebec to look after the work leaving his family behind him. Up to the time of the application he visited Brantford three times. First in the month of June, next in September, (the affidavits filed on his behalf state the early part of September while those filed for the plaintiff say the middle of September), and again in October. He remained several days on each occasion. In the affidavits filed on behalf of defendant, it was stated that the writ might have been served in time at Brant-

ford in June to bring the cause down to trial at the last Brantford assizes.

By affidavits of the plaintiff's attorney and his clerk, it is shown that a note endorsed by the defendant for £25 had been placed by plaintiff's in the attorney's hands for collection in July, that inquiries were then made made for defendant, and it appeared that he was in Quebec looking after the building of the Post Office. A writ against him as an absent defendant was personally served there, and he settled the suit. About the 10th August the note in this cause was placed in the attorney's hand for collection, enquiries were made and the information obtained, was that the defendant was still at Quebec but they could not learn if he was soon to return to Upper Canada. On the next day a writ was issued against the other parties to the note as residents of this Province, and a separate action commenced against Elliott as a non-resident defendant, and he was served at Quebec on the 15th of August and put in a defence to the suit.

In the affidavits filed on behalf of the plaintiffs, the opinion is expressed that unless defendant had been served as an absent defendant he would not have visited Upper Canada in September, and he could have been served herein time for the last Brantford assizes. That defendant's desire was to delay and throw them over, and the attorney was obliged to take the course he did to serve the interest of his clients.

Burns, for the defendant contended that plaintiffs were bound to have proceeded against defendant at same time as the other parties to the note, and not having done so was not entitled to any costs except disbursements in the second action.

Harrison, on the contrary contended, 1st that plaintiffs could not have proceeded against defendant in the suit with the other parties to the note, defendant being at the time a resident in Lower Canada, and 2nd that even if plaintiffs could have so proceeded, it was not reasonable to compel them to do so, under the penalty of being deprived of full costs, the separate action against defendant.

The authorities cited by Counsel are referred in the judgment.

RICHARDS, J.—I shall refer to the statutes applicable to this cause as they are found in the Consolidated Statutes.

By cap. 42, sec. 23, the holder of a bill may serve all or any of the parties to it in one action and proceed to judgment, execution against the defendants as if they were joint contractors. Then follow several sections as to the mode of procedure and and the rights of several defendants between themselves and the plaintiff respectively. Sec. 35, provides in case several suits be brought on one promissory note against the maker or indorsers respectively, then shall be collected from the defendant the costs taxed in one suit only, at the election of the plaintiff, and in the other suits the actual disbursements only shall be collected or received from the defendant.

The 29th section provides that when several defendants are included in one process under the act, and any of them cannot be served therewith by reason of absence from or concealment within Upper Canada, then the action may proceed as against the other defendant or defendants without prejudice, and the plaintiff may afterwards sue the defendant separately who has not been served with process, and may recover costs as if the act had not been passed.

It is urged on behalf of the defendant that inasmuch as plaintiff could have issued a concurrent writ against the defendant to be served out of the province and against the other defendants to be served within Upper Canada, and has not done so, he is to be considered as in no more favorable position than if he had commenced a separate action whilst the defendant was within Upper Canada.

I am not prepared to assent to this proposition for it is undoubtedly more inconvenient to effect service on parties out of the Province than within, and when so served there is delay as to the time for appearance, and the other proceedings against an absent defendant in case of non-appearance are to be approved, directed by a judge's order, causing considerable delay and increase of expense, &c.

I do not think therefore that it is unreasonable that a plaintiff should proceed against such of the parties to a note as are resident in Upper Canada, and against any other party when he should return to the Province as an absent defendant before his return.

I do not think that the Legislature intended anything more than to deprive the plaintiff of the additional costs when he unreasonably and unnecessarily multiplied suits against the parties to a promissory note, bill of exchange, &c.

In the present case I think the plaintiffs were not bound to wait until the defendant came to Upper Canada before suing him separately if he was absent at the time of commencement of the action and such absence was likely to continue as it appears, from the affidavits filed it was so as to prevent the service here of a summons within a reasonable time.

The 29th section if construed literally might make it necessary to include the name of the absent defendant in the writ against the others in order to entitle a plaintiff to costs, if such absent defendant were afterwards sued separately. It seems to me that it would not be interpreting this section of the act in its true spirit, if we were to hold it necessary to insert in a writ against the other parties the name of a person then out of the province and likely to be so for some considerable time, when it was notorious he could not be served here merely for the purpose of enabling the plaintiff if he should sue him separately afterwards to recover his full costs of suit. The way in which the section is framed is evidently for the relief of plaintiffs, where the defendants are all named in the writ to enable the action to go on, when one is not served either from being absent from the Province or concealed within it. I think as already mentioned the object of the statute is to prevent the multiplying of suits for the purpose of making costs. I do not think the Legislature ever intended where a indorser on a note was absent perhaps in California or Australia, that a plaintiff in proceeding against the parties resident here should be compelled to insert his name in the summons as a matter of form when he could not be served here or issue a concurrent writ against him to be served there under the penalty of being deprived of full costs in the event of sueing such indorser separately to recover the amount from him.

I am not therefore prepared on the merits to direct the suggestion applied for to be entered.

If I thought the plaintiffs only entitled to collect or recover the full costs in one suit only, I am not prepared to say that the defendant is in a position to compel "*the plaintiff to elect*" to take the full costs in the same suit against the other defendants and only the disbursements in this suit.

The statute does not in words direct that the judgments are not to be entered in all the suits for the full costs, but that there shall be collected or recovered from the defendant costs taxed in one suit only at the election of the plaintiff, and in the other suits the actual disbursements only shall be collected or recovered.

It may be argued that the plaintiff is not compelled to make his election until the costs in all the suits are taxed, or until he has *collected* or *received* the costs in one. However it is not necessary in the view I take to decide this point

I see no reason to direct judgment to be entered or costs taxed here. If defendant thinks the costs not properly taxed they may be revised here without difficulty under the provisions of the statute.

The summons will be discharged without costs.

Summons discharged without costs.

MCNAUGHTON V. WEBSTER.

Interpleader—Attachment of debts—Books of account—Sale thereof by Sheriff.

A sale of books of account by sheriff under an execution, does not pass the property in the debts or accounts therein charged.

Semble, that books of account and open accounts cannot be seized by sheriff, under 20 Vic., cap. 57, s. 22: at least they cannot be sold or transferred but, if seizable at all, must be held by sheriff in security for judgment debt and collected as such in his own name.

An order attaching a debt in payment of a judgment, is a bar to any action brought for the recovery of such debt, so long as it is in force.

An interpleader will not be granted in order to try the validity of an attaching order, or to determine the amount due to the judgment debtor.

Any debt that a defendant could set off at law against his creditor may be attached under garnishee clause of C. L. P. Act, 1856.

Quære. What right has an attaching order on the party's right to set off?

This was a summons calling on the plaintiff and the Commercial Bank to shew cause why they should not appear and state the

nature of their respective claims to the subject matter for which this action was brought, and to maintain or relinquish their respective claims.

The affidavits and papers upon which the summons was granted, shewed that on the 15th September, 1859, a writ of summons issued in this cause, which was specially endorsed, and the last item of the plaintiff's claim was under date of 1st February, 1859, the whole amounting to $188 16½, the correctness of which was admitted by defendant, who claimed, however, to have a contra account overdue. The plaintiff declared on the 11th October, 1859, on the common counts. On the 20th April, 1859, an attaching order was issued in a suit of the Commercial Bank of Canada, judgment creditor; and James McNaughton, (the present plaintiff,) and James Wilson, judgment debtors. And the now defendant, Webster, was then named as one of the garnishees, which order was served on the defendant as such garnishee before the commencement of this suit: but no order calling on him to pay to the Commercial Bank the debt due by him to McNaughton had ever been served.

It was sworn by the defendant, that, as he was informed, the plaintiff was not actually prosecuting this suit, but that one John Sudden, (also a garnishee named in the attaching order,) claimed the debt due by defendant to the plaintiff, under a sheriff's sale of the plaintiff's books; and that John Sudden was the actual plaintiff in this cause, while the Commercial Bank claims the money by virtue of their attaching order; and that the defendant was willing to pay the debt according to any order of court that might be made, and he expressly denied any collusion with the Commercial Bank.

On showing cause by the Commercial Bank, it was shewn that the attaching order was served on the 30th April, 1859, on the defendant, and that, on the 8th August last, a notice was published in the town and country papers, calling on the several parties named in the attaching order, to pay the several debts due by them to McNaughton and Wilson into the hands of the agent of the Commercial Bank at Galt.

It was sworn, that the books of account said to have been purchased by Sudden, were seized by the sheriff of Waterloo, under a *fi. fa.* against the goods of McNaughton and Wilson, but that the debts contained in such books were in no manner attached by Sudden.

McNaughton, the plaintiff, filed affidavits; that he had no interest in the suit, as his interest in the account from which the action was brought, was sold by the Sheriff to Sudden; that there was no settlement of accounts between plaintiff and defendant; that he had not received the defendants account, and was not aware what the balance was; that his books were seized by the sheriff sometime before the defendant informed him of the attaching order.

Sudden swore, that about the 15th August last, he bought, at sheriff's sale, the plaintiff's books of account, for about $16 00: that he was then informed he could collect the accounts therein; that he was informed the attaching order above mentioned was served on defendant after the sheriff had received the writ; that the sheriff had informed him, that the proceeds of the sale of the books had been applied on the execution. He did not directly state that he paid the $16 00. He denied all collusion with McNaughton There was another affidavit, to shew that the account between plaintiff and defendant was an unsettled account.

DRAPER. C. J.—It has been urged, that because there has been no balance struck (and it is, therefore, not settled how much plaintiff has a right to receive from defendant) the debt was not one which could be attached. By virtue of the order set forth, I see no foundation for this objection. The plaintiff or Sudden, using his name, has considered the claim to be sufficiently certain to endorse the summons in this action specially. The principal question in this action is, whether this is a proper case to call upon the plaintiff and the Commercial Bank to interplead.

In seeking to solve this question, it appears to me necessary, in the first place, to determine whose rights are involved. As to the defendant in this suit, there is no doubt; but as to the plaintiff, it is expressly asserted by himself, that he has no interest in the question. And one Sudden claims to be beneficially interested, and to have the right to use the plaintiff's name to sue for, and recover whatever the defendant may owe the plaintiff; and he founds this claim upon the fact, that the sheriff, on an execution in his hands, against the goods and chattels of the now defendant, sold the books of account belonging to the defendant; and that he, Sudden, purchased them for the sum of $16 00; and that by this purchase, he acquired the property in, and the right to all debts due to the defendant, which were entered and charged in these books; the debt now claimed from the defendant being one of them.

No one on behalf of the plaintiff, or rather of Sudden, was able to inform me on what authority this claim rests.

The 20th Vic. cap. 57, sec. 22, certainly authorises the sheriff to seize money, bank notes, cheques, bills of exchange, promissory notes, bonds, mortgages, specialities, or other securities for money; but this does not include debts due upon open accounts, even if by any strained, and, to my mind, untenable construction, such accounts could be held to be liable to seizure, as "securities for money." The direction of the statute referred to is, that such securities shall be held by the sheriff, as a security for the sum he is empowered to levy, and he, not the owner of such securities, is unauthorized to sue in his own name for the recovery of the sum secured thereby,

Sudden, therefore, has no right, in my opinion, to advance on this question. It is simply a question between the plaintiff resting on his own right, the defendant and the Commercial Bank, as a judgment creditor of the plaintiff, having an order attaching the debt due by the defendant to the plaintiff.

Then the solution becomes, I think, simple. There is an order directing the defendant to pay to the Commercial Bank the debt owing to the plaintiff; and the plaintiff, notwithstanding this order is in full force, for anything shewn to me, then sues for the money. If it were necessary to go so far, I should, as at present advised, hold, that the order, so long as it exists, is a complete bar to the action. If the Commercial Bank are negligent, or are delaying with or without collusion with the defendant to the plaintiff's prejudice, an application may, I presume, be made by the plaintiff to set aside the attaching order; but I perceive no necessity for an interpleader.

The defendant may, under sec. 196 of the Common Law Procedure Act 1856, forthwith pay into court the amount due from him to the plaintiff, as judgment debtor to the Commercial Bank.

It does not appear to me to be necessary that he should wait to be served with a summons to pay to the Commercial Bank for that purpose, although he may not be safe to pay them directly, without an order for that purpose.

This mode of relieving himself is open to him without any application. If he intends to deny that he is indebted to the plaintiff in this suit, he may contest it under the 197th sec. of the same act; when the Commercial Bank claim it or not in this suit, either the plaintiff or the Commercial Bank has a right to try that question with him.

The denial on his part that he owes the plaintiff anything, cannot give him a right to ask for an interpleader; and if he does not deny the debt, he would be relieved by paying it into court, after being served with the attaching order.

I have not made up my mind upon general grounds that this is a fit case for an interpleader; there is the objection, that though the defendant is indifferent as to whether he pays the plaintiff or the Commercial Bank, yet he claims to have a set-off against the amount appearing on the plaintiff's books to be due. The question of how much his debt really amounts to, may be as well determined in this action, as on a writ under sec. 197 of the Common Law Procedure Act, but I do not see how it could be raised on an interpleader suit between the plaintiff and the Commercial Bank.

It was suggested that the debt claimed by the plaintiff was not subject to the attaching order, because the amount was not ascertained; that it was not a liquidated demand. I think there is nothing in the objection. The plaintiff's demand is, as appears from the endorsement on the writ, is liquidated in its nature. The price of the goods sold constitutes the demand, and it is not the less a liquidated demand, because the plaintiff may have paid part, or may have a right to set-off part. I apprehend it will be found, that any debt which a party may, by law, set-off

against his creditors, may be attached under the garnishee clauses. I say nothing as to what effect the attaching order may have on the defendant's claim to set-off.

I think this summons must be discharged, but without costs. The Commercial Bank, by delaying so long to act upon their attaching order, have, to some extent, afforded ground for this application; while the plaintiff (putting Sudden out of the question) should not have brought an action while the attaching order was still in force. As to Sudden, I do not see that I have authortiy to make any order upon him.

Summons discharged without costs.

The Queen v. Norman Shipman.

Crown—Recognizance to keep the peace—Venue.

The Crown has the right in a civil action to lay the venue in any County.

A proceeding by *sci. fa.* on a recognizance to keep the peace is a civil and not a criminal proceeding.

Where the recognizance is removed into one of the superior Courts at Toronto, the United Counties of York and Peel are the proper Counties in which to lay the venue.

In such a proceeding the venue cannot be changed without the consent of the Attorney-General.

As the declaration would be only a transcript of the writ no declaration need be either filed or served.

It is not irregular to state the venue in the Nisi Prius record without having stated it in any previous proceeding.

(Chambers, 8th January, 1860.)

A writ of *scire facias* was sued out, 19th September, 1859, against Norman Shipman, upon a recognizance entered into by him on the 3rd of February, 1859, in the county of Lanark, before a Justice of the Peace there, the condition of which was, that the cognizor should keep the peace and be of good behaviour towards Her Majesty the Queen and all her liege people, and especially towards Daniel Harvey Shipman, for the term of two years.—The recognizance was in £50.

The averment in this suit was, that the Defendant did on the 10th March, 1859, at &c., in the county of Lanark, assault one Joseph Eaton, a subject of her Majesty, by taking hold of his coat collar, and tearing the coat off his back, and throwing him down on the floor, and otherwise ill using him.

The writ of *scire facias* was made returnable on 3rd October, 1859, in the Queen's Bench.

There was no mention of any county in the margin of the writ, which was directed to the Sheriff of the United Counties of Lanark and Renfrew, within whose bailiwick the defendant, Shipman, resided.

The defendant appeared on 3rd October, a rule to plead was issued and served, and a plea filed on 19th November, denying the assault and the matters alleged, and issue was joined.

No declaration on *sci. fa.* was filed, but defendant pleaded to the writ.

Of these proceedings a record was made up by the Attorney-General, and entered for trial at the January Assizes (1860), for the Counties of York and Peel.

The defendant objected that this could not legally be done, because there is nothing in the proceedings to show a venue laid in York and Peel; and nothing to indicate any venue, except the direction of the writ of *sci. fa.* to the Sheriff of Lanark and Renfrew, and the mention of the county of Lanark in the body of the writ, as the place where the assault was committed, which is stated to have been a breach of the recognizance.

In the record that was entered for trial, the county of York was entered in the margin in the usual way of stating a venue.

The defendant contended that there was nothing to warrant the laying such venue in the record, and the carrying the case to trial in the county of York, of which notice had been given.

The defendant's attorney made an affidavit that the cause of action, if any, arose in the county of Lanark, and not in York and Peel, or elsewhere out of Lanark; that the defendant had a good defence to the action on the merits, but that it would be necessary for him to subpœna three witnesses from Lanark, &c.; and should the proceedings be not set aside, a change of venue to Lanark was asked.

On the part of the Crown an affidavit was filed, stating that in May, 1859, a writ of *certiorari* was obtained for removing the record of recognizance into the Court of Queen's Bench, upon which the recognizance was returned and filed. That after this the writ of *sci. fa.* was issued, upon which such proceedings had taken place as have been already stated.

Richards, Q.C., for defendant.

Harrison, for the Crown.

The following authorities were referred to in the course of the argument. Bunbury, 236, 237, 261; Manning's Ex. Prac. 108, 197, 203. Com. Dig. Prerogative, D. 85. *Attorney General* v. *Smith*, 2 Price 113. *Rex* v. *Wiblin*, 2 C. & P 10. *Philips* v. *Smith*, 2 Dowl. N. S. 688. *The King* v. *Cousins, et al*, Parker 54. *The King* v. *Justices, West Riding Yorkshire*, 7 A. & E. 383, Bac. Abr. "Surety to keep the peace, and Surety for good behaviour." King's case, Cro. Eliz. 86. *The King* v. *Heyward et al*, Cro. Car. 498.

Robinson, C. J.—It is not disputed that it is common in practice to plead as has been done here to the writ, without any declaration having been filed; and if a declaration had been filed, it would have been a mere transcript of the writ and appearance.

Then it is clear that the Crown in any civil proceeding may lay the venue in any county, and even in an information for intrusion, may lay it in another county than that in which the lands lie.

This being a civil proceeding to collect a debt upon recognizance, the venue not only might be properly laid in the county of York, but would in any such case regularly be laid there, the record of the recognizance having been brought hither by *certiorari*.

In proceedings at suit of the Crown, the venue is never changed at the instance of the defendant unless the Attorney General consent.

So it is reduced to the question whether the record has been unwarrantably made up with a venue in the margin "County of York."

It cannot be held to be unwarrantable, I think, upon the ground taken that the question to be tried is the truth of the alleged breach, in other words, whether an assault has been committed, and that that is in fact a criminal trial, and should be in the county where the assault is alleged to have taken place. The proceeding by *scire facias* is a civil proceeding on the recognizance, to collect a debt, in which the Crown may lay the venue in any county; and as to the inconvenience of trying the assault here, that may or not be the case; for it is alleged that the defendant has been convicted of such assault as is charged, and if so, the conviction can be as easily proved in one county as in another. If, however, the party had not been yet convicted, and the fact of his guilt were yet to be found on the issue raised by a jury on the *sci. fa.* as seems to have been done in some of the old cases reported, still, I think, that would not enable me to over rule the privilege of the Crown, broadly lain down, that in a civil action the Crown may lay the venue in any county. (Com. Dig. Prerogative D 85).

The only question then is whether the *nisi prius* record should be set aside, as having nothing to warrant the venue stated in the margin, viz., County of York, that is nothing in the previous proceedings.

I cannot hold that the writ was irregular for not stating a venue in the margin, and defendant has pleaded to it and issue is joined; to be tried where? is the question raised by the defendant.

It is not alleged in the writ that the recognizance has been removed into this court, but it is admitted that it has been, and until it had been the writ of *sci. fa.* could not properly have issued.

Now the record, which is the foundation of the proceedings being here, we must see that this is the proper venue, that has been inserted in the margin of the *nisi prius* record. Is the venue so stated repugnant to or unwarranted by the previous proceeding, that is the writ? I incline to think not. 1st.—Because the writ does not state, and need not state any county in the margin by way of venue. 2nd.—What is stated in the body of the writ, as to the place where the assault was committed, does not go to the foundation of the action, which is the recognizance; but to the failure to observe the condition, which if observed would have defeated the recognizance, just as if A. had entered into a bond to indemnify B. against any trespasses that might be committed by C. on land in a certain county. If such condition were broken in suing upon the bond, the venue, might be laid

anywhere, notwithstanding the cause of action against the trespasser, and for the trespass would have been local.

There may be room for doubt upon the question, but considering the venue is not matter of substance, in such a case, because the crown has a right to lay it in any county, and it is laid in a county, in the record, and that county the most proper one, the recognizance being a record now in this court, I am of opinion that the summons should be discharged.—Summons discharged.

RICHARD CUTHBERT v. JOHN STREET, SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF TIMOTHY STREET.

Notice of Trial—Computation of time—Consolidated Statutes U. C. cap. 22 J. W.

In computing the eight days required for Notice of Trial the Commission Day of the Assizes must be excluded.

(January 9th, 1860.)

This was an application to set aside the notice of trial in this cause served on Thursday the 29th December, for the Toronto Assizes held on Thursday the 6th January, 1860, on the ground that such notice did not give eight days pursuant to the statute.

The motion was supported by *Harrison* on the part of the defendant and argued on the part of plaintiff by *Beaty*, who referred to the practice under ch. 1, 2nd Geo. IV, secs. 22 & 36, as establishing a rule in cases like the present under precisely similar provisions.

Under the first of these sections, it was provided that, the first and last days of all periods of time limited by that Act, or thereafter to be limited by any rules or orders of Court, for the regulation of practice should be inclusive and the 36th section declared, "that no indictment, information, or cause whatsoever shall be tried at Nisi Prius, before any Judge or Justice of Assize, or Nisi Prius in any district of this Province, unless notice of trial in writing has been given *at least eight days before such intended trial.*

McLEAN, J.—Under that Act the practice certainly did prevail to give notice of trial so that computing the day of service of the notice and the first day of the Assizes eight days would be made up, but I cannot think that such a practice was correct or sanctioned by the Statute, and I am not at present aware of any judicial decision by which it is sustained. The statute clearly intended that a defendant at Nisi Prius should have at least eight days notice of trial and the number of days ought not to be abridged by making the first and last inclusive. It is I think also clear that at least eight days notice were required to be given *before* an *intended trial.*

Now if notice were given on a Monday of an intention to try a cause on the Monday following, the first day of the Assize, that could not be a notice of eight days *before* the *intended* trial for the tention to *try on*, the first day is manifested and a party must be entitled to the *whole* of that day to make up the number of days allowed for preparing a defence.

The Common Law Procedure Act 1856, sec. 146, made eight days notice of Trial or Assessment sufficient in all cases whether at Bar or at Nisi Prius. A change in the computation of time was introduced by this provision and continued until the Consolidated Statutes came into operation on the 5th of December last. Up to that time the rule adopted was to make the first day inclusive and the last exclusive or *vice versa*, and in the cases of *Vrooman* v. *Stuart*, 2nd U. C. Prac. Rep. 124 & 126, and *Buffalo and Lake Huron Railway Company* v. *Brookshanks*, before me in the Practice Court as well as in a case before Sir J. B. Robinson in Chambers, v. *Dickson*, 1 U. C. Prac. Rep. 366, proceedings were set aside for irregularity, because that mode of computation of time in giving notice of trial or demanding plea was departed from. Now by the 21st chapter of the Consolidated Statutes sec. 201, it is declared that eight days notice of trial or of Assessment, the first and last days being inclusive shall be given and shall be sufficient in all cases whether at Bar, or at Nisi Prius, or at the County Courts; thus introducing again the period which was established under the 36 section of 2nd Geo IV, ch. 1. The question arising now is whether the first day of the Assizes can be reckoned as one of the eight days, and whether the practice which formerly prevailed in that respect shall be revived and continued hereafter.

I am clearly of opinion that the practice was wrong and ought not to be again introduced and in this opinion I am confirmed by the views of a number of my brother judges with whom I have consulted on the subject. By the old mode of computing time under ch. 1, 2nd Geo. IV, it was in the power of a plaintiff to abridge the time for notice of trial, so as in fact to give little more than six days; if notice were served at 9 or 10 o'clock at night on Monday for trial on the Monday following, and a cause were brought on at ten o'clock on the first day of the Assizes as might be the case, very little more than six days time would be allowed to prepare for trial, including the Sunday before the Assizes. A practice admitting of such abuse ought not I think to prevail, and though in computing the time, the first and last days must be inclusive, that must be taken to include the day of service and the day before the the Assizes if necessary to make up eight days; so that in no case can the first day of the Assizes be reckoned as one of the days which may be included in 8 days notice of trial.

The decision in this case may cause some inconvenience, but I think it better that a rule should be established by which every defendant shall be entitled to what the law intended to allow him, viz., eight days notice, before a suit can be brought to trial against him.

On these grounds I think the notice of trial in this case must be set aside, but as the point is new and the plaintiff's attorney might reasonably expect that the practice under the former act of Geo IV, should again be continued, I make the summons absolute without costs.—Summons absolute without costs.

IN RE JAMES FRANCIS v. JAMES BOULTON.

Attorneys bill—Delivery and Taxation thereof—Costs of application.

An Attorney may be ordered to deliver his bill against his client though the same may have previously been fully settled and to give credit therewith for all monies received by him.

When an order has been properly made for an attorney to deliver his bill and he makes default he will have to pay the cost of such order in any event.

When after a claim has been settled this client applies to have the attorney's bill taxed, and nothing is found due to him in such taxation he will have to pay the costs of the application.

(November, 1859.)

This was a summons calling on Mr. Boulton to shew cause why he should not deliver to applicant his bill of costs to be taxed, and all credits for money received by him for applicant within one week.

It appeared Mr. Boulton had been employed by Francis as his attorney in these suits, one against Andrew Quinton, which was settled and the costs paid in another, against Hugh Johnston and Horatio Johnston, in which after the plaintiff Francis succeeded he arranged the matter with the defendants, and became liable himself to settle Mr. Boulton's costs, and the third against one Watson, in which Mr. Boulton collected upwards of £25.

The application related to these two last mentioned suits, and the object was to obtain the bill in the suit *Francis* v. *Johnston et al*, in order to have it taxed and to ascertain how much Francis ought to claim in the suit against Watson.

It appeared also that in the suit against the Johnstons, Francis had paid Mr. Boulton a retainer of $10.

One Cool made an affidavit that he was acting under a power of attorney from Francis in this matter. In his affidavit of 27th September 1859, Mr. Boulton says, he has received the balance in suit of *Francis* v. *Watson*, of £25 or thereabouts, which he is ready to account for.

On 27th September, 1859, order that Mr. Boulton should deliver his bill of costs in the suit *Francis* v. *Johnston*, and give all credits within a week from the service of the order. This order was served on the same day.

On 17th October, 1859, there was a summons calling on Mr. Boulton to shew cause why he should not pay Francis £26 16s. collected by him from Watson; and the costs of the application. This was granted on an affidavit of the Sheriff of Halton, that on a writ of execution in the cause *Francis* v. *Watson*, there was collected £26 16s. debt, and £12 18s. costs, taxed, writ and interest which money on the 7th May, 1859, was paid to Mr. Boulton, and an affidavit of the demand of the money and of the service of the order for the delivering of the bill and that no bill had been delivered.

On 18th October, 1859, Mr. Boulton filed an affidavit made by one Manasset Leeson, that he Leeson had a demand against Francis, due on a mortgage, that Francis gave him an order on Mr. Boulton for money collected on the notes mentioned in a receipt (produced) 20th December, 1856, note of Thomas Fallow and Joseph Fallow, for £31 5s. but to sue one Wm. Johnston for a horse, this note having been given on representation that it was good; also Wm. Watson's note for £24 10s. for collection; also Andrew McQuenalan's note for £26 5s. for collection. That Leeson gave the order to Mr. Boulton, who accepted the same, and agreed to pay him the balance after deducting certain costs due him by Francis, that he (Leeson) found there was only a balance of some $60 due on the whole transaction, which sum he (Leeson) arranged with Mr. Boulton, in full of the order and agreement with Francis, that Francis seems desirous of getting the money into his own hands to his (Leeson's) injury, and that the present proceeding is to his injury, and contrary to the agreement with Francis.

On 24th October, 1859, affidavit of John Cool, that Francis is indebted to him and therefore gave him a power of attorney dated 25th August, 1859, to receive all monies due to him by Mr. Boulton, for collection by him on Francis' account.

On 28th October, 1859, affidavit by Charles Durand, of Mr. Boulton's admission of liability to pay the balance of the money collected from Watson, to Francis, deducting the costs due in *Francis* v. *Johnston*, the admission being made after the making of the order of 29th September last, and no allusion being then made to any liability to pay Leeson, and explaining that Francis residence in the Township of Normanby, in the County of Grey, renders it difficult to have communication with him.

On 29th October. 1859, there was an order that Mr. Boulton should pay to Francis £26 16s. collected from Watson, and the costs of the application subject to any deduction for the bill of costs ordered by the order of 28th September last, to be taxed provided Mr. Boulton within three days from the date (29th Oct.,) rendered and tax his bill.

On 1st November, 1859, affidavit of Mr. Boulton, that when Durand first applied to him in this matter, he told him Francis had given Leeson an order for the balance due him. That at the time of the first application he did not recollect that he (Mr. Boulton) had accepted that order. That on seeing Leeson he (Mr. Boulton) arranged the amount due to Francis, as sworn to by Leeson. That he was engaged at the assizes, when the case came on and the order of 29th October, was made.

On the application of Mr. Boulton, Mr. Justice Burns rescinded the order of 29th October, leaving both parties to procure further affidavits.

On 14th November, 1858, affidavit of Alexander F. Soott, that George Wright, holds a mortgage on a lot of land in Brampton, given by Alexander A. Anderson *et ux* to secure £93 9s. 10d. with interest. That Anderson had bought the lot of one Elliott, and gave a mortgage to him, and then Francis bought of Anderson, subject to the said mortgages that he (Scott) was not aware that Manasset Leeson, has or had any claim on the lot or the mortgage. That on the 22nd April, 1858, £53 4s. 8d. was paid on the mortgage to Wright, to Mr. Scott by Francis, and was endorsed thereon, and that no other payment was made.

On 17th November, 1859, affidavit of Manasset Leeson, that he was paid the balance due Francis, by Mr. Boulton, being $60 by the transfer of a note of one Thomas Donaldson, for that sum, which he knew to be good for the amount, and has given credit to Francis for the amount on a bill due by Francis, on mortgage which he was to pay on a lot of land, which he had agreed to discharge from incumbrances, and which he had sold to Leeson. That he gave the writing from Francis to Mr. Boulton, as well as the original receipt of Mr. Boulton, when he settled the same with him.*

On 19th Nov. 1859, affidavit of Mr. Boulton, that this order was an open letter from Francis, and handed to him by Leeson, when he produced "my receipt to said Francis last spring, as I think," that this open letter was lost having been treated as unimportant when Leeson delivered up Mr. Boulton's receipt.

DRAPER, C. J.—In the absence of any affidavit from Francis to the contrary, I must presume that he did give Leeson such an order or open letter.

It would have been much more satisfactory if it had been distinctly stated when this order was delivered to Mr. Boulton; Leeson says nothing as to the time, Mr. Boulton only says it was last spring, *as he thinks*. It would also have been satisfactory to know when the arrangement between Leeson and Mr. Boulton, and the transfer of Donaldson's note took place. It might have been stated whether it was before or after the 24th September last. Any such arrangement *after* that summons, would be open to a very different construction, as to motives from what it might receive if made before. But the balance between £26 16s. collected as debt from Watson, with subsequent interest from the date of the endorsement on the execution, and the payment to the Sheriff; and the sum due Mr. Boulton, for costs in the suit against Johnston, has not yet been ascertained.

I gather from the affidavit of Leeson, and Mr. Boulton, that it is intended to be urged that Leeson settled the balance at $60. And therefore Francis is concluded. I see no authority for Leeson to do more than obtain from Mr. Boulton the sum due by him to Francis, but not to compromise or give up any part of Francis's claim whatever it might be. Therefore this payment to Leeson, if good in other respects, does not conclude Francis.

I therefore, 1st. Order that Mr. Boulton render his bill in pursuance of the order of 27th September last, giving credit for the full sum of debt and interest, received by him in the suit of *Francis* v. *Watson*, within a week, and that as he is in default in not having obeyed that order he pay the costs thereof.

2nd. I order that such bill be taxed, and that if there is a balance after allowing to Mr. Boulton, the amount of that bill and the $60 paid to Leeson, that he do within a week after such taxation and demand of such balance, pay the same and the costs of this application to Francis or his lawful attorney.

3rd. That Mr. Boulton do within one week produce an affidavit shewing whether the arrangement with Leeson, and transfer of Donaldson's note was before or after the summons of 24th September, 1859. If before,—and if there be no balance due Francis as stated in the preceding paragraph then the summons to be discharged with costs.

COMMERCIAL BANK OF CANADA v. LEE AND MCCULLOCH.

Issue Book—Notice of trial—Irregularity—Setting aside.

A defendant who files one plea, and by mistake serves a different one, cannot be heard to object to the issue book, on the ground that it does not contain a true copy of the plea filed.

Notice of trial in and "for the County of York," and not "United Counties of York and Peel," is a mere irregularity which may be waived.

DRAPER, C. J.—This is an application to set aside the notice of trial, for irregularity.

The defendant, by a mistake which was explained (though not on affidavit), filed a plea at London, and served a different plea on the agent of the plaintiffs' attorney at Toronto. The defendants attorney resides at Stratford. He employed an agent at London to file appearance there, as the writ was issued from the office there, but instructed (in order to throw the plaintiffs over the Winter Assizes) that agent not to accept service of any papers.

In consequence, the plaintiffs' attorney sent a message specially to Stratford, and served his declaration. In the same spirit, the defendants' attorney employed the same agent to file a plea in London, but instructed that agent not to serve a copy on the plaintiffs' attorney, who resides in London, and whose clerk was present when the plea was filed. He sends a copy to serve on the agent of the plasntiffs' attorney in Toronto. The plaintiffs' attorney, without waiting to be served, makes up his issue book, and from the declaration, and from the plea already filed, and immediately sends to Stratford to have the joinder of the issue, issue book, and the notice of trial, served on defendants' attorney, all which was done. It is now objected that the issue book is irregular, because it was served before a copy of the plea was served. On examining the papers, it appears that a copy of the plea filed, never was served at all. As I understood the explanation offered

* This order or writing by Francis on Mr. Boulton, in favor of Leeson, was not produced.

on behalf of the defendants' attorney, the clerk of his agent at London, mislaid or lost the plea sent to him, and understanding it to be one of payment, drew up and filed a com non plea of payment, as appears on the issue book. But the plea intended to be filed, was only pleaded to part of the cause of action, and the copy served in Toronto, no doubt a true copy of that sent to London to be filed, was a copy of the one filed. Misled by this, the defendants' attorney has made a statement in his affidavit which is untrue, for he asserts that a true copy of the plea filed is annexed to his affidavit, which is not the case, and the summons was granted among other objections, because the issue book did not contain a copy of the plea.

It is obvious that this is a mere error, but it is unpleasant to swear to an untruth even inadvertently, and in this instance, it ought to be the more unpleasant, because it arises from attempting what I must characterize as a disingenious and shuffling practice, in order unfairly to throw the plaintiffs over the Winter Assizes. This objection was, of course, abandoned, when the explanation was given, and I have no difficulty in overruling the other, namely, that the issue book was made up and served with notice of trial, before the plea was delivered. There was no regular delivering of the plea at all, and in effect, the defendants seek to derive an advantage from their own irregular proceeding. I think the plaintiffs might waive service of a copy of the plea, upon the principle *Quilibet potest renunciare juri pro se introducto*, and that the proceeding was regular.

It is further objected, that the notice of trial is wrong, because it takes no notice of the defendant Lee, who has suffered judgment to go by default. Lee is sued as maker, and McCulloch as endorser, and I do not see on what ground McCulloch can claim to regulate the plaintiffs' proceedings against Lee, though they are joined in the same action.

Then the notice of trial is objected to, because it is thus worded, after the Court and cause, "Take notice of trial in this cause, for the next Assizes, to be holden at the City of Toronto, in and for the County of York, on the fifth day of January, A. D. 1860. Yours, &c." The objection is, that the Assizes are held in and for the *United Counties of York and Peel.*

It appears that this notice was served at the same time as the issue book, in which the venue in the margin is correctly laid. The cause is properly intitled, and I think it cannot be said the defendants' attorney was or could be misled, and his affidavit sets up no such a pretence. It unequivocally informs him, the plaintiffs will proceed to trial at a certain time, viz., the 5th January, 1860; and at a certain place, viz., the City of Toronto, which is in the County of York. I think the notice would have been good, if the words "in and for the County of York," were left out, and therefore am not disposed to hold that their insertion can vitiate.

Just at the close of my hearing the parties, it was suggested that there was another irregularity, namely, that the record had been entered for trial pending this summons, which operated to stay the proceedings, and I was asked to consider that point also. At first I was disposed to do so. But the parties seem to me to differ somewhat as to the enlargment of the summons. The minute of enlargment signed by my brother Hagarty, seems open to the construction that such objection comes too late. I shall therefore leave it to be moved, if the defendants' attorney thinks fit to do so. Possibly he may consider that it will be quite as creditable to himself, after all that has appeared in this matter, not to bring up a doubtful question, for if the enlargment was at his instance, and the conditions of it for his advantage, he is not very likely to succeed.

At all events, I think it better to dispose of this summons as it stands, and I have no hesitation in discharging it with costs.

GENERAL CORRESPONDENCE.

HAMILTON, January 3, 1859.

TO THE EDITORS OF THE LAW JOURNAL.

Municipal Law—Disqualification.

A question agitates this City, as I presume it will other places, *i. e.*, whether, or not, a person holding a license from or under a Corporation, by himself or partner, other than a Saloon or Innkeeper, can be considered duly qualified under our Statute, for the office of Alderman or Councilman?

It is thought strange here, that such classes are permitted to enter our Council, for we have invariably found them to legislate for their own interests. Of course they have a voice and a vote in fixing the amount of their own licenses, and may benefit themselves in many other ways. I could give you instances, but do not wish to be personal. Your answer to the above question, will suit all the purposes of my enquiry, and may be of use to more than one place or person in the Province.

Yours &c.,
"SCRUTENS."

[It is impossible for us to answer the question put by our correspondent, without understanding more fully than he explains, the nature of the license to which he refers. Some licenses from a Municipal Corporation, are in the nature of contracts or dependent upon contracts. A person holding such a license, would be disqualified as "having by himself or his partner, an interest in a contract with the Corporation."—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. C. BECKH V. PAGE AND ANOTHER. *June 21st.*

Sale of goods—Mercantile contract, construction of—"Or any less number that may arrive"—Bales of hides.

The plaintiff sold to the defendants certain bales of hides described in the contract as—

"P. B.	826	425	100	bales containing	15,600 lbs.
H. B.	1	15	15	" "	2,840 "

(or any less number that may arrive.) East India hides said to be very good Patna, shipped per "Ontario" Calcutta to Hamburg, and to be delivered at 11½d per lb. round, but the wrappers to be charged at 8d per lb. The bales were formed of hides wrapped up in hides. The ship and cargo having met with sea damage, the master put back to Calcutta and eighteen of the bales in question which had been damaged were sold, the remaining ninety seven arrived at the port of discharge, but the defendants refused to accept them.

In an action for not accepting.

Held, (affirming the judgment of the Common Pleas), that the words "or any less number that may arrive," applied equally to the number of bales and to the number of hides, and therefore that the defendants were liable though the number of bales tendered was short of the precise number mentioned in the contract.

Q. B. BRUNSDON V. ALLARD. *June 9th.*

Attorney's lien for costs—Right of the parties to compromise.

If the parties to an action enter into a compromise, the effect of which is to deprive the plaintiff's attorney of his lien for costs, the court will not set it aside, unless it be collusively entered into with the express object of defeating the attorney's lien.

Semble, that if a case for the interference of the court be made out, the proper way of proceeding is to apply to the court to compel the defendant to pay the attorney his costs.

EX. C. JACKSON AND ANOTHER v. FOSTER. *June 18th.*

Insurance—Condition that life policy shall be void in the event of suicide, unless third party have acquired a bonâ fide interest for valuable consideration—Assignment by operation of law—Bankruptcy.

B a merchant at Valparaiso, insured his life in England under a policy subject to this condition :—This policy will be void if the life assured die by his own hands or the hands of justice by duelling or suicide, but if any third party have acquired a *bonâ fide* interest therein by assignment or by legal or equitable lien for a valuable consideration or as security for money, the assurance thereby effected shall nevertheless to the extent of such interest be valid and of full effect. On the 9th of July 1856, while the policy was running, B became bankrupt and according to the law of Valparaiso his property became vested by operation of law in the escribano or notary of the Consulado Court. On the 14th July B committed suicide. On the 15th July a meeting of creditors was held and the plaintiffs were appointed assignees, upon which the property of B became vested in them.

Action having been brought to recover the amount insured.

Held, (affirming the judgment of the Queen's Bench,) that the plaintiffs were not entitled to recover as they were not such third parties as the exception in the condition was intended to refer to.

COCKBURN, C. J.—The bankrupts assignees are not a third party, they only represent the bankrupt's estate as it was at the time of bankruptcy and not the interest of a third party.

EX. CARTER v. CRICK. *May, 7.*

Warranty—Sale of goods—Representation.

Where the plaintiff hearing from a third person that the defendant had some seed barley for sale, went to him and saw a sample of it, and upon the defendant saying, "it is very good, or else I would not sell it to you," the defendant's clerk at the same time writing to the vendor of the defendant in the plaintiffs presence, in these words, "I shall be glad to know what sort it is, as it would do very well for seed," bought sixty-six quarters of it, and it turned out to be barley of an inferior kind, not usually grown.

Held, that these representations did not amount to a warranty that the barley was of any particular kind.

EX. CORBETT v. THE GENERAL STEAM NAVIGATION CO. *May, 8.*

Costs—County Courts Act—Concurrent jurisdiction—Dwelling by Corporation.

A Corporation does not dwell, within the meaning of the 128th section 9 & 10 Vic., c. 95, at a place other than their chief office, where they carry on business by means of an agent merely.

EX. CORNISH v. ABINGTON. *April, 29.*

Evidence—Estopped by conduct—Interference from silence.

Plaintiff's foreman sold goods of his master to the defendant, representing when he sold them that he was dealing on his own account, and selling the goods as principal. The sales were entered in the plaintiff's books as made to the defendant, and invoices were sent by the plaintiff to the defendant, in which the defendant was charged with the goods to the plaintiff. The foreman explained to the defendant that it was done by mistake, as he, the foreman and not the defendant, ought to have been charged in the invoice, and the defendant gave the foreman bills for the value of the goods, and afterwards settled the amount on account with him.

Held, that the plaintiff was entitled to recover the price of the goods in an action for goods sold and delivered, on the ground that the defendant had, as found by the jury, so conducted himself as naturally to induce a belief in the plaintiff's mind that the defendant was purchasing the goods of him.

Q. B. FRANCIS v. HAWKESLEY. *May, 30.*

Statute of limitation—Acknowledgment in writing.

A party chargeable with a debt wrote a letter, wherein he states an account, making the debt one of the items against himself, and claiming a balance in his own favor, and offered to make an arrangement which was not acceded to.

Held, that the letter was not an acknowledgment within Lord Tenterden's Act.

C. P. ANN LECAAN v. KIRKMAN. *April, 21.*

Promissory note—Effect of putting name on back of note by person, other than by payee or indorsee—Notice of dishonor—Waiver of.

A being indebted to B makes a promissory note, payable to the order of B, which B agrees to take on having C's name endorsed by C on the back of the note. Thereupon, and before any endorsement by B, C writes his name on the back of the note. This, alone does not amount to an authority to B the payee, to put his name on the back of the note above C's name, so as to constitute C an indorsee, and so liable as a second indorser.

Quære.—What would the effect have been if C had given such authority expressly.

Q. B. MACDONALD ET AL., v. LONGBOTTON *May, 27.*

Written contract—Evidence to apply—Effect of that evidence—Excess.

The defendant, a wool buyer, purchased of the defendants, sheep-farmers, a quantity of wool described simply as "your wool" A previous conversation had taken place between the parties in which the plaintiff had stated that beside their own clip of wool, they had purchased the clips of four or five neighbouring farmers whose names were specified, and that altogether the quantity amounted to "2300 stones, a hundred stones more or less."

Held, in an action against the defendants for not accepting the wool, that evidence of this conversation was admissible to explain what was meant by the term "your wool."

Held also, per CAMPBELL, C. J., and ERLE, J.,—that this conversation was not thereby made a part of the contract so that the quantity specified became an ingredient in the contract and that the contract was performed by the plaintiffs sending all the wool which they then had amounting to 2,505 stones.

WIGHTMAN. J.,—*dissentiente.*

Semble, per ERLE, J.,—that even if the quantity mentioned was a part of the contract that it was a question for the jury whether or not the excess was unreasonable.

EX. PRICE v. WORWOOD. *April 30*

Ejectment—Forfeiture—Waiver of forfeiture—Payment of rent—Evidence of breach of covenant to insure—Evidence of insufficient distress.

A tenant admitted twice before the commencement of an action of ejectment, under a condition for re-entry on failure to keep the premises insured, that he had not insured the premises. The last admission was about a month before the action was brought, and he then said he did not insure for want of money. The day previous to the bringing of the action, the landlord received rent from an under tenant.

Held, that there was evidence that the premises were uninsured after the receipt of the rent.

Semble, that the receipt of the rent was no waiver of the previous forfeiture.

Evidence of a search of the ground floor only, where there are rooms in an upper floor is not sufficient for the purpose of showing that their are not goods on the premises sufficient to satisfy arrears of rent.

EX. WRIGHT v. MILLS. *May 12.*

Practice—Signing judgment after death of defendant on the same day.

Where judgment was signed on the same day that the defendant died, the defendant dying at half past nine in the morning, and the judgment being signed at eleven, the hour at which the office opened.

Held, on the authority of *Regina* v. *Edwards*, 9 Ex. 32, that the signing judgment being a judicial act took precedence of all other acts done on the same day, and was valid.

C. P. *May*, 11, 26.

MARSHALL v. THE BISHOP OF EXETER AND ANOTHER.

Common Law Procedure Act 1852, *secs.* 80, *and* 81.

Sections 80 and 81 of the Common Law Procedure Act 1852, apply to pleadings in *Quare impedit.*

L. C. CROUCH v. WALLER. *June* 1.

Separation deed—Public policy.

A deed of separation and a deed of settlement were executed in pursuance of an award. The former contained some provisions as to the custody of the children, contrary to public policy, and the master of the rolls being of opinion that both deeds constituted one transaction, held both void.

On appeal, *Held*, that though both sprung out of the same circumstances, and were executed in pursuance of the same award, the deed of settlement was independent and that an annuity under it was absolutely payable.

CHANCERY.

V. C. S. IN RE GROVE'S TRUSTS. *June* 4.

Will—Construction—Gift of annuity for separate use.

A testator by his will requested his executors to invest in Government securities sufficient money in their names to produce £40 a year and pay the same quarterly, to A for her separate use, without power of anticipation.

Held, that A. was not entitled to have the corpus of the fund producing the annuity transferred to her.

V. C. IN RE MARSDEN'S TRUSTS. *June* 4.

Power—Fraudulent execution—Married women.

Where a discretionary power given to a married woman to appoint among her children, is executed by appointing the whole to one, and there is evidence to prove that such appointment was made upon the arrangement that such child should hand over half the sum appointed to her father, and give him a life-interest in the remainder; such appointment is void as a fraud on the power, although the arrangement is never communicated to the appointee.

Where an appointment is valid on the face of it, if it can be proved that the exercise of the power is not an honest one, but tending to defeat the object, the Court will declare it to be void as a fraud upon the power.

Where an appointment is in fraud of a power, there is an important distinction between the case of defeating the objects of the power and those to take in failure of those objects.

REVIEW.

THE LOWER CANADA LAW ALMANAC FOR 1860. Compiled by George Futvoye, Advocate. Printed and published by authority, by John Lovell, Montreal. Price, 2s. 6d.

This appears to us to be a very useful compilation, and furnished at a moderate price. It is something similar to the Sheet Almanac which we issue yearly for Upper Canada.

The Law Almanac for Lower Canada is printed and published "by authority." What does this mean? It cannot mean that either Mr. Futvoye or Mr. Lovell require the permission of Government, the one to compile or the other to publish the Sheet Almanac. We are sufficiently rebellious to publish a Law Sheet Almanac for Upper Canada without any such permission.

We fancy the expression, "by authority," must have a different meaning. Is it that the Government aids with money the Lower Canada publication? If so, why the charge of 2s. 6d. per copy? We presume the Government has no desire to make a profit on such a puny enterprize.

We have heard that the Government aid the Lower Canada Law Reports, and it is not improbable that the Lower Canada Sheet Almanac receives some substantial crumbs of comfort. If this surmise be correct, we find no fault with the Government for its connexion with these legal publications. We think it the duty of Government to succor publications of the kind, but think also that kindred publications in Upper Canada should not be neglected.

It is admitted everywhere that the *U. C. Law Journal* has done more to extend the usefulness of local courts, than any other influence at work in Upper Canada; and yet we have never yet received one sixpence of Government aid.

THE ATLANTIC MONTHLY. Boston: Ticknor & Fields.

The number for February, just received, contains the following:—Counting and Measuring; My Last Love; A Shetland Shawl; Riba de Roma; The Amber Gods; The Poets' Friends; The Memorial of A. B.; Some Account of a Visionary; The Truce of Piscatagua; The Maroons of Jamaica; The Professor's Story; Mexico.

The article, "Counting and Measuring," is deservedly placed first in the number. It is both learned and interesting. Both counting and measuring are arts, and the gradual improvement of the arts, as the mind of man expanded, is beautifully described. This paper is evidently the production of a scholar. Of the light articles, we have perused "My Last Love" and "Some Account of a Visionary." Both are well written, and well worth reading. Other papers in the same number we have no doubt are as much so, but we have not had leisure to read them.

GODEY'S LADY'S BOOK. Philadelphia: Louis A. Godey.

In this, as in each number, our fair friends will find much to instruct—much to delight. Lessons are given both as to "the ornamental" and "useful."

APPOINTMENTS TO OFFICE, &c.

JUDGE.

JOHN BOYD, of the City of Toronto, Esquire, Barrister at Law, to be Junior Judge of the County Court, in and for the United Counties of York and Peel.—(Gazetted 17th December, 1859.)

REGISTRARS.

The Honorable GEORGE STRANGE BOULTON, to be Registrar for the West Riding of Northumberland.—(Gazetted 10th December, 1859.)

JOHN M. GROVER, Esquire, to be Registrar for the East Riding of Northumberland.—(Gazetted 10th December, 1859.)

GEORGE C. WARD, Esquire, to be Registrar for the East Riding of Durham.

ROBERT ARMOUR, Esquire, to be Registrar for the West Riding of Durham.

JAMES BELL, Esquire, to be Registrar for the South Riding of Lanark.

ORMOND JONES, Esquire, to be Registrar for the North Riding of Lanark.—(Gazetted 10th December, 1859.)

CORONERS.

WILLIAM CREELMAN, Esquire, Associate Coroner for the City of Toronto.—(Gazetted 10th December, 1859.)

DANIEL YOUNG, Esquire, M. D., Associate Coroner, County of Hastings.—(Gazetted, 16th December, 1859.)

NOTARIES PUBLIC.

HUSON WILLIAM MUNRO MURRAY, of Toronto, Esquire, Barrister at Law, to be a Notary Public in Upper Canada.—(Gazetted 10th December, 1859.)

WILLIAM HENRY WILKINSON, of Napanee, Esquire, Attorney at Law, to be a Notary Public in Upper Canada.—(Gazetted 10th December, 1859.)

JOHN WILLIAM DUNKLEE, of Clifton, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 17th December, 1859.)

JAMES R. COTTER, of Dunnville, Esquire, to be a Public Notary in Upper Canada.—(Gazetted 31st December, 1859.)

TO CORRESPONDENTS.

PAUL DUNN; H. PULTZ.—Under "Division Courts."

SCRUTENS.—Under "General Correspondence."

STUDIOSUS.—Required your name. No notice taken of anonymous communications.

DIARY FOR FEBRUARY.

5. SUNDAY ..... *Septuagesima Sunday.*
6. Monday..... HILARY Term beg. Last d. for not. of Ex. Sandwich & Whitby
7. Tuesday..... Chancery Ex. Term, Toronto, commences.
10. Friday ..... Paper Day, Q. B.
11. Saturday..... Paper Day, C. P.
12. SUNDAY ..... *Sexagesima Sunday.*
13. Monday..... Paper Day, Q. B. Last d. for not. of Ex. Chatham & Cobourg.
14. Tuesday ..... Paper Day, C. P.
15. Wednesday.... Paper Day, Q. B. Last day for serv. of Writ in Co. Court Y. & P.
16. Thursday..... Paper Day, C. P.
18. Saturday..... HILARY Term ends.
19. SUNDAY..... *Quinquagesima Sunday.*
20. Monday..... Last day for notice of Ex. Chancery for London & Belleville.
21. Tuesday ..... Shrove Tuesday. Chan. Ex. Term, Sandwich & Whitby com.
22. Wednesday.... *Ash Wednesday.*
25. Saturday..... Last day for declaring in County Court.
26. SUNDAY..... *1st Sunday in Lent.*
27. Monday..... Last day for Chancery notice of Ex. London and Belleville.
28. Tuesday ..... Chancery Ex. term, Chatham and Cobourg, commences.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

FEBRUARY, 1860.

OUR CALENDAR.

It having been decided in *Cuthbert* v. *Street*, 6 U. C. Law Journal, p. 20, that in computing the eight days required for Notice of Trial, the commission day of the assizes is to be excluded, we so altered our calendar as to meet the effect of the decision.

Though necessary, in consequence of this alteration, to shift back one day the several days named for pleading, serving process, and other proceedings in a cause, by some oversight, the compiler of the calender neglected to do so.

The oversight was not known to us, until the issue of the calendar with our last number, and now that it is in our power to draw attention to the fact, we not only do so, but issue a new and amended calendar with this number.

We are most anxious to make the yearly calendar as correct as possible, and in order to attain this object, spare neither trouble nor expense.

We shall take it as a favour, if any person discover a material error in the calendar now issued, and will inform us of the same, with a view to correction.

REGISTRARS—DUTIES AND LIABILITIES.

The registration of title to lands is become a subject of much importance in Upper Canada.

Much depends upon the proper discharge of duty by the several Registrars of the Counties, Ridings and Cities, and much dissatisfaction is felt at the carelessness of some and the rapacity of others.

It is a fact, that in some Counties the Registrars, in regard to fees, know of no law but their own selfishness, and in others are as disobliging as their ignorance of the law regulating the performance of their duties is lamentable.

The greater number of the Registrars of Upper Canada are, as we have reason to believe, free from these terms of reproach. They discharge the duties appertaining to their offices to the satisfaction of the public and in strict accordance with the requirements of the law. As a rule, those who know most about the duties of their office are the most obliging. All are public servants, and it is the duty of each public servant to be courteous in his dealings with the public.

We proceed in this number of the *Law Journal* to make some remarks on the duties and liabilities of Registrars of titles to land.

It is the duty of every Registrar, or his deputy, to attend at his office every day in the year (excepting Sunday, Christmas Day, New Year's Day, Good Friday, Easter Monday, and the Queen's Birthday,) from the hour of 10 in the forenoon until 3 in the afternoon.

Upon payment of his proper fees, of which we shall say more hereafter, it is his duty to register such Deeds, Conveyances, Powers of Attorney, Wills, Devises, Judgments, Decrees of Foreclosure, Bills in Chancery, Certificates of Satisfaction, Discharges of Decrees or Orders of Chancery and Rules or Orders of Court directing the payment of money other than costs, and other instruments such as mentioned in the Consolidated Statute of Upper Canada, chapter 89.

It is also his duty, when required to make searches concerning all Memorials registered, and concerning all Deeds, Wills or Judgments, Decrees or Orders recorded, and give certificates thereof under his hand if required by any person.

The books, indexes, and other documents in the office of the Registrar are all in his keeping, not merely for the convenience of parties but for the safety of the community. who are interested in their being preserved unaltered and unmutilated. He is not obliged to place his books and indexes in the hands of any person desiring to make a search, but may in his discretion do so,

Whenever, however, a person conducting himself respectfully desires to make a search into the state of any particular title or into the registration of judgments, &c., tha Registrar ought, as a general rule, to allow the person interested in the search to run his eye over the index in order to give greater assurance that no entry respecting the land or the party in question shall escape attention, but this of course would only be when the Registrar sees the object to be the single one of making the search more satisfactorily.

Such a proceeding would not only to a certain extent relieve the Registrar from responsibility, but be a great satisfaction to the party interested in the enquiry.

On these points the case of Webster and the Registrar of Brant, reported in this number, is an authority. It is the judgment of a Court of competent jurisdiction, and at present the law of the land.

There is nothing in the Registry Act requiring a Registrar to keep an index of lands in any particular form. The index is kept for the purpose of facilitating searches It is for the Registrar's own convenience and not a record of his office.

The Registrar is, however, expressly required to enter in a separate book to be kept for the purpose, the certificates of all judgments, decrees or orders brought to him for registration, and to prepare an alphabetical index thereto (Consol. Stat. s. 71).

It is the duty of the Treasurer of the County to provide a fit and proper Register book for each Township, reputed Township, City and Town, the limits whereof are defined by law. Whenever any Registrar requires a new Registry book it is the duty of the Treasurer, on his application, to furnish him therewith, and books so furnished are to be paid for by the Treasurer out of County funds. The Registrar has no authority without reference to the County Council himself to order Register books so as to make the County liable for them (*Read* v. *The Council of the County of Kent*, 13 U. C.. Q. B., 572).

If the Treasurer refuse or neglect to furnish Register books within thirty days after the application of the Registrar therefor, the Registrar may provide the same and recover the cost thereof from the Municipality of the County (Consol. Stat. U. C., p. 897, s. 69).

Next as to the Registrar's fees. The legal principle is, that every charge imposed by law on the subject in the shape of a tax or fee must be by clear and express words (*Keele* v. *Ridout*, 5 U. C., Q. B., 240).

We cannot too deeply impress this principle upon the minds of Registrars. Some of them think that they may create fees according to fancy, and because some persons submit to the exactions, believe nobody will question the right.

It is to our own knowledge the habit of some Registrars to make charges for many matters of detail for which there is no statutory or other legal authority.

The following are the only charges which a Registrar is entitled by law to make :—

1. For drawing affidavit of execution of instrument if done by the Registrar or his Deputy... .....$0 50
2. For recording every Deed, Conveyance, &c., *including* all necessary entries and certificates..... 1 25

   In case such entries and certificates exceed 300 words then at the rate of 13½ cts. for every additional one hundred words.
3. For registering a Sheriff's Deed.....$0 75
4. " " Certificate of Payment..... 0 50
5. " " Satisfaction thereof..... 0 50
6. " " any Certificate of a Suit or Proceeding in Equity..... ..... 0 50
7. For registering any Certificate of Decree..... 1 00
8. For entering Certificate of Payment of Mortgage money, *including* all entries and Certificates thereof 0 50
9. Drawing Affidavit of the execution thereof when done by the Registrar or his Deputy..... 0 50
10. For searching Records relating to any parcel or lot of land not exceeding four references..... 0 25
11. For every additional four distinct references, and so in proportion to every number of searches made... 0 25
12. In no case a general search into the title of any particular lot, piece or parcel of land to exceed..... 2 00
13. For every extract furnished, *including* Certificate.... 0 25
14. Where the extract exceeds 100 words for every additional 100 words..... 0 15
15. For furnishing statements required under the 72nd section of the Registry Act, per folio of 100 words 0 10

A Registrar is not in any way bound to give extracts or certificates of such portions of a lot as are not asked for, nor can he compel a person to pay for such. He may make search to see whether the Crown had granted the whole of a lot or granted it in halves or other lesser proportions, but as soon as he discovers that it was granted in halves or other lesser proportions his search and his extracts should be confined to that part which is asked for, and his extracts for which he would have a right to charge should be confined to that part.

If a Registrar finds that it enables him to make searches more easily to insert all the conveyances affecting a particular lot in one part of a page he may do so, though the Crown may have granted it in half lots or other lesser proportions, yet that will not enable him to charge for searches and abstracts for the whole when not wanted.

When after grant from the Crown a person sub-divides a lot himself and does not furnish the Registrar with a plan, the Registrar has no other mode than to put all conveyances affecting the lot in the one index, and in this case it is apprehended would be entitled to each search made, though on portions of the lot other than that about which the enquiry is made.

On these points we refer to *Hope* v. *Ferguson*, 17 U. C., Q. B., 219.

Much contrariety of practice exists as to the right of a Registrar to charge 25 cents "for every *extract* furnished *including certificate*, and where that same exceeds 100 words 15 cents for every additional 100 words contained in such extract and certificate."

A Registrar is required to furnish a certificate of title to a particular lot with judgments. To do this he looks at a number of memorials, and considers *each* memorial as a separate and distinct extract and certificate, and charges for it as such. This he has no right to do. He is not asked for an extract of each memorial, or a certificate as to each memorial, but for *an* extract of all memorials on the land, and a certificate thereof. Should a particular memorial be required to be extracted and certified separately, then there would be the charge of 25 cents for the first 100 words, and 15 cents for each subsequent 100 words. But a mere memorandum of the name of each granter and grantee, the date, &c., the date of registry, and description of instrument, whether bargain and sale or mortgage, is not such an extract as entitles a Registrar to charge 25 cents.

Such is the decision of the Court in *Hope* v. *Ferguson*, 17 U. C. Q. B., 219, but still we are informed some Registrars adhere to the erroneous but more profitable mode of calculation.

We are not sure but such a practice is an "undue practice," within the meaning of S. 77 of the Registry Act, for which a Registrar may be prosecuted criminally, and incur a forfeiture of his office. We do not venture a decided opinion on the point, but would recommend complaints to the government with a view to redress.

It was held under the old Registry Act, 9 Vic., cap. 34, that a Registrar must record the memorial of a deed, &c., in every Township in which there are lands situate that are embraced in the deed; but that he need not enter in the book of any township lands other than those lying in that Township. (*Smith et. al* v. *Ridout*, 5 U. C. Q. B., 617.) It is only necessary, in such case, to furnish one memorial, which memorial is to be copied in each township book, in the same manner, and to the same extent only, as if a separate memorial had been furnished in relation to the lands situate within each such township. (Consol. Act, S. 33.)

It is not yet decided whether for the purpose of charging fees, the Registrar is entitled to each entry in each separate book, as a separate memorial—that is $1,25 if under 800 words—or is obliged to register continuously in the several books, charging $1,25 for the first 800 words, and 13½ cents for each additional 100 words in the books. The question is now before the Queen's Bench, but not yet determined.

Every Registrar is required to keep a book in which he is to enter all the fees and emoluments received by him by virtue of his office, showing separately the sums received for registering memorials, certificates, and other documents, and for searches, and to make a return of such fees and emoluments in detail, annually, to the Legislature. (Consol. Stat., S. 76.)

Most Registrars keep the book of emoluments, but so far as we can learn *keep* the returns also. This is because of a defect in the Act. No penalty is imposed for non-compliance, and so the law is wilfully disobeyed. The information is such that the Legislature should receive annually, with a view to funding the fees and payment by salary, if thought desirable, for the public interest. We hope some Member of Parliament will turn his attention to this matter, and see that the section of the statute requiring a return is either repealed or obeyed. Laws lose much of their force if enacted only to be disobeyed.

DELIVERY OF JUDGMENTS.

QUEEN'S BENCH.

Monday ..... 5th March, 10 o'clock, a.m.
Saturday ..... 10th March, 2 o'clock, a.m.

COMMON PLEAS.

Monday ..... 5th March, 2 o'clock, a.m.
Saturday ..... 10th March, 10 o'clock, a.m.

SPRING CIRCUITS, 1860.

EASTERN CIRCUIT.

THE HON. CHIEF JUSTICE DRAPER.

Perth	Wednesday,	11th April.
Brockville	Tuesday,	17th April.
Cornwall	Monday,	23rd April.
Ottawa	Tuesday,	1st May.
L'Original	Tuesday,	8th May.

MIDLAND CIRCUIT.

THE HON. SIR J. B. ROBINSON, BART., CHIEF JUSTICE.

Whitby	Thursday,	15th March.
Peterboro'	Tuesday,	20th March.
Cobourg	Monday,	26th March.
Belleville	Tuesday,	10th April.
Picton	Wednesday,	25th April.
Kingston	Wednesday,	2nd May.

HOME CIRCUIT.

THE HON. MR. JUSTICE BURNS.

Hamilton	Monday,	19th March.
Niagara	Monday,	9th April.
Welland	Monday,	23rd April.
Milton	Monday,	30th April.
Barrie	Monday,	7th May.
Owen's Sound	Tuesday,	15th May.

OXFORD CIRCUIT.

THE HON. MR. JUSTICE MCLEAN.

Guelph	Monday,	26th March.
Berlin	Monday,	2nd April.
Stratford	Tuesday,	10th April.
Woodstock	Monday,	16th April.
Brantford	Monday,	23rd April.
Simcoe	Tuesday,	1st May.
Cayuga	Tuesday,	8th May.

WESTERN CIRCUIT.

THE HON. MR. JUSTICE RICHARDS.

Sarnia	Wednesday,	14th March.
Goderich	Tuesday,	20th March.
London	Monday,	26th March.
St. Thomas	Tuesday,	10th April.
Chatham	Monday,	16th April.
Sandwich	Monday,	23rd April.

TORONTO.

THE HON. MR. JUSTICE HAGARTY.

Monday, 9th April.

LECTURES

ON THE JURISDICTION AND PRACTICE OF THE HIGH COURT OF ADMIRALTY OF ENGLAND.

It is doubtless known to some of our readers, that up to a very recent period the High Court of Admiralty in England was an exclusive Court, possessing the privilege of appointing its own Practitioners (Proctors), but under a recent English statute, has been "thrown open" to the legal profession in England.

We have extracted from the *Law Times* of December 10th, 1859, the subjoined notice of two lectures which were about to be given to the members of the Incorporated Law Society, by John Morris, Esq., of old Jewry London, Solicitor, a member of the firm of Ashurst, Son & Morris.

Two Lectures on the Jurisdiction and Practice of the High Court of Admiralty of England will be delivered in the hall of the society on Wednesday, Dec. 14, and Wednesday, Dec. 21, at eight o'clock in the evening precisely, by John Morris, Esq., a member of the society.

The History of the Jurisdiction :—The Ancient Jurisdiction. The Restraining Statutes of Richard II. The Conflict with the Common Law Courts. The Statutes of Victoria; and Rules of Court made there-under.

Distinction between the *Instance* Court and the *Prize* Court.

The present jurisdiction of the Instance Court in causes of—1. Wages. 2. Possession. 3. Mortgages. 4. Bottomry. 5. Necessaries. 6. Salvage and Towage. 7. Damage.

The practice of the Instance Court :—Suits *in rem ; in personam; in personam.*

Changes introduced by recent Statutes and Rules of Court.

The Prize Court :—Its jurisdiction and practice.

General remarks,—On the duties of Proctors (which under the recent statute apply equally to Solicitors.) On the special characteristics of the Jurisdiction and Procedure. Suggestions thereon, and especially as to any extension of the jurisdiction —also as to a course of study in Admiralty Law.

The members of the society and the subscribers to the other courses of Lectures are invited to attend these additional Lectures.

R. MAUGHAM,
Secretary.

The Editor remarks as follows in the same number on the proposed lectures.

We wish to direct the special attention of our readers to a programme, which has been published to the Incorporated Law Society, of two Lectures which are to be delivered in the Hall of the Society, on Wednesday the 14th and the 21st inst., at 8 p. m., by Mr. Morris, of the firm of Ashurst, Son and Morris. There are many, now in the full tide of professional business, who will remember how much they owe of their success to their practice at the Law Students' Debating Society, when Mr. Morris was—as we believe he was for many years—its Secretary, and one of its most active members. They who recollect him in this character will need, we are convinced no other stimulus to interest them, and aid him in an undertaking which is perfectly new. The subject of the lecture is the Jurisdiction and Practice of the High Court of Admiralty; and now that this once close court has been thrown open lately to the Profession, it was unnecessary to show how opportune and useful will be a popular exposition of its practice by an experienced and able man, such as Mr. Morris is.

But it is in another point of view that these lectures are, perhaps, most interesting. It is the first appearance of a solicitor as a law lecturer at the Law Institution. Now that so much has been done to fuse the two great divisions of the Profession, and to identify their practitioners in education and professional knowledge, it is apparent that nothing like presumption can be charged against a gentleman who comes forward in his character of solicitor as an expounder of the law. In truth, the large and varied knowledge of law which is absolutely essential to every competent solicitor in these days—composed, as it necessarily is, in almost equal proportions of an intimate acquaintance with principles as well as with practice—will be thought reasonably, at least by some, to fit such a one more thoroughly for the office of a lecturer than even the more special, but less general, learning of the barrister. It may be that the latter dives more deeply into principles and details; but it is certain that he does not work upon so extensive and matter-of-fact a surface of daily useful practice. We will only add, that we think Mr. Morris deserves much credit for having started so useful an initiative. We wish him heartily success; we trust that all who can will encourage him; and that many others will follow his example.

In pursuance of the announcement, the lectures were delivered on the 14th and 21st December, and a full report was given in the *Jurist* of the 31st December.

Though there is not any Admiralty Court in Upper Canada, we deem these lectures of sufficient importance to give place to them from time to time in the *Law Journal*. They evince much research and much learning, and being the first of a solicitor before the Law Institution, we hail them as an earnest of what may yet be done by that branch of the profession in England.

The Act of last session, enabling barristers and attorneys to practise in the Admiralty Court, has given to the subject of the lectures I am about to deliver an interest and importance to the profession generally which it has not hitherto possessed.

I trust that my present effort to stimulate that interest, and give it a practical direction, may not be without use.

It is necessary that we should, at the commencement, have a clear perception of the subject on which we are about to enter. It is not the maritime law of England in general, nor even the particular portions or branches of it which govern the proceedings of the Court of Admiralty, but it is the jurisdiction and practice of that Court. I do not propose to treat

of the law administered by the Court further than may be necessary to define the limits of its jurisdiction. I would here merely remark that the law by which the proceedings of the Court are governed is founded on the maritime laws of ancient Europe, modified and controlled by Acts of Parliament and common usage.*

I shall, in the first place, glance at the origin and history of the jurisdiction, without which it would be impossible to show you clearly its present limits, and the principles on which they have been fixed; why it is that the Court takes cognisance of suits for wages, bottomry, salvage, &c., and not of causes of charter-parties, marine insurance, necessaries supplied to a ship not foreign, &c.

The origin of the Court is involved in the same obscurity which rests on the early history of the Courts of Common Law. Some writers, and amongst them Blackstone, have assigned the origin of the Amiralty Court to the reign of Edward III.; but subsequent investigations have shown that it existed at a much earlier date. One old writer † concludes that "decision of marine cases was not put out of the king's house, and committed to the charge of the admiral, until the time of King Edward III." From this I infer that this Court, like the Courts of Westminster, was originally attached to the king's household.

In the reign of Richard II., grandson of Edward III., two statutes were passed relating to the Admiralty jurisdiction, which have been generally termed the "restraining statutes." They were founded on frequent petitions of the Commons against the admiral, the substance of which was, "that the admiral and his officers held pleas of contract arising in the bodies of counties, of trespasses, debts, quarrels, wears, kiddles, breaking open of houses, carrying away goods, illegal imprisonment, excessive fees, and extortion." ‡

The first of these statutes was the 13 Rich. II., c. 5. It enacted that "the admirals and their deputies shall not meddle, henceforth, of anything done *within the realm*, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward III., grandfather of our Lord the King that now is."

The next was the statute 15 Rich. II., c. 3. It enacted "that of all manner of contracts, pleas, and quereles, and of all other things done or arising within *the bodies of counties*, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognisance, power, nor jurisdiction," but that the same should be remedied at common law.

One question which arose on the construction of the first of these statutes, was as to what was the jurisdiction of the Admiralty, as "*duly used*" in the reign of Edward III.; which has given rise to a great deal of learned discussion. Mr. Justice Story, in his able judgment in *De Lovio* v. *Boit*, (2 Gallison's Reports, 398,) which has been well termed a "learned and elaborate essay on the Admiralty jurisdiction, and one of the most elementry views on the subject extant," after reviewing the ancient authorities, comes to the conclusion, "that before and in the reign of Edward III. the Admiralty exercised jurisdiction—1. Over matters of prize and its incidents. 2. Over torts and offences in ports within the ebb and flow of the tide, on the British seas and on the high seas. 3. Over contracts and other matters regulated and provided for by the laws of Olerom and other special ordinances. And 4, (as the commission of Robert de Herle shows) over maritime causes in general."

This, it must be admitted, is a favourable view of the ancient jurisdiction; yet Mr. Justice Story challenges the production of "any authority previous to the 13 Rich. II., which properly considered, impeaches the jurisdiction of the Admiralty as here asserted." It is true that Lord Coke, in his view of the Admiralty jurisdiction, in his 4th Institute has made citations from ancient cases, which seem to impugn or weaken the conclusions so drawn; but then, as Mr. Justice Story remarks, "It is well known with what zeal, ability, and diligence, Lord Coke endeavored to break down the Court of Chancery, as well as the Admiralty. It would have been fortunate for the maritime world, if his labours in the latter case had been as unsuccessful as in the former. There are many persons who are dismayed at the danger and difficulty of encountering any opinion supported by the authority of Lord Coke. To quiet the apprehension of such persons, it may not be unfit to declare, in the language of Mr. Justice Buller, that with 'respect to what is said relative to the Admiralty jurisdiction in 4 Inst. 135, that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction.' "

The Courts of Common Law adopted and followed Lord Coke's views. They put the narrowest construction upon the language of the restraining statutes. In the reigns of James I. and Charles I., attempts were made to put an end to the unseemly conflict between the two jurisdictions; but after the restoration it was renewed with more vigour than ever. Prohibitions to the Admiralty Court were issued by the Common Law Courts almost as of course; and if they had consistently followed out their construction of the restraining statutes to its logical consequences, the Admiralty Court would have been shorn of all its important jurisdiction. What, in substance, the Common Law Courts contended for, and so far as they could, held, was as follows:—

1. That the jurisdiction of the Admiralty is confined to contracts and things made and done upon the sea, and to be executed upon the sea; whereas all important maritime contracts are necessarily, from the nature of the case, entered into on land.

2. That the Admiralty Court has no jurisdiction over maritime contracts made within the bodies of counties or beyond sea, although of a maritime nature.

3. *Nor* of contracts made upon the sea, if to be executed upon land, or not of a maritime nature, or under seal, or containing any unusual stipulations.

4. *Nor* over torts, offences or injuries done in ports, or within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide.

On the other hand, the Admiralty Court asserted its jurisdiction over all maratime contracts, contending that the subject matter, and not locality, was the true test; and as to torts, &c., it claimed cognisance over all those committed on the high seas, and so far as the tide ebbs and flows.

The Admiralty Court always asserted jurisdiction over things done beyond sea; for such cases it was peculiarly well suited, being, even as to its ordinary jurisdiction, a sort of international court; whereas our Common Law Courts, in their early history, according to the narrow views then prevailing held that they could take cognisance only of things done within the realm. At length they got over the difficulty, as they had done in other cases, by the aid of a fiction—viz., by supposing the things to have been done at Cheapside and such like places, and holding that such averments were not traversable.

In the language of Mr. Justice Story, in the case from which I have already cited:—"The Courts of Common Law, by a silent and steady march, have gradually extended the limits of their own authority, until they have usurped or acquired concurrent jurisdiction over all causes, except of prize, within the cognisance of the Admiralty. And even as to matters of prize, its exclusive authority was not finally admitted and confirmed till the great cause of *Lindo* v. *Rodney* (2 Doug. 613). almost within our own times. It is curious, indeed, to observe the progress of the pretensions of the Courts of Common Law

* Browne's Civil & Ad. Law, p. 34; Pritchard's Adm. Digest, introduction, p. vii.
† Lambard.
‡ Wynne's Life of Jenkins, p. 78

in amplifying their jurisdiction. At first they disclaimed all cognisance of things done without the bodies of the counties of the realm, and even over collateral matters done out of the realm, which came incidentally in question upon issues regularly before the Courts. They afterwards held cognisance of contracts originating within the realm, to be executed abroad; of contracts made abroad to be executed within the realm; and finally, after much hesitation and doubt, by the use of a fiction, often absurd and never traversable, over all personal causes arising on the high seas or in foreign realms, without any regard to the place of their transaction or consummation."

Sir Leoline Jenkins, the distinguished Admiralty judge in the reign of Charles II., in his celebrated argument before the House of Lords on the Admiralty jurisdiction, pointed out the inconvenience to the public arising from the evasion of the Admiralty jurisdiction in his time—1. As to foreign contracts, or those made abroad. 2. As to mariners' wages, freight and charter parties. 3. As to building and victualling of ships, and as to material men, who furnish materials or supply work for the ship. 4. As to disputes between part owners.

Lord Tenterden, in his work on shipping adverts to the "flame of jealousy" formerly prevailing in Westminister-hall against all the courts at Doctors' Commons. These jealousies, however, have now long since subsided The successive judges of the Admiralty Court (especially Lord Stowell), so far from evincing any desire improperly to assume jurisdiction which it has not, state it as an invariable maxim that the Court is, *ex mero motu*, bound to reject what does not belong to its jurisdiction; though, in cases free from doubt, it is also bound to exercise, and not abdicate, that jurisdiction with which it has been invested, and which it ought usefully and beneficially to employ on behalf of its suitors.

In the case of the *Apollo* (1 Hagg. R. 312), Lord Stowell said that a great portion of the powers enumerated in the Commission of the judge of the Court, are inoperative, and that the active jurisdiction of the Court stands in need of continued exercise and usage.

At the commencement of the present reign, the jurisdiction of the Court (except in prize cases) had been circumscribed within very narrow limits. In many cases great inconvenience and injury resulted from the inability of the Court to administer complete justice in cases properly before it, and from its want of jurisdiction in other cases where it would alone afford a proper remedy. Much, however, has been done to remove these defects by the statutes which I am about to notice.

The most important of them is the 3 & 4 Vic., ch. 65, entitled, "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England." As to the improvements in the practice, the provisions of the statute will come under review at a subsequent period: but as to the jurisdiction, I may here observe that it is extended by the statute in several important particulars—viz., over claims of *mortgagees*, whenever a vessel shall be arrested or the proceeds brought into the registry—on questions of *title*, as to which it was previously held that the Court had no jurisdiction—in cases of *salvage, damage, and towage*, or for *necessaries supplied to any foreign vessel*, "whether such ship or vessel may have been in the body of a county or upon the high seas at the time when the services were rendered, or damage received, or necessaries furnished, in respect of which such claim is made;" whereas previously the Court had no jurisdiction in any case of salvage, damage, or towage, happening within the body of a county, nor had it jurisdiction to entertain any claim for necessaries, even to a foreign vessel; it being held that there was no distinction whether the necessaries were supplied to a British or a foreign vessel. This extension of jurisdiction as to necessaries supplied to foreign vessels was most expedient and has been found to be of great advantage. Without the power of arresting the ship which can only be done by the Admiralty process, there is, practically, no means of enforcing claims against foreign vessels.

Other statutes of this reign, and the rules of Court made thereunder will be more appropriately noticed in the observations which I shall afterwards make on the *present* jurisdiction and practice of the Court.

Here, perhaps, I might remark, that criminal offences at sea constituted formerly an important breach of the jurisdiction; but by recent statutes (the last of whith is the 7 & 8 Vic. ch. 2.) that jurisdiction is now vested in the Central Criminal Court, and in the justices of assize.

It will be convenient here to notice the distinction between the ordinary or civil jurisdiction of the Court called the "Instance Court," and the prize jurisdiction, called the "Prize Court." The two jurisdictions are quite distinct, although exercised by the same judge. They are somewhat analogous to the plea and revenue side of the Court of Exchequer. The Instance Court takes cognisance of certain maritime contracts and injuries, concurrently with our other Courts; the Prize Court has jurisdiction over prizes taken in time of war, and this jurisdiction it exercises free from the controlling power of the Common Law Courts, questions of prize being exclusively cognisable in this court.

The jurisdiction, both of the Instance and Prize Court, but especially the latter, is (to use the language of a recent writer)* "exercised according to the rules and practice of the Roman Civil Law, which from its universality, and as forming the foundation of the system of jurisprudence established in most of the great nations of Europe, is best adapted to the proceedings of a Court administering the law of nations."

Thus, being founded upon the same model, there is an affinity between the maritime tribunals of Europe and America, which is most fitting and useful in dealing with subjects which have no special locality.

I propose now to consider the present jurisdiction and practice both of the Instance and Prize Courts. With reference to the Instance Court, I shall particularly endeavour to point out, in those cases in which it has concurrent jurisdiction with the common law or equity courts, the special advantages if any, of proceeding in this court.

The present jurisdiction of the Instance Court comes first in order before us.

It would make my observations on this subject more intelligible, if you had some previous acquaintance with the procedure of the Court; but it may answer my present purpose if I remark that the one distinguishing feature of the Admiralty procedure is the power to arrest the ship, as the first step in the suit; the suit is, therefore, a suit *in rem*—the ship, as it were, "being brought into court" and adjudicated on. This remedy *in rem* against the ship is founded on the practice of the civil law, which gives an *actio in rem* to recover or obtain the thing itself, the actual specific possession of it; whereas, with us, things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most impossible either to ascertain their identity, or to deliver them in their original condition; and, therefore, the law contents itself with restoring, not the thing itself, but a pecuniary equivalent in damages (3 Black Com. 146).

I propose to consider the present jurisdiction of the Instance Court under the following heads—viz., causes of

1. Wages.
2. Possession and Restraint.
3. Mortgages.
4. Bottomry.
5. Necessaries.
6. Salvage and Towage.
7. Damage.

(*To be continued.*)

* Pritchard Ad. Dig. Introd., p. 7.

INDEX TO VOLUME 5.

In reply to numerous inquiries, we take this mode of stating that the Index to Volume 5 is nearly completed, and will be issued with the March number of this *Journal*.

LAW SOCIETY, U. C.

HILARY TERM, 1859.

ARTICLED CLERKS' EXAMINATION.

SMITHS' MERCANTILE LAW.

1. What is the effect upon a creditor's remedy of taking a bill or note for a debt?
2. How may a general lien arise; what is the extent of an attorney's lien, and upon what does it attach?
3. Is there any, and if so, what case in which an endorsement can be for part of the sum secured by a bill or note?
4. *Messrs. W. & Co.*

I will engage to pay you by half-past four to-day, fifty-six pounds, or bill that amount on H, J. W.

Is this a good guarantee? Give your reasons.

5. What parties to a promissory note stand respectively in the position of the drawer and acceptor of a bill of exchange?
6. What is barratry, and against whom can it be committed?

WILLIAMS ON PERSONAL PROPERTY.

1. What exceptions are there to the maxim: *actio, personalis moritur cum personâ?*
2. In what order must the claims against a deceased person be satisfied out of his personal estate, by his executors or administrators?
3. Will a surety be discharged by the creditor neglecting to sue the principal; give your reasons?
4. Mention some chattels which descend to the heir.
5. Upon what principle does the husband's liability for debts contracted by his wife, previous to marriage, depend; and to what extent does he remain liable for such debts after her decease?

BLACKSTONES' COMMENTARIES.

1. Upon what is a master's right of action, for beating his servant, founded?
2. Of what parts may every law be said to consist?
3. What is the distinction between *mala in se*, and *mala prohibita?*
4. What is the meaning of the maxim: "The king never dies?"

STORY'S EQUITY JURISPRUDENCE.

1. Is a voluntary conveyance of lands void as against a subsequent purchaser for valuable consideration who has notice of the prior voluntary deed? Upon what statute does the law on this subject depend?
2. In what cases will a registered deed be postponed in equity to a prior unregistered deed?
3. What are the rights of a surety who pays off the debt, as to collateral securities in the hands of the creditor?
4. Does the creditor discharge a surety by giving time to the principal debtor, with a reservation of all his rights against the surety, but without having any communication with the surety?
5. What course should a partner take upon the goods of the partnership being seized under a *fi. fa.* against the other partner for the separate debt of the latter?
6. Will a bill in any, and what cases, lie for the specific performance of an agreement for the sale of the chattels?

WILLIAMS ON REAL PROPERTY.

1. What is an estate by the courtesy of England, and what is essential to constitute a title to it?
2. Are the conveyances of infants void, or voidable only?
3. How may a tenant in tail, in possession, convert his estate into a fee simple?

STATUTE LAW AND PRACTICE.

1. Is a widow in any cases, and if so what, entitled to dower out of an equitable estate?
2. In what cases is a sheriff entitled to an interpleader, is he bound to make any, and what enquiry into the nature of the claim set up?
3. Has there been any statutory alteration with regard to costs where judgment is arrested?
4. Can inferior jurisdiction cases be tried in the Counties of of York and Peel?
5. What is the course under the Common Law Procedure Act for compelling a plaintiff to proceed to trial.
6. What is the distinction between an avowry and a cognizance?
7. By what statute was a Court of Chancery erected in Upper Canada? Does the Act referred to contain any, and what special provision as to the redemption of mortgages?
8. Does the Court of Chancery in a suit for foreclosure give any, and what personal remedy against the mortgagor?
9. If a bill to redeem is dismissed at the hearing, what is the effect of the decree?

EXAMINATION FOR CALL TO THE BAR.

SMITH'S MERCANTILE LAW.

1. To what extent is an auctioneer the agent of the vendor and purchaser respectively?
2. What is freight, and under what circumstances is it payable?
3. What is the common law liability of a common carrier?
4. In what cases is the insured entitled to a return of the premium?
5. Is a warranty made after a sale binding? Give your reasons.

BYLES ON BILLS.

1. To what extent is an agreement to renew a note or bill written a separate piece of paper binding between the original and subsequent parties respectively?
2. Upon what grounds, and to what extent, does a promise by an inderser to pay a note or bill after it becomes due, dispense with proof of notice of dishonour?
3. Is it necessary to present a bill or note payable at sight or on demand, or either of them, for the purpose of charging the maker or acceptor?
4. If a bill or note be re-indorsed to a previous indorser, has he any remedy against the intermediate parties? Give your reasons.
5. Where a note or bill is given to a single woman who afterwards marries, who should indorse, and who should sue upon it during coverture?

BLACKSTONE'S COMMENTARIES.

1. What is the meaning of a menial servant?
2. What are the duties of a coroner?
3. What is the difference between a denizen and an alien?
4. What are the two divisions of municipal law?

STORY'S EQUITY JURISPRUDENCE.

1. What is the nature of the equitable right of a married woman usually termed her "equity to a settlement?" Out of what property will a settlement be enforced? Will such a settlement be enforced against the husband's assignee for a valuable consideration?
2. What forfeitures for breaches of covenants in leases will courts of equity relieve against?
3. Upon the death of one of several co-partners, do his real or personal representatives become entitled to his share of the real estate belonging to the co-partnership? Give reasons for your answer.
4. Is a general assignment to a trustee in trust for the creditors of the settler, and to which no creditor is a party revocable? What will render such an instrument irrevocable?

5. What is requisite beyond the transfer itself, to perfect an equitable assignment of a chose in action as against subsequent assignees? Does this doctrine apply to the assignment of equitable interests in real estate?

6. Will the Court of Chancery in any, and what cases, interfere at the instance of a private individual to restrain a public nuisance?

7. Mention some of the cases in which a bill in equity is demurrable unless the plaintiff's affidavit is annexed to the bill.

8. Will a bond, void upon its face for illegality, be decreed in equity to be delivered up to be cancelled? Give a reason for your answer.

9. When a debt for which a surety is bound, is due, and the principal debtor refuses to pay, has the surety any, and what remedy in equity to which he may have recourse without first paying the debt himself?

10. In whose favor will a court of equity aid the defective execution of a power?

WILLIAMS ON REAL PROPERTY.

1. What covenants for title should an ordinary vendor give? What covenants should mortgagor enter into? What covenants is a purchaser entitled to from a trustree for sale?

2. What is the appropriate form of conveyance on a purchase by one joint tenant from another?

3. When a power is required to be executed by writing under hand and seal, attested by two witnesses, what should be the form of the attestation?

4. If the donee of a power having also an estate in the lands subject to the power, convey away his estate, can he afterwards execute an appointment in pursuance of the power, which will defeat the conveyance?

5. Under a devise to husband and wife, and their heirs, what will the wife surviving the husband take?

ADDISON ON CONTRACTS.

1. Can a covenant not to sue be pleaded as a discharge of the cause of action; if not, what is its effect? Is there any exception to the rule that a right of action once suspended is gone forever?

2. Where goods are obtained under a colour of a purchase with fraudulent intention of never paying for them, what remedies are open to the vendor?

3. Can a contract sufficient to satisfy the Statute of Frauds, be collected from several distinct documents, and can the connexion between them be shewn by parol evidence?

4. In what cases will the principal be liable for the negligence of his agent?

5. Mention some cases in which a master will, and some in which he will not, be liable for goods purchased on his credit by a servant.

TAYLOR ON EVIDENCE.

1. What papers is an attorney justified in refusing to produce under a *subpœnâ duces tecum?* If he refuses, and is not compelled by the judge to produce the papers asked for, can the party requiring them give secondary evidence of their contents; if not, what further steps must he take before he can do so?

2. State some cases in which a notice to produce is not necessary for the purpose of making secondary evidence admissable.

3. Is a witness who refuses to answer a question on the ground that it may criminate him bound to show how his answer would have that effect? Give your reasons.

4. When a written receipt has been given is oral evidence of payment admissible, and why?

5. To what extent is it permitted to give evidence impeaching the character of a witness, and what is the proper form of question for this purpose?

6. In what cases, and of what facts, is a dying declaration admissible evidence?

7. Is it necessary to object at all, and if so, to what extent, to inadmissible evidence tendered at Nisi Prius, in order to be allowed to make the reception of each evidence a ground for a new trial?

PRACTICE AND STATUTES.

1. Is there in Upper Canada any and what statutory enactment as to purchasers seeing to the application of purchase money?

2. What statutory powers has the Court of Chancery in Upper Canada over the real estate of infants and lunatics?

3. From what time does the Statute of Limitations run against a *cestui que* trust asking relief in equity against a sale of real estate by an express trustee in breach of trust?

4. Can the Statute of Frauds be taken advantage of in equity in demurrer to the bill? Can the Statute of Limitations be so taken advantage of?

5. Is the mis-joinder of co-plaintiffs an objection for which a bill will be dismissed at the hearing?

6. From what office can writs of summons in local and transitory actions respectively be issued?

7. Can an equitable defence be set up at common law in an action of ejectment, or in a case stated for the opinion of the court, without pleadings? Give your reasons.

8. What is the effect of the marriage of a woman plaintiff or defendant during the progress of the suit?

9. When a verdict is taken subject to arbitration, what is the method of enforcing the award?

10. Within what time must a rule enlarged from a previous term be mentioned to the court to prevent its lapsing?

11. In what cases can the court make a compulsory reference to arbitration, and at what period of a suit?

EXAMINATION FOR CALL WITH HONORS.

JUSTINIAN'S INSTITUTES.

1. To what persons were curators appointed; and by whom was the appointment of a curator made?

2. What were "Servitudes?" Mention some of the principal real servitudes. How were they created?

3. Give a definition of the right of "Usufruct" in the Civil Law. How was an "Usufruct" created? How determined, and what things could have been made the subject of this right?

4. What was the enactment of the Falcidian Law?

5. On what ground could a "*donatio inter vivos*" after it had been completed, have been revoked by the donor.

6. Where several "*fide jussores,*" or sureties, were bound each for the whole debt, could the creditor enforce payment of the whole from any one? If one of several "*fide jussores*" so bound for the whole debt, voluntarily paid the whole, could he enforce contribution from his co-sureties? Give reasons for your answers.

7. What was "*novation?*"

8. Was a contract of sale, by which it was agreed that the price should be fixed by a third person, good in the Civil Law; and what was the consequence if the person to whom the question of price was referred, refused or became unable to fix it?

9. Could a mandatory or agent, after having accepted the office, renounce the performance of the duty delegated to him?

COOTE ON MORTGAGES.

1. From what dates does the Statute of Limitations run against a mortgagee out of possession?

2. Will the Court of Chancery in any, and what case, in taking an account against a mortgagee in possession, take it with annual rests?

3. Blackacre and Whiteacre are by separate deeds, at different dates, and for distinct debts, mortgaged to A., subsequently the same mortgagor mortgages Blackacre alone to B.; can B. redeem the mortgage on Blackacre without also redeeming that on Whiteacre?

4. What is the remedy given to an equitable mortgagee, who not being able to maintain ejectment, is desirous of applying the rents and profits in reduction of his debt?

DARTS' VENDORS AND PURCHASERS.

1. After the conveyance has been executed, can a purchaser, upon discovering a defect of title, in any case, obtain relief either

at law or in equity otherwise than by action upon the covenants for title.

2. Will the Court of Chancery in any, and what cases, set aside a sale of lands for inadequacy of price only?

3. Does it follow that because a court of equity refuses specifically to perform a contract, that it will rescind it?

4. What is the effect of a registered judgment as a charge? What interest in real estate does it bind?

5. What must be shewn as to a title to induce a court of equity to compel an unwilling purchaser to take it?

JARMAN ON WILLS.

1. Give a definition of the rule against perpetuities.

2. Under a devise of lands to A. and his children, A. having no children either at the date of the will, or of the testator's death, what estate does A. take?

3. What is the rule by which to determine whether or not a devise to a person in trust for another, gives the legal estate to the person named as trustee?

4. In what cases is parol evidence admissible to shew the intention of a testator? Give instances.

5. In what cases are cross-remainders implied in a will? Give examples. Is there any difference between the construction of wills and deeds as to the implication of cross-remainders?

6. Explain the doctrine of constructive conversion?

WATKINS ON CONVEYANCING.

1. In whom does the legal estate vest if on a conveyance by bargain and sale, a use is limited to a person other than the bargainee? Give the reason for your answer.

2. What is a power simply collateral? What a power in gross? Give instances of each.

3. Of what property is a deed of "Grant" the appropriate form of conveyance at common law?

STORY ON PARTNERSHIP.

1. Give a definition of partnership, and illustrate the rule that partnership is a *voluntary* contract.

2. Where the same person is a partner in two different firms, can one of such firms sue the other? Will this rule affect the rights of the holder of a note or bill made by one of such firms to the other, and endorsed over? Give your reasons.

3. In what cases will a person be liable as a partner to third persons, when he is not an actual partner?

4. Has one partner in the business of an attorney the power to bind the firm by bill or note? Give your reasons.

5. Is the absence of an express stipulation between the parties conclusive on the question, whether a partnership is at will or for a definite period?

6. State some of the distinctions between the rights of a partner and a part owner of a chattel.

7. Where there are running accounts between a firm and a customer, how will the ordinary rule of law, with regard to appropriation of payments by such customer, affect the liability of a retiring partner?

RUSSELL ON CRIMES.

1. What is the distinction between a principal in the second degree and an accessory; in what cases there be no accessories?

2. Is a married woman liable for crimes which she commits in the presence of her husband, and why? Does not the rule apply to all crimes? If not, state the exceptions.

3. Give a definition of larceny. Is *lucri causâ* a necessary ingredient; at what time must the *animus furandi* exist to constitute the conversion of goods found a larceny.

4. What is the presumption of law as to the age at which a person is responsible for crime?

5. Mention some cases in which homicide is justifiable, and some in which it only amounts to manslaughter.

6. Define the crime of burglary. What is considered night for this purpose; does this depend on common law or statute?

7. If a prisoner is acquitted on the ground of insanity, how should the verdict be returned, and what is the effect of such finding; is the question of insanity ever raised before plea?

8. If a servant is entrusted with property by his master and converts it, is this larceny or embezzlement? Give your reasons.

STORY'S CONFLICT OF LAWS.

1. Give the definition of the term "Domicil," and state some of the principal rules to be applied in determining the question of "Domicil."

2. By what law is the validity of a will of personalty to be determined, where the property bequeathed is situate in one country, the domicil of the testator being in a different country, whilst the will is made in the third?

3. Can an action be maintained in Upper Canada on a contract void under the Statute of Frauds, but made in a foreign country, by the law which it is valid? Give reasons for your answers.

4. What is essential to make a foreign judgment an estoppel by the law of England? Give a short outline of the law of estoppel by foreign judgment.

5. Supposing a debt, not transferrable by the law of Upper Canada, contracted in a foreign country, and there assigned over by the creditor to a third person, who by the law of the foreign country could maintain an action as such assignee in his own name, who would be the proper person to sue in Upper Canada for the recovery of the debt?

6. Would a child born before marriage in Scotland, whose parents afterwards married, be considered legitimate in England? Give your reasons, and state how far the laws of England is governed in cases of legitimacy by the law of the country where the birth takes place.

7. Are there any, if so, what exceptions to the rule, that a marriage is valid in England when valid according to the laws of the country where is was celebrated?

JURIDICAL SOCIETY.

(From the *Solicitors' Journal and Reporter.*)

The Lord Chancellor, on last Monday evening, as President of the Juridical Society, presided at its usual bi-monthly meeting, when Mr. Lewis, Q.C., read a paper upon the law regulating the prosecution of Blasphemous Libels; after which a discussion of more than ordinary interest took place. There was a very large attendance of members, including several judges and Queen's Counsel.

Mr. Lewis, in his paper, after referring to the delicacy of the inquiry, apologised for introducing it to the society, on the ground that the law in reference to it had been assailed by able men in violent terms as incompatible with that freedom of opinion which ought to prevail in a free country. Having given examples of the kind of speaking which the law held to be blasphemous, he remarked that such blasphemy was indictable, under both the common and the statute law, the malice of the person uttering it being assumed as an essential ingredient of the offence. Formerly, nonconformity and heresy were indictable by statute, but that law had been repealed, and that being the case he was ready to maintain that there was not anything prejudicial to free opinion in the state exercising its power to protect the Christian religion from ribald and scurrilous attacks.

The learned reader then proceeded as follows:—

We have now ascertained the mode in which the law of England deals with the three leading classes of occurrences, in which blasphemy may present itself. That law we find in each case to have the purely practical aim of protecting what, *rightly or wrongly*, in regard to religion, it deems the essential interests of society at large, or of individuals specially in need of, and entitled to claim its protection.

"*Rightly or wrongly*," I say; for the question has been started, whether this interference is right or justifiable? Whether society or the law has any function to examine what is irreligious, or to make irreligion a crime? It is said to be

each man's right *et sentire quæ velit, et quæ sentiat dicere;* and that the law oversteps its rightful limits when it annexes a punishment to profane speech. A claim is put forward, which I will state in the precise words of one who has made himself most conspicuous in denouncing this portion of our laws. Mr. Buckle, the well-known author of what at first appeared to be a promising treatise on "Civilisation in England," put forward this proposition:—"It should be clearly understood that every man has an absolute and irrefragable right to treat any doctrine as he thinks proper; either to argue against it, *or to ridicule it.* If his arguments are wrong, he can be refuted; if his ridicule is foolish, he can be *out-ridiculed.*" "Every species of attack is legitimate." Again: "Any punishment inflicted for the use of language which does not tend to break the *public peace*, and which is neither seditious in reference to the *State*, nor libellous in reference to *individuals*," is "simply a wanton cruelty." And once more, he puts the proposition in the form of a question, thus:—"Is it proper that law, or public opinion, should discourage an individual from publishing sentiments which are hostile to the prevailing notions, and are considered by the rest of society to be false and mischievous?" In other words, our objectors say, *Deorum injuriæ, diis curæ!*

Here, then, is the problem which it is my object to submit for your consideration. Here is the issue which remains to be decided by the educated mind of the country, and which it especially befits us, as jurists, to aid in the determination of! The protest against the existing law is made not by Mr. Buckle only, but also by a writer of even higher repute and consideration—Mr. John Stuart Mill, whom, in fact, as respects this question, Mr. Buckle only *followed* in order of time; but whom he has far *outstripped*—if I ought not rather to say, *contrasted* with himself—in the intemperance of the remarks which he has published on the subject, and the unjustifiable mode in which, in his eagerness to heap abuse upon the law, personal character has been traduced by him.

It is wholly impossible, in a discussion of this subject, to omit noticing the particular case which has given this question more immediate prominence among the public disputations of the day. It is invested with special interest to us, *as lawyers*, because it is the first occasion in the long period which has elapsed since society assumed its present settled and refined condition, that the administration of justice, by one of the first class of judicial functionaries, has been openly alleged, by persons of education, to have been designedly perverted to the purposes of oppression. It is also invested with interest for every one who is concerned for the character and honour of our highest *literature;* in that we find, how even a cultivated intellect may surrender itself to prejudices, under the influence of which it may be guilty of the breach of every imaginable literary propriety, and of even the commonest decencies of social intercourse.

[The learned reader here detailed the particulars of Pooley's case, and the attack of Mr. Buckle on Sir John Coleridge, in reference to it; animadverting, in strong terms, on the spirit manifested by Mr. Buckle in that attack, and the mode in which he had conducted that controversy.]

Has then the law a right to restrain offensive attacks on religion.

"*No!*" says the lover of liberty; "OR," he says, "IF you interdict the use of such weapons, interdict them equally *on both sides.* Restrain the employment of vindictive, sarcasm contumely, and other intemperate means against irreligious opinions, if you forbid their use in opposition to the prevailing that is, the Christian opinion." This ground is taken by Mr. Mill and others. Mr. Mill says, "If it were necessary to choose, there would be much more need to discourage offensive attacks on *infidelity* than on *religion.* It is, however, obvious that law and authority have no business with restraining *either.*" So, it is asked by an anonymous writer, as to "those who would punish blasphemy because it is offensive to believers, will they similarly punish believers for language offensive to those of other creeds, with equal virulence and wilfulness?"

Now it would be mere disingenousness, a mere evasion were I to profess myself satisfied with the *alternative* offered of an equality of treatment to be extended to the defamers of *Christianity*, and the *supposed* defamers of *unbelief.* I shall not shelter myself under any such compromise! Part of my argument, indeed, will be, that there is nothing in unbelief to defame! It is plausible, but utterly false (as I shall hope to show), to assume that there is room, or material, here for any *bargain.* The man who rejects religion has nothing to offer which can entitle him to put the Christian *under terms.* There is no subject matter for an *exchange!* The offence (supposing the fact of an offence to be established), is *all on one side.* How can any one *defame infidelity*, which, in its very nature, abjures all claim to veneration, and which says, "Let us eat and drink for to-morrow we die!" Its own description of itself confesses that there is *no sacredness* in it to *desecrate.* It may be arguable theoretically whether Christianity is or is not true, and the unbeliever is not sought to be precluded from denying its truth; but if I establish, as I hope to do, that Christianity may, for certain limited purposes, be treated by the State as it would be were it certainly known to be true, then we must take *its own description of itself*, and, according to that description, it offers sanctions with which *disbelief* has nothing to compare,—against which it has nothing to *set-off*; sanctions which are of such a nature that an attack upon them *may* be indecent—may be *profane*; sanctions, moreover, which being profaned, there is no longer *even equality* (as I shall show), for Christian opinion (that equality which the unbeliever himself insists on), but a gross *inequality*, to the unfair hindrance and disparagement of those opinions.

The arguments which establish, as I conceive, the right to visit blasphemy with legal penalties, are of *two* kinds. *One* class of arguments is derived from the essential nature of Christian doctrines, and the intrinsic difference between their sanctions and those of infidelity (if the latter can be said to claim any sanctions). In other words, from the very nature and character of Christian opinions, they occupy, in regard to protection from the State, a preferable position to disbelief. The *other* line of argument is either historical, or bases itself on existing facts.*

Before submitting to you the arguments that have occured to me, there are certain *admissions* which may be most readily and unhesitatingly made, and which will assist in clearing the ground of the controversy.

Thus, I need hardly say, I admit that a human being is not accountable to *others* for his religious belief. I admit that, as between man and man, or between man and society, each individual for himself is entitled to "absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological." I admit that this complete liberty belongs to all, whether *Christians* or not. I admit that the "only part of the conduct of any one, for which he is amenable to society, is that which concerns *others.*"

The right which the law asserts, therefore, is not a right to *persecute* any opinion. Beyond even this, it is not a right to *inforce* any opinion. It is not a right to *prohibit* any opinion. It is not even a right to prohibit the *publication* of any opinion *as an opinion*, provided there be decorum and respect. It should, therefore, be clearly understood that it is altogether inappropriate to adduce in the present argument such examples as that of the Mussulman not permitting pork to be eaten, or the Hindoo beef; Spain prohibiting Protestant worship or a married clergy; the Persians forbidding temples; the Puritans

* I need hardly say that in using the term "infidel" or "infidelity," I adopt the term merely as a convenient form of expression, without the slightest intention of inflaming prejudices, or affixing any stigma.

denying wordly amusements; or the Socialists disallowing the appropriation of more than a ratable or sufficient portion of wealth.

The line of argument which I first venture to submit, is derived, as I before said, from the very *nature* and character of Christian opinions. The essence of the Christian's faith—as we all know—is God, a future state, a revelation, sin, redemption, and a final judgment Now, I admit that, in so far as we claim a right to punish the ridicule of Christian tenets, on the ground of their divine character, we deny Mr. Mill's theory of the perfect equality of opinion in the just view of liberty, and assert or insist on the soundness, or the right to assume the soundness, of our own as against those of the infidel, though we claim no right to *persecute* or be *intolerant*. If the law cannot take cognizance of the fact that Christian opinions have, or claim, Divine sanction, it cannot, on the mere ground of their alleged orthodoxy, deem the irreverent aspersion of those opinions a crime; or supposing that the law could so treat it, then, upon the hypothesis I have mentioned, it must equally punish any contumely of the opinions of the infidel.

This, then, is the position of the argument:—There is no attempt to proscribe freedom of opinion, as such; and for the purpose of the enjoyment of that freedom, it is agreed to be assumed, that the opinions commonly deemed orthodox *may* prove *wrong*, and those of the unbeliever sound. But, when the greater license of derision and reproach is claimed, those who refuse to concede it, rely, though not exclusively, on the assumption that there is something in the protected creed which the State is at liberty to take notice of, as entitling it to that protection, and that in this respect the creed of the infidel cannot be treated as on a level with it. Undoubtedly, then, I am concerned to show that the sanctions of Christianity are matters which the State, *i. e.* the nation at large, may, for some purposes of police, inform itself of, without unduly infringing on what all allow to be the just liberty of opinion, and, therefore, of infidelity.

I shall desire to consider this question in a manner and on grounds strictly logical, without calling in aid matters of *feeling* and *sentiment*, which, however legitimate, and even necessary in a *Christian* view, *opponents* could not be expected to share in.

Now one thing, at all events, it may be expected the objector to our laws against blasphemy will concede:—The questions involved in religion *may* be of eternal moment. *His own* proposition is, that we can never be sure of our opinion being a sound opinion, or another's a false one. He says, that we cannot call any proposition certain, because we are not the judges of certainty. He says that creeds fluctuate, and that we find an improvement in the character of successive creeds. Now, this being his own view of opinions generally, he will admit that the Christian *may* be right, when he declares that religion is of eternal moment, and that Christianity furnishes the means of knowing what are the obligations, what the perils, and what the rewards of religion.

It is therefore, a fact, which no license of opinion can dissemble, that a most serious, indeed, an awful choice, is presented when the rival opinions are Christianity on the one hand, and infidelity on the other. To say that this is a case merely of *opinion against opinion* is deceptive. Granted, for the purpose of argument, that *either* may be true, yet there is this difference—the one *offers* nothing, *entails* nothing, involves no risk of *losing* anything; it is a simple *negation*, and presents a mere *blank*:—the other *warns*, *promises*, and holds out *consequences* of *never-ending* importance to every one to whom the choice is tendered.

Now, does it not flow from this, that the treatment which the mass of opinion ought to receive, must be such as is suitable to the more complicated, as well as to the simplest, of the two sets of opinions—in other words, ought to be measured by the conditions of that opinion which involves *responsibility*,—which professes to involve loss, deprivation, perdition; and not merely of that which claims to produce no sanctions, and entail no consequences.

The two sets of opinions, in other words, exist under altogether different conditions. There is an atmosphere in which the one set of opinions could not *live* even as *opinions*, which, nevertheless, would be quite compatible with the vitality of the other set of opinions. *Reverence* is essential to the one, but it is altogether *indifferent* to the other. What, then, does the very liberty of opinion itself require, on which the objector prides himself? It requires that these several rival opinions should be allowed to exist under conditions suitable to each. It is not equality, not liberty, to deny to the more complicated opinion any other range of existence or of action than that which suffices for the balder one.

This being so, the State rightly enough, is called upon to take notice of each of these rival sentiments, and to allow them due play. It learns, therefore, the nature of each opinion, and the sanctions which it claims for itself. It is called upon to take care not to interfere unnecessarily with the propagation or action of either set of opinions. It agrees to do this. It sees the tremendous seriousness in particular of the Christian opinion, according to its own description of itself. It at once acknowledges that, seeing what Christian opinions are, both the ordinary liberty of opinion, and the very nature of those opinions in themselves, require that they should enjoy a reverent medium of communication with the public. It acknowledges that *irreverence* conflicts with what is of their very essence and is fatal to their free action as opinions.

But the State has a more special duty even than this. The great bulk of the community are in a condition which entitles them to *protection* on the part of the State. The great mass are composed of the *young*, the *ignorant*, and the *poor*. Towards these classes, the position of the State is this:—It is bound to take care that those opinions, between which they are to choose, shall come to them, or have the means of reaching them, in their true character, without any illicit interference or poisonous adulteration. Especially must this be so with regard to that particular set of opinions which are alleged to carry in their train eternal consequences of good or evil. Shall these be prevented from finding access to the poor, the ignorant, and the young, in their true garb, and with the freedom and purity which their own nature requires?

Now, how is it consistent with the fair and free action of religious opinions upon those who are unprotected, and not of sufficient intellectual or social strength to cast off all illicit influences, to allow those religious opinions to be publicly ridiculed and held up to scorn? Where is the liberty of opinion? where the fairness? where the equality? if unbridled irreverence stalks abroad to bias and prejudice and intimidate the weak and the unweary. Irreverence and contempt, be it observed, involve not merely an improper prejudice against Christian opinions, but poison the very atmosphere of those opinions. The spirit of ridicule is itself destructive of the very conditions under which alone religious opinions can live merely *as opinions*. Christianity and irreverence are absolutely incompatible. And yet, irreverence cannot pretend to be an *opinion*. It cannot shelter itself under a claim to be treated, itself, as an independent *opinion*.

Perhaps to this it may be answered, that persons need not be affected by the ridicule or the scoffing *unless they like*, and that there is no harm in leaving them to feel and do as they *like* in this respect. But to this again I answer, that the common mass of the people are not those who know and understand all that can be said *on both sides*. It cannot be expected that they *should* do so. The common mass are the weak and the unprotected, and no state of the world can be anticipated, in which people generally shall be able to erect a *barrier for themselves* against irreverent influences, by first critically ex-

amining all that has been written and said *for* and *against* the Christian faith.

I contend, then, that since Christianity *may* be true (which is all that I ask the infidel to allow); that since, if true, its behests are of everlasting moment to every one; that since, irreverence and ridicule are conditions inconsistent with the very nature of Christian opinions, and incompatible with their just action *as opinions*, it is the right and the duty of the State, not by *infringing* upon liberty of opinion, but on the contrary, in *pursuance* of it, and for securing it, to punish the licentious scoffer, and declare blasphemy a crime.

Let me, in conclusion of this view of the question, remind you of the touching language of Lord Erskine in *Williams'* case. Speaking of the blasphemous publication, "Paine's Age of Reason," he says,—"It strikes at the best, and sometimes, alas! the only refuge and consolation amidst the troubles and afflictions of the world. The poor and humble, whom it affects to pity, may be stabbed to the heart by it. They have more occasion for firm hopes beyond the grave than the rich and prosperous, who have other comforts to render life delightful. I can conceive a distressed, but virtuous man surrounded by his children looking up to him for bread, when he has none to give them; sinking under the last day's labour, and unequal to the next; yet still (supported by confidence in the hour when all tears shall be wiped from the eyes of affiiction) bearing the burden laid upon him by a mysterious Providence which he adores, and anticipating with exultation, the revealed promises of his Creator, when he shall be greater than the greatest, and happier than the happiest of mankind. What a change in such a mind might be wrought by such a merciless publication!"

Another consideration which more properly belongs to this line of argument, than to the succeeding one, though perhaps in strictness to neither, arises from the particular circumstance that the great majority of people in this country profess the *Christian* religion. As individuals, they being Christians, cannot but acknowledge the duty of holding in veneration God and the Bible. Now, the question which I would ask is, whether they are released from this obligation because they have aggregated themselves into a state—because they are a corporation, and not units? It is, of course, conceded, that all the members of the corporation are not Christians by profession; and those I need hardly say, who are not such, we do not address in this argument. Further still, I admit that, if it were a question of *prohibiting* or *enforcing* opinions, then against those rejecting them we could make no use of the fact that the majority are Christians. But, persecution and intolerance, which are no weapons of Christianity, being out of the case, what answer is there to the suggestion that the same duty rests upon the aggregate of Christians which is acknowledged to bind them individually? How can their association in the same community with unbelievers exonerate them from performing the duty which rests upon themselves as Christians, and the performance of which, by the hypothesis, involves no breach of the just liberty of the dissentients. How can the mass who accept the Divine injunction, "at the name of Jesus every knee shall bow," allow a public and (what they must admit to be) a profane desecration of that name to go unrebuked, and that too under the tacit sanction of their own laws, merely because there are some *allied* with them in the State who *disavow* the Christian injunction, but whose liberty of opinion is not infringed by enforcing it?

Let me now proceed to those considerations which are of a mixed character, and represent *worldly* rather than *religious* interests; *secular* rather than *religious* considerations. Is the State entitled to repress blasphemy upon the basis of a foregone conclusion, that atheism or infidelity is publicly pernicious, apart from any consideration of the precise nature of Christianity?

I shall here assume (what no doubt has been denied) that some opinions may be treated as necessary to civilization; and that as regards the State, so long as there is no persecution, the usefulness or expediency of particular opinions, and not their truth merely, may be taken into consideration. It cannot be necessary when a given emergency presents itself, and the State must, in that emergency, act one way or the other, that the State should know, with infallible certainty, that its opinions on the abstract question are right. But then it is said, when we claim to look at expediency or usefulness, that even the usefulness of an opinion is itself matter of opinion! What then? Is the State to *stand still, and do nothing*, in all matters that can be demed *matters of opinion*, because the truth or usefulness of the opinion may be debated? It would be idle to treat such a contention as entitled to any serious attention, were it not that such a notion seems to be countenanced by recent writers of great ability.

Now, what I am contending for is, that the state may adopt and act upon the opinion that Atheism is publicly and nationally pernicious—that when Atheism assumes the form of blasphemy it may be punished—and that, so to treat it, involves no violation of true liberty of opinion. The answer is, that the nation, *i.e.*, the majority, cannot, without assuming infallibility, be *sure* that Atheism is *not right*. Supposing this to be granted, is it meant that, until the certainty is obtained, all practical interests affected by the question are to be left to take care of themselves? Is history, is experience, is example, to be disregarded, so far as it warns us against infidelity? Is Government to fall to pieces—the fabric of society to totter—so far as they have been reared and built up of Christian materials, because as yet there is no one and no Government that can oracularly assume infallibility?

Now, this dilemma is expressly stated by Mr. Mill in his book on Liberty, and it is worth while to notice how explicitly he puts it. I claim the full benefit of the objection as he himself supposes it.

After arguing that all opinions are equally liable to the risk of error, he supposes some one to object thus:—

"There is no greater assumption of infallibility in forbidding the propagation of error than in any other thing which is done by public authority, on its own judgment and responsibility. Judgment is given to men that they may use it. Because it may be used erroneously, are men to be told that they ought not to use it at all? To prohibit what they think pernicious is not claiming exemption from error, but fulfilling the duty incumbent on them, although fallible, of acting on their conscientious conviction. If we were never to act on our opinions because those opinions may be wrong, we should leave all our interests uncared for, and all our duties unperformed. An objection which applies to all conduct can be no valid objection to any conduct in particular. It is the duty of Governments, and of individuals to form the truest opinions they can; to form them carefully, and never impose them upon others unless they are quite sure of being right. But when they are sure (such reasoners may say) it is not conscientiousness but cowardice to shrink from acting on their opinions, and allow doctrines which they honestly think dangerous to the welfare of mankind, either in this life or in another, to be scattered abroad without restraint. Because other people, in less enlightened times, have persecuted opinions now believed to be true, let us take care, it may be said, not to make the same mistake; but governments and nations have made mistakes in other things, which are not denied to be fit subjects for the exercise of authority: they have laid on bad taxes; made ununjust wars. Ought we therefore, to lay on no taxes, and under whatever provocation, make no wars? Men and governments must act to the best of their ability. There is no such thing as absolute certainty, but there is assurance *sufficient for the purposes of human life*. We may, and must, assume our opinion to be true for the guidance of our own conduct; and it

is assuming no more when we forbid bad men to pervert society by the propagation of opinions which we regard as false and pernicious."

One would have hoped the difficulty, being thus candidly noticed, would have received a full and satisfactory solution, For myself, however, I must declare that, having carefully examined the book several times, with the anxious desire to learn what is the explanation of the difficulty which Mr. Mill would give, I have been quite unable to find any answer whatever to the objection, either in form or substance, in any part of the book.

Let me, then, shortly state the general grounds on which the law, as I conceive, may claim to punish those who revile religion, apart from any consideration of the special character of our religion, and even though those grounds form but matters of opinion :—

1. The whole existing fabric of the constitution and Government in this country is identified with religion ; and to hold up religion to scorn is to attempt undermining the foundations of the constitution and the Government. The monarch, on his accession swears to maintain the Christian religion ; and, as it has been well said, "the whole judicial fabric, from the King's sovereign authority to the lowest office of magistracy, has no other foundation than the oath that has been taken. The whole is built, both in form and substance, upon the same oath of every one of its ministers to do justice as God shall help them hereafter. What God? and what hereafter?"

2. The standard of morality in this country is the Christian standard. The Bible is the highest sanction of our morals, and Christ the great Teacher of them. True, this is not so in the estimation of unbelievers ; but the question nevertheless still presents itself, what has hitherto been the basis of those rules of right and wrong which, as a civilised people, we have heretofore recognised in our social and political intercourse? It may be that, as matter of fact, with the national Christian example before them, infidels, in ordinary life, conduct themselves morally as Christians are accustomed to do. But does this necessarily show that the standard morality would be preserved to us if there were merely an atheistical basis? This point has been so forcibly put by one of the controversialists, whom Mr. Buckle's attack has brought forward, that I shall only run the risk of enfeebling the argument by giving it in any other words than his own :—

"But it by no means follows that, because they or any other individuals are not often directly affected by the standing sanctions of morality and religion, those sanctions can be safely dispensed with ; or that, because in them Atheism is, in the existing state of society generally, consistent with morality, and even with a sort of philanthrophy, it is not essentially immoral and destructive of all that is valuable in life. The truth is, the good qualities which, in a certain state of society, are consistent with *Atheism*, owe not only their force, but their very existence to *religion*. After a nation has lived for many centuries under the influence of Christian modes of feeling, the standard of morality in ordinary men, who are almost entirely the creatures of habit, is so high, that they fancy that it exists in virtue of eternal *self-evident* principles, which would be acknowledged by all mankind as soon as they were understood, and not in virtue of a long course of external influences, which, in the lapse of centuries, have moulded not only the modes of thought and feeling, but the very language and principles of thought of the nations, which have been exposed to them. It is idle for any man in the present day to try to separate himself from Christianity, and to say,—"Though I am not a Christian, I think so and so." In fact, he is a Christian in many respects, and he cannot cease to be one, however much he may wish it. He might just as well try to cease to be an Englishman." And again :—"If atheistic habits of mind were ever to become so general as to model thought and language, and to cease to be remarkable from their peculiarity, what sort of society should we have? Would people in general continue to be amiable, self-denying, and philanthrophic, or would they not act on the principle of eating and drinking, for to-morrow we die?"

3. Viewing the position of religion historically, whether as regards our own country or others, is not the State warranted in protecting religion from insult? Has not civilisation here grown and prospered hand in hand with the Christian religion? nay, rather under the shelter of it? Not relying, however, on affirmative experience alone, let us advert to the fatal example which negatively history likewise furnishes. If we wish to learn the fate of a country of scientific morals, but without religion, let us turn to China! It has been well said, that in all the world there is no more terrible or instructive example of the practical results of looking upon men as mere passing shadows, who have no superior and no hereafter.

4. Is it not clear, that as matter of public *decency*, blasphemy is rightly declared criminal? Do not the feelings of the mass of the people constitute a definite class of *interests* which may give the State jurisdiction when open blasphemy offends those feelings? The bulk of the nation consists of professed Christians. Their feelings as such, when no persecution of unbelievers is involved, constitute *rights*, which the infidel may be held bound to respect, without at all infringing upon his reasonable liberty. The conduct of the man who asperses religion affects a definite interest of all those to whom the religion is dear ; and it cannot be shown to be justifiable as a fair exercise of his own religious liberty. Conceive the disgrace, the confusion, and the chaos, if every street furnished its carricature of the persons and events that make up the Christian history and creed!

Lastly. There is no injustice in punishing the blasphemer in respect of his offence being one of words merely, and involving no physical violence and no external inteference with the property or actions of others. Is there not a whole class of offences which, time out of mind, so to say, have been punishable by our English law, that, nevertheless, comprise no breach of the peace, and no physical or overt interference with others? In what sense is blasphemy a mere matter of opinion,—mere conduct affecting a man's self only,—which is not equally true of such offences as the following?—Publishing obscene prints? using obscene language ; speaking in contempt of the sovereign ; gaming, perjury, and Sabbath-breaking, or some instances of it?

I am, indeed, aware that our laws against some even of these offences have incurred the censure of recent writers on liberty. But I am well content if the law against blasphemy stands no more in need of defence than these other laws that I have mentioned.

We have now been occupied in considering the mode in which, in a free country, indecent or unfair attacks on Christianity may be dealt with by the law. Let us hope that, painful and repulsive as the investigation, in some respects, must have been, it may have served to remind some of us of the eloquent declaration of Lord Erskine in his speech on the prosecution of Williams for blasphemy. Speaking of Christianity, he says,—"It is at this moment, the great consolation of a life, which, as a shadow, passes away ; and, without it, I should consider my long course of health and prosperity (too long perhaps, and too uninterrupted to be good for any man), only as the dust which the wind scatters, and rather as a snare than a blessing!"

The Lord Chancellor observed that while he agreed with a great deal he did not agree with everything which had fallen from the learned reader. There could be no doubt that it was a very grave offence to speak scornfully or in terms of ridicule or insult of the Christian religion and he hoped it would ever continue to be one punishable by the law of England ; but the views of Mr. Lewis went further for he would direct the powers of the State to the prosecution, not only of Paine, but also against men like Gibbon and Hume ; but, as had been the

case with himself at the time he held the office of Attorney-General, the law officers of the Crown had to consider not only the character of the offence, but also whether it was prudent to prosecute it.

Mr. J. G. Phillimore, Q.C., characterised the arguments of Mr. Lewis as being those most frequently used in the cause of error, for, pushed to their legitimate conclusion, they would justify the revocation of the Edict of Nantes. The doctrine "parens patriæ," as acted upon by the Court of Chancery, was a gross usurpation; and with regard to the Shelley case, although he would not select him as the tutor of his children, the very last person he would select to fill that office was Lord Eldon himself. He thought Christianity ought to spurn being defended by weapons which were taken from the armory of error.

The Hon. Baron Bramwell complained that Mr. Lewis had made use of negative terms, such as infidelity and heresy, which were correlative of something positive, which he had omitted to define. What he considered truth and orthodoxy would in Constantinople be held as blasphemy, which the state was under an obligation to repress and punish. For his own part he would, as a general principle, severely punish any one who would indulge in indecent or ribald attacks upon the religion of any sect, no matter how few might be its members.

Mr. T. Chambers, the Common Serjeant, observed, that Mr. Lewis's views were misunderstood, and, instead of being at variance with those expressed by the learned Baron, were identical with them.

The Attorney-General, in moving the adjournment of the discussion, said that Mr. Lewis did not intend to give his paper a general application, but confined it to the law of England. With regard to matters of religion, the duties of the State were of a completely negative character, as it could neither teach religion nor enforce morality. With regard to the Toleration Act, it was inapplicable in practice, and as such had fallen into desuetude, for it related only to those who had been educated in the Christian religion, a limitation which rendered it a nullity in practice. With regard to the interference of the Court of Chancery in the case of Shelley's children, there was a great deal of misunderstanding. It was not because their father was an unbeliever in Christianity, but because he violated and refused to acknowledge the ordinary usages of morality.

The motion having been agreed to, the thanks of the society were, on the motion of Baron Bramwell, seconded by Vice-Chancellor Stuart, voted to the Lord-Chancellor, for his kindness in attending, and the proceedings terminated.

DIVISION COURTS.

CORRESPONDENCE.

NORFOLK Co., February 16th, 1860.

To the Editors of the Law Journal.

I find that the several Division Court Clerks in this County, differ with me on what I construe to be very plain. And I thought, perhaps your opinion might set them or me right.

I maintain, according to the wording and intention of the Act, that it does not require the plaintiff, in suing, to furnish his account in duplicate, although it is customary to do so, and the custom is established upon the impression that the law requires it. I really cannot see how there can be two opinions on the subject. The 35th section of the Division Court Act says, "The plaintiff or defendant, respectively, shall furnish the Clerk with the particulars of the plaintiff's claim, or demand. And the clerk shall annex the plaintiff's particulars to the summons, and *he shall furnish copies thereof.*" Then again, what is meant by the 74th section, which says, "The plaintiff shall enter with the Clerk, a copy, and if *necessary, copies* of his account, claim, or demand?" Now I cannot imagine any case wherein it would be *necessary* to furnish copies; except it means where two or more persons are joined in one action. Furthermore, in the tariff of fees for Clerks, they are allowed ten, fifteen, and twenty cents, in proportion to the amount, for furnishing particulars of demand or set-off. There is nothing, so far, that goes to show that in any case, claims or set-offs are to be furnished in duplicate.

Yours &c.,

A DIVISION COURT CLERK.

[We quite coincide in the opinion above expressed by our valued correspondent. It is the duty of the *Clerk* to furnish a plurality of copies when required.—EDS. L. J.]

KINGSTON, January 30th, 1860.

To the Editors of the Law Journal.

GENTLEMEN,—I send a statement of proceedings had in the First Division Court, in the United Counties of Frontenac, Lennox, and Addington, under the authority of the "91st clause," during 12 months ending 6th October, 1859.

You will perceive that the amount collected, is nearly 25 per cent. of the total amount claimed; that the amount of suits "settled by parties" or "withdrawn," is about 39 per cent. of the total amount claimed; and that the amount of suits "remaining unpaid," is about 36 per cent. of the total amount claimed. From this it may be inferred, that between 50 and 60 per cent. of the amount sought to be recovered, has been rendered available to the plaintiffs. There is little doubt that 75 per cent. of the amount of suits marked, "Settled between the parties, &c.," has been paid or secured in some other way.

I have ascertained from the Jailer, that the number of persons committed to Jail under the 91st clause, from the several Division Courts of the United Counties of Frontenac, Lennox, and Addington, during the year 1859, was 13. Number of days in Jail, 155; average for each prisoner, about 12 days.

From these facts and figures, it will be manifest that the law, as it stands, is a beneficial one, and mercifully administered in these Counties. Were it not for the existence of such a law, not a cent of the money above mentioned, would I believe, have ever been paid. I also believe that a considerable portion of the proceeds of Division Court suits, now paid without recourse being had to the "91st clause," would be withheld, were it not that the parties know that there is a sure method of enforcing payment.

I am also of opinion, in common with every person with whom I have had an opportunity of conversing on the subject, that if the "91st clause" be rescinded, the efficiency of the Division Courts will be much impaired, and that any benefits which may accrue to individuals in consequence of their being exempted from the payment of their just debts, will be more than counterbalanced by the injury which will, in such cases, be inflicted on the public.

Respectfully yours,

A. BURROWES,

Clerk of 1st D. C., F. L. & A.

Memoranda of proceedings had in the First Division Court, Frontenac, Lennox, and Addington, under authority of 91st clause Division Court Act of Upper Canada, from 6th October, 1858, to 6th October, 1859—1 year.

	No.		$	c.
1. Number of Judgment Summonses issued.....	144	...		
2. Amount sought to be recovered.....		...	5,110	07
3. Number of Orders of Commitment made.....	64	...		
4. Number of Warrants of Commitment issued.	57	...		
5. Number of persons committed.....	7	...		
6. Number of days in Jail.....	96	...		
7. Average for each prisoner, days, about.....	14	...		
8. Amount of money paid to Clerk.....		...	1,225	24

9. Collective amount of Judgment suits in which proceedings were "stayed by plaintiffs," or which were "settled between the parties," or in which no further action was taken in consequence of want of orders from plaintiffs.....	... 1,997 67
10. Amount of Judgment suits in which the money remains unpaid.....	... 1,887 16

[One grain of testimony such as the above, is worth more than all the political clap-trap of a session. The evidence in support of the 91st clause, is not only satisfactory, but almost universal. The measure itself is a wise one, and if properly administered, a beneficial one. It is a *libel* upon the County Judges of Upper Canada, to say that it is not so administered. Facts are "stubborn chiels." In support of the 91st cluse, it is unnecessary to do more than refer to the facts monthly disclosed in the *Law Journal*, by the publication of letters, such as the above, from intelligent Division Court Clerks.—Eds. L. J.]

TO CORRESPONDENTS.

We have carefully perused the long statement of grievance furnished to us by Mr. Marcus Gunn.

It does not seem to us, that he suffered injustice in the case determined against him. We, however, know nothing of the facts, beyond what his statement affords. He appears to have given the note of Parks to I. & S. Gordon, in satisfaction of so much of their demand against him as amounted thereto. This, however, is most positively denied by affidavit. Owing to the conflict about facts, it may be that no decision other than that given, could be rendered.

If not given in satisfaction, the note should, instead of being retained by I. and S. Gordon for more than a year, have been returned by them to Mr. Marcus Gunn, in order that he might have endeavored to make something out of the maker, while in good circumstances.

As a rule, the assignee of a chose in action, cannot sue in his own name. Some County Judges, however, we believe have created many exceptions to this rule, and probably the County Judge who tried this case, saw fit to make it an exception to the general rule.

The statement, besides being too long, is not of sufficient general interest for publication in the *Law Journal*. It will be returned upon application to the Editors within one month, otherwise destroyed.

U. C. REPORTS.

QUEEN'S BENCH.

Reported by Christopher Robinson, Esq., *Barrister-at-Law.*

In the Matter of Webster and The Registrar of the County of Brant.

Registrar—Right to inspection of his Books.

A registrar is not obliged to place his books and indexes in the hands of any person desiring to make a search, but may do so in his discretion, and on his own responsibility.

In this case one W. desired to ascertain the judgments recorded against Y., and the registrar gave him the numbers of certain judgments, which he said were all that related to Y., and offered to show him the corresponding certificates, but refused to allow him to inspect the index or the registry book of judgments.

Held, that he was justified in such a refusal.

[E. T. 22 Vic.]

E. B. Woods obtained a rule upon the defendant, upon the application of George Thomas Webster, to shew cause why a mandamus should not issue, commanding him to allow the said Webster, or any other person, upon request and tender of the legal fees, to have inspection of the separate books and alphabetical index in the registry office of the county of Brant, in which are entered all certificates of judgments registered in the said county against one Yardington, or against any other person or persons against whom it may be desired to search for judgments in the said office; and to have inspection, and take copies, if required, of all such certificates of judgment found entered or referred to in the said separate book or alphabetical index, and generally to have inspection of all the public books and records in the said registry office in which are any certificates, memorials, or entries affecting the lands of the said Henry Yardington, or any other person or persons in the said county, at all proper hours of the day, and upon tender of the lawful fees thereof; or that such order should be made as the justice of the case requires; and why the said registrar should not pay the costs of the application.

This rule was granted upon affidavit made by the said Webster, in which he swore that he had occasion, on, &c., as clerk to an attorney, to search in the registry office of the county of Brant for judgments entered there against Henry Yardington, or his lands, &c.: that he informed Mr. Shenstone, the registrar, of his object, and requested to be allowed to examine the separate book, and alphabetical index referred to in the statute 13 & 14 Vic., ch. 63, sec. 9, and also to be allowed to see and examine the original certificates of judgments brought to him for registration for three years next preceding the 29th April, for the purpose of ascertaining which of them, if any, operated as a charge upon or affected the lands of the said Yardington in that county: that he offered to pay the registrar the proper fees, in connexion with the said search, and offered him a sum more than sufficient: that the registrar refused to allow him to search, or inspect, or examine the alphabetical index and separate book, or to search, or inspect, or examine the certificates of judgments, or any of them, further than that, having referred to a book for certain numbers, he gave to the deponent a paper on which certain numbers were written, and brought to him a number of certificates of judgments registered in the office against Yardington, and that he might examine the certificates corresponding with the numbers; but that he would not allow the deponent, in a search against Yardington, to examine or look at any other certificates than those he had marked on the paper, or under any circumstances to examine or look at the said separate book and alphabetical index: that he, Webster, declined to make the search on those terms.

He swore that he had several times before been refused by the registrar the permission which he desired on this occasion, on the ground that the deponent had only the right to see such certificates of judgments as in the opinion of the registrar related to the person or his lands respecting whom he might at that time be searching.

M. C. Cameron shewed cause.

Robinson, C. J., delivered the judgment of the court.

We do not think it necessary or that it would be proper for us to grant a mandamus upon this application. The applicant was not able to refer us to any judicial decision or other authority shewing it to be the duty of the registrar to comply with what he desires to enforce, and certainly there is nothing in the statutes creating or regulating the office of registrar that either makes it the duty of the registrar to do what has been insisted upon in this instance, or that would exonerate him from blame in complying with such a claim, if in any case an injurious use should be made of the permission granted.

The books, indexes, and other documents in the office of the registrar, are all in his keeping, not merely for the convenience of parties, but for the safety of the community, who are interested in their being preserved unaltered and unmutilated.

We cannot act upon the presumption that the registrar is so careless or incompetent that his search into his index and books, and his certificate showing the result of his search, cannot be relied on, and that it is on that account necessary that all persons should be allowed by law to demand to have all or any of the books or documents placed in their own hands, that they may search and and make extracts or copies for themselves. It was candidly acknowledged, as regarded Mr. Shenstone, the registrar who is the object of this application, that he is an upright, pains-taking officer, and one who fulfils his duties zealously, and if any thing with more than ordinary care, though he may occasionally in a multitude of searches have passed over a name in an index; but were the fact

otherwise, we could take no peculiar course with regard to him individually, which we could not be required as a matter of right to adopt with respect to all others.

We have no doubt that whenever any person conducting himself respectfully desires to make a search into the state of any particular title, or into the registration of judgments, in order to see whether any certain individual has one or more judgments registered against him, the registrar would, from courtsey, and as a general rule, willingly allow the person interested in the search to run his eye over the index with him, in order to give greater assurance that no entry respecting the party in question shall escape attention; but that would be only when the registrar sees the object to be the single one of making the specific search more satisfactorily.

We can easily suppose there might be cases where it would neither be safe as regards the public, who have the utmost interest in the careful preservation of the books and documents in the registry offices, nor fair towards the registrar himself, that he should be compelled to throw his indexes and books and certificates before any one who might choose to come in and ask for them; and at all events, if the legislature would really approve of such a method of dealing with these important public books and documents, they must, so far as our opinion is concerned, give us plain evidence by some statute that that is what they do intend and desire. In the acts which they have passed we see no evidence of such an intention, but the contrary. In the first registry act, 35 Geo. III., ch. 5. sec. 8, the provision is, that every such registrar or his deputy "*shall make searches*," &c., not that he shall place his books, &c., in the hands of whoever calls for them, and let them search for themselves

So the 9th clause gives to the registrar a fee for "every search in the office," which we take to mean searches made by himself respecting some certain person or parcel of land about whom or or which he is requested to make a search, and perhaps to finish a certificate. The existing registry act 9 Vic., ch. 34, secs. 15 & 16, is to the same effect.

The 16 Vic., ch. 187, sec. 8, shews what fees the registrar is entitled to, and for what services, and we need hardly say that while fees are allowed to him, with a proper limitation as to amount, for all searches, there is no fee assigned to him for standing by and watching his books and papers while others are searching.

If the present applicant can demand as a right to go into the office, and have the registrar's books and documents placed before him, every one else must have the same right, and how the public business could be conducted with convenience and despatch, and the safety of the documents secured under such a system, it is not easy to understand.

It was candidly avowed in the argument that the real object of this application is to save fees for searches. If by that is meant that a person, while ostensibly searching for judgments registered against one person, should have it in his power to make use of the opportunity for making either a general search, or a general search through any particular letter, and so avoid paying the established fee for one or more other searches which it is his real object to make, though he said nothing about them, then it appears to us that it is not unreasonable that such a pretension should be resisted.

At the same time we must say that we do not assume that any registrar would object to give to any person conducting himself properly a fair opportunity to inspect any particular entry or document which is referred to in the index, and has been searched for at his request, or an opportunity to satisfy himself that the registrar has not accidently missed some entry in passing through the the index. This, however, may be fairly entrusted to the registrar himself; and we must say we have never before heard of a complaint that persons desiring to have a search made in a registry office met with any obstruction. One would suppose that in the course of sixty years this matter would have adjusted itself, so that the course pursued under the act, and constantly submitted to, would be generally understood. If we were to grant a mandamus in the terms moved, meaning it to be used for the purpose for which it was stated in the argument to be desired, we could not profess to found the command upon anything laid down in the statutes as being the duty of the registrar; and if it should happen that a leaf or more of an index, or the index itself, should disappear, or any document be altered or mutilated, it would be little satisfaction to the public that the registrar should be enabled to say that these documents had been freely and unavoidably put into the hands of any and every body by the order of this court, though that would certainly go far towards relieving the officer from all blame. The registrar may put his index or other books into the hands of others to make a search, instead of searching himself, but he does that in his discretion, and upon his responsibility. If he were commanded to do it freely whenever asked, he must be taken to have no discretion in the matter, and would be relieved from responsibility, and unable to answer for the security of his books and papers.

Rule discharged, with costs

REGINA v. MCCORMICK.

Waste lands—Effect of possession as against the Crown—Nullum Tempus Act, 9 Geo. III. ch. 16—Point au Pele Island.

The *Nullus Tempus* Act, 9 Geo. 3, ch.16, is in force in this province, but it does not apply to the unsurveyed waste lands of the Crown.

Point au Pele Island, in Lake Erie, and forming by law part of the township of Mersea, had been occupied by defendants and those under whom they claimed, without interruption, since 1789. It was not shewn that the possession held had been other than that of trespassers, nor that the Crown had ever taken charge of or received any rents from the Island, nor that it had been surveyed, or the title of the Indians extinguished, and it had never been assessed or returned as assessable.

Held, that the Crown was not barred by such possession.

This was an information filed by the Attorney General for Upper Canada to recover from the defendants possession of the lands known as Point au Pele Island, in the township of Mersea, in the county of Essex, which is an Island in lake Erie, near the said township.

The defendants pleaded not guilty, and issue was joined thereon: and by consent of the parties the following case was stated for the opinion of the court:

In the year 1789, Alexander McKee was in the actual possession and occupation of the land in question, and so remained until his death, some years afterwards, when he left a will devising it to his son Thomas McKee, who shortly afterwards died intestate, leaving Alexander McKee his eldest son and heir at law. On the first of September, 1828, this Alexander McKee by deed conveyed to William McCormick the land in question, and all his interest therein.

William McCormick went into possession and so remained until his death. He left a will devising the land by certain described parcels to and among his children, most of whom were then residing on the portions so devised, which had been previously allotted to them by the testator. The children were as follows: Alexander, John, David, William, Thomas, Lucinda, Elizabeth, Charles, Mary, Sarah, Peregrine, and Arthur. All were then living: Alexander, John, and Charles have since died. All the children continued to occupy their portions, and those living and the representatives of those deceased still do so, except that Alexander and David have by deed conveyed their portions to purchasers.

No grant from the Crown has ever issued, nor has any interruption or intermission in the possession or occupation of the premises by Alexander McKee and those claiming under him taken place since the year 1789. Neither has the same been assessed nor returnable as assessable.

The question for the opinion of the court is, whether the Crown can recover the land, or whether the possession for upwards of sixty years does not bar the Crown's right.

If the court should be of opinion that the Crown should recover, then judgment should be entered for the plaintiff, with the costs of suit. If the court should be of opinion that the Crown is barred, then judgment shall be entered for defendant.

R. A. Harrison, for the Crown. *Prince*, contra.

Co. Lit. *b.* 277 *a*; *Doe West* v. *Howard*, 5 U.C. O.S. 462; *Elvis* v. *Archbishop of York*, *Hobart* 322. *Doe Fitzgerald* v. *Finn*, 1 U. C. Q.B. 70; 21 Jac. 1, ch. 14; 4 Wm. IV. ch. 1, secs. 16, 17; 9 Geo. III., ch. 16; Bac Ab. "Prerogative" E. 5 p.; 14 Geo. III., ch. 83, were referred to on the argument.

Robinson, C. J.—This case brings up an important question, and one which, cannot I think, be quite satisfactorily disposed of without our knowing whether the Crown had ever in any manner exercised any act of ownership over Point au Pele Island, and whether it had been acquired by purchase from the aboriginal Indian tribe to which it had belonged.

Our statute of limitations in regard to real property, 4 Wm. IV. ch. 1, does not bind the Crown, nor has any legislative provision that I am aware of been made in Upper Canada, or in Canada since the union, placing any limitation upon the Crown in respect to the time within which its title to real property must, under any circumstances, be asserted.

At common law we have the maxim, *nullum tempus occurrit regi*, which would leave the Crown at liberty to pursue its remedy, by action or information, at any distance of time.

The British statute, 21 James I. ch. 2, never could have affected such a question as here, from the nature of the provisions contained in it, for it could only be applied to actions in respect to estates to which the King had title within sixty years before the passing of that act.

We have only to consider the *Nullum tempus* Act, 9 Geo. III. ch. 16, which was passed because the operation of the statute of James the First was spent.

That act, I have no doubt, must be held in force here, under our general adoption of the law of England in all matters relative to property and civil rights, by our statute 32 Geo. III., ch. 1, although the King is not named in the last mentioned statute.

Then what should be the effect of the statute 9 Geo. III., ch. 16, under the circumstances of this case?

According to the statenent of facts placed before us, there has been an actual and uninterrupted possession of the whole of the premises in question by the defendants, and those under whom they claim title, from the year 1789 to the present time. There is therefore no reason for considering the question as applying only to any part or parts of the island, and not to the whole, for the admission is of an actual and continued occupation since 1789 of the whole island. It is not stated whether such occupation was held with the knowledge or in any manner by the sanction of the Crown, or whether it was held adversely under a claim of right, or adversely by persons who acted in the first instance as trespassers, and not claiming title.

Under the statute 9 Geo. III., ch. 16, occupants do not from the mere lapse of time acquire a title, as they might under our statute 4 Wm. IV., ch. 1, by occupying lands owned by individuals for more than twenty years, without payment of rent or written acknwledgment of title. The effect of the statute 9 Geo. III. is simply that the Crown is barred; and that will only be the case where the possession appears to have been adverse, and by a party claiming title, and not entering as a mere trespasser.

Can it be said that this is shewn to have been the fact in regard to this island? The statement is, that Alexander McKee, the first occupant, who held possession in 1789, devised the island to his son Thomas McKee, whose heir inherited it, or claimed to do so, and conveyed it by deed to William McCormick in 1828. It is not stated whether the devise or the deed professed to give an estate in fee, but that I think may be fairly inferred; and it is expressly admitted that there has been no intermission in the occupation of the premises.

Supposing that the British statute 9 Geo. III., ch. 16, is in force here by reason of our adoption of the English law, as I think I may say it has always been assumed to be, though there seems to have arisen no case in which a court has been called upon to apply it, some proof, I think, should be given in any such case that the possession has been adverse to the Crown, and not permissive, and has not been a mere continued possession taken in the first instance by a mere intruder not asserting title. (See *Doe dem. William IV.* v *Roberts*, 13 M & W. 520.) I cannot say that I see in the case stated anything that would warrant us, standing in the place of a jury, in coming to that conclusion.

In the next place, I think that to enable us to apply the statute 9 Geo. III., ch 16, the case should be one in which the Crown might in the nature of things have had it in its power to set up in its favor one or other of the exceptions contained in the statute; namely, that within the sixty years His Majesty or his successors had, "by force or virtue of his right or title to the land, been answered the rents, issues, or profits of the land:" or that the land "had within that time been duly in charge of His Majesty, or some of his predecessors, or shall have have stood *insuper* of record within the space of sixty years." It is only, I think, in regard to lands of which that might be predicated that this statute can have been intended to apply.

Now if in 1789, or at any time more than sixty years ago, this had been part of the lands of the Crown from which rents and profits had been received for the Crown, or might in the ordinary course of things been received, amd yet it had been shewn that for sixty years no rents and profits had been in fact received, nor the land in any way put in charge to or for the Crown, the meaning of which is explained in some of the provisions of the act, then the Crown might fairly have been deemed to have abandoned its right in favour of the person who had been left so long unmolested in the possession, though even the nature and origin of that possession would require, I think, to be made to appear more distinctly than it does in the case before us.

But for all that appears this island had not for sixty years been part of the organized territory of the province, in which the title of the original Indian inhabitants had been extinguished, or if the Indian title had been extinguished, the land may never have been surveyed and laid out by the Crown with a view to granting it, but may have been suffered to lie like other waste lands from which the Crown had neither derived either rents or profits, and which can never be supposed to have been under the actual supervision and charge of its officers. As to all waste lands so situated I apprehend the entry of any stranger, and his continued possession for sixty years, would not, under the statute, bar the Crown, and certainly not unless it were shewn that the Crown knew of such occupation sixty years ago, and that it was taken adversly to the Crown, and with the intention of setting up a title against the Crown. That, in my opinion, would be the case in regard to any trespasser, or succession of trespassers, who might for sixty years past have been occupying lands in the remote parts of Upper Canada, north of our lakes; and it would make no difference if there had been a succession of trespassers who had pretended to convey the land from one to another; and if so, we cannot on any principle draw a distinction between lands so situated and lands similarly circumstanced lying nearer to the settled portions of the province.

This land, it is stated in the case, has never been assessed, from which it is reasonable to infer that it is not land which has yet been made liable to assessment. For anything that appears, this may have been regarded and treated by the Crown as Indian land, in which the right of the natives had not been extinguished, though it is by law a part of the township of Mersea as the case states and in that case, or even if it formed part of the waste lands of the Crown, to which no tribe of Indians could pretend any claim, but which had never been organized by the Crown, and surveyed and laid out with a view to its being occupied, I do not think the *Nullum Tempus* Act of 9 Geo. III. could be properly held to apply to it. We could draw no distinction founded upon the proximity to settlement or comparative remoteness, but, so far as the application of legal principles is concerned, must look as we should upon any other waste land of the Crown which had never by any particular act been reduced into possession of the Crown, as lands from which rents or profits might be derived. To hold otherwise would be inconsistent, I think, with the various statutes which have from time to time been passed for the protection of the waste lands of the Crown, and of what are called Indian lands, from trespassers, The Indians could not have adopted any legal proceedings for dispossessing trespassers, either as holding in a corporate capacity or otherwise; and it would seem unreasonable, on the other hand, that the time should be considered as running so as to bar either the Crown or the Indians, while the Crown could not be held to be acquiescing in any interruption of rents or profits, which it had never at any time been receiving, or in a position to receive.

I do not doubt, when I consider the position of this island on the southern frontier of Canada, that it must have been known to the government in fact that McKee and McCormick and his family had held the long possession which is admitted. If the govern-

ment acquiesced in it from a knowledge that the Indians had all along intended the land to be theirs, and for that or any other reason have forborne for sixty years to assert a claim, either on account of the Indians or for the Crown, that may be felt perhaps by the government to give a strong claim to the present occupants to be confirmed in their title, or at least to be left unmolested as they have hitherto been; but that is a consideration to be disposed of by the government, and it is evident, I think, from what is before us, that the defendants are not likely to be unjustly or harshly dealt with. As a court of justice we must be careful not to distort legal principles on account of their operation in particular cases, for what we hold to be law in the present case we should be bound to apply in others, unless there should be a difference in the facts such as should warrant a different decision.

My opinion is that the Crown, upon what is stated in this case, is entitled to a verdict.

BURNS, J.—The question to be decided in this case, is whether the 9 Geo. III., ch. 16, is to be applied to the unsurveyed public lands of this province or not, and I believe it is now for the first time brought up.

The act 14 Geo. III., ch., 82, passed five years after the *Nullum Tempus* Act, making more effectual provision for the government of the province of Quebec, expressly provides that in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same; but when the province of Quebec was separated into Upper and Lower Canada, the legislature of Upper Canada, on the 15th of October, 1792, enacted, in consequence of that provision being manifestly and avowedly for the accommodation of his Majesty's Canadian subjects, that in future, in all matters of controversy relative to property and civil rights, resort should be had to the laws of England, as the rule for the decision of the same.

It appears from the case submitted to us that the first occupation of the island in question by those under whom the defendant claims, took place in 1789, three years before the Canadian Legislature altered the rule of decision.

Looking at the two statutes of Upper Canada with respect to the public lands, 2 Vic., ch. 15, and 12 Vic., ch. 9, and others also, I do not think the legislature contemplated the act of 9 Geo. III., ch., 16, applicable in Upper Canada to lands for which there had been no grant, lease, ticket, either of location or purchase, or letter of license of occupation. In the provisions in these acts no time is contemplated when the Crown would be barred from taking the summary remedy provided in the two specially mentioned. We should not however be pressed with that consideration, if we saw clearly that in the case of the unsurveyed and ungranted lands of the Crown, the *Nullum Tempus* Act must be held to apply, for we should take the legislature was only making provision for cases in which the Crown had not lost title.

I have no doubt we must consider the act called *Nullum Tempus* Act, as part and parcel of the law of this province so far as affecting lands, the revenues, issues or profits of which the Crown has taken or received, or where the lands can be said to have been duly in charge at some period, so that the act would apply; but with regard to the public waste lands vested in the Crown, I take it they must be looked upon as at common law without being bound by that statute. When I consider the 36th and 37th sections of the Imperial act, 31 Geo. III. ch. 31, with respect to the allotment of lands of the Crown, for the support and maintenance of a protestant clergy, and also the 43rd, 44th, and 45th sections of the same act, with respect to the mode of granting lands, and by what title they should be held, I cannot do otherwise than conclude than that the Imperial Legislature supposed the lands of the Crown at that day in Canada were not subject to be considered in the same light with the lands of the Crown in England. Again, when the Union Act, 3 & 4 Vic., ch. 35, was passed, we find that all the territorial revenue at the disposal of the Crown was surrendered to the government of this province upon certain conditions. The act 7 Wm. IV., ch. 118, to provide for the disposal of the public lands, and the act 2 Vic., ch. 14, passed before the union, and the act since that time, the 4 & 5 Vic., ch. 100, 12 Vic., ch. 31, and 16 Vic., ch. 159, all shew, I think, the distinction between lands which may be supposed to be lands of the Crown proper, and public lands which belong to the government of the country, by which I mean the unsurveyed waste lands of the Crown, and which do not come within the meaning of lands duly in charge, or where rents, revenues, issues or profits may have been taken. In this case it is admitted this island has never been assessed, nor been returned as assessable, and it therefore cannot be considered otherwise than as lands from which neither rents, issues, revenues or profits have been derived. It is not stated in the case whether it has ever been in charge of the Crown or not, but if it ever had been that should be made to appear, and so long as that is not proved or admitted we must assume that it never has been. In order to bar the Crown from the common law right belonging to it the case should be brought within the statute.

I think the Crown is entitled to judgment upon this special case.

MCLEAN, J., concurred.

Judgment for the Crown.

COMMON PLEAS.

Reported by R. C. JONES, Esq., *Barrister-at-Law.*

EDWARD HARVEY POTTER v. JAMES CARROLL, SHERIFF OF THE COUNTY OF OXFORD.

Sheriff—False Return—Cognovit—Absconding Debtor—Executions—Attachments—Priority.

In an action against a Sheriff, in the first count of the declaration alleging a false return, and in the second neglect to levy, the Sheriff, among other pleas, pleaded that at the time of the delivery of the plaintiff's execution to him, the plaintiff's judgment had been satisfied, and that there was nothing due from the judgment debtor to the plaintiff thereon.

Held, though with much doubt, to be a good defence.

One P., without the issue of process, on 18th April, 1857, gave a confession of judgment to plaintiff. On 7th May, 1858, an execution was placed in the Sheriff's hands against the goods and chattels of P., at the suit of C. Under this execution, the Sheriff seized P's. goods and chattels. Shortly afterwards he absconded, and on the 7th and 10th August, 1858, attachments were placed in the Sheriff's hands against his goods and chattels, as being the property of an absconding debtor. On 16th August, 1858, plaintiff delivered to the Sheriff an execution issued on his cognovit, upon which judgment had been entered before P. absconded.

Held, that while C's. execution remained in the Sheriff's hands, it prevented the application of the attachments on the goods, and consequently suspended their operation, but that the moment plaintiff's execution was received by the Sheriff, it bound the goods in the Sheriff's possession, subject to the satisfaction of the prior execution of C., under which he held them.

(M. Term, 1860.)

The first count of the declaration was for a false return of *nulla bona* to a writ of *fi. fa.* issued by the plaintiff against the goods of one Pickle, though the defendant, as sheriff, had actually levied on goods to the amount endorsed on the writ.

The second count complained, that though there were goods of Pickle on which the defendant ought to have levied, yet he neglected to do so, and falsely returned *nulla bona* to the *fi. fa.*

The defendant pleaded; 1st, not guilty; 2nd, to the first count, that he did not levy; 3rd, to the second count, that there were not any goods of Pickle whereof he might have levied; 4th, to the declaration generally—leave and license; 5th, to the first count, that at the time of the delivery of the writ to the defendant, the judgment had been satisfied, and that there was nothing due by Pickle to the plaintiff thereon; 6th, to the second count, that at the time of the issuing of the writ and the delivery thereof to the defendant, the judgment had been satisfied, and that there was nothing due by Pickle to the plaintiff thereon.

The plaintiff took issue on all these pleas—and demurred to the fifth and sixth, the objections resolving themselves into this, that it is not competent for a sheriff to set up such a defence to an action for false return.

DRAPER, C. J. The only cases relied upon to support the pleas were *Imray* v. *Magnay*, 11 M. & W. 267, and *Christopherson* v. *Burton*, 3 Exch. 160. These cases show that the sheriff may set up as against an execution creditor, that his judgment and execution are fraudulent as against another creditor, whose execution is at the same time in the sheriff's hands, and that if he has had notice of the fraud he must do so, or he will render himself liable to the *bona fide* execution creditor should he return his writ *nulla bona*, and satisfy the fraudulent execution.

In *Remmett* v. *Lawrence*, 15 Q. B. 1004, some doubt is thrown upon the case of *Imray* v. *Magnay*, but the Court of Exchequer, in *Shattock* v. *Carden*, 6 Ex. 725, recognize and act upon the same

principle. These cases are not applicable to the present question and do not give any color to the present defence.

The question in them was one of fraud on the part of one execution creditor and the execution debtor, to delay, hinder, and defeat another *bona fide* creditor, contrary to the statutes of Elizabeth. Here it is simply a question, whether the sheriff shall, in excuse of a breach of his duty to execute a writ, be allowed to raise the question, whether as between the plaintiff and defendant in the original action anything remains due.

I can find no case in which this question is directly raised, but we have been referred to the case of *Wylie* v. *Birch*, 4 Q. B. 556, as establishing, that in an action for a false return to a *fi. fa.* pleas which, admitting the defendant's breach of duty, shew that the plaintiff has sustained no damage by the action, are good answers to the action. If that be a general principle, applicable to all similar cases where the pleas shew that there was no damage, then I do not see how this case can be distinguished, for, at the time of the delivery of the writ to the sheriff, the judgment was satisfied, and nothing was due to the plaintiff by the execution debtor. It is difficult to see what damage the alleged false return would cause.

The issues, in fact, were tried at the last assizes at Brantford, before Burns, J. The plaintiff put in an exemplification of a judgment against Charles Pickle, entered 18th April, 1857, for £4008 14s. 9d., upon a cognovit given without the previous issue of process. A copy of a writ of *fi. fa.* (admitted) issued by the plaintiff thereon on the 16th August, 1858, against the goods and chattels of Pickle, directed to the defendant, received by the defendant on the day it was issued, endorsed to levy £2750 with interest from date, £8 14s. 9d. costs, 15s. for this and concurrent writ and sheriff's fees (note—the costs appear by the roll to have been taxed at £8 14s. 9d. ;) and endorsed is a return of levy of goods to the value of £25 remaining on hand for want of buyers, and no goods *ultra*.

Then a paper was put in by consent, coming from defendant's office, bearing date on 8th Oct., 1859, which shewed that on the 7th May, 1858, the defendant received an execution against the goods of Pickle, in favour of one Carden for £606 8s. 3d,. which, before the 9th of Sept., 1858, defendant had returned goods to the value of £100 on hand, whereupon, as appeared later in the case, Carden issued a *ven. ex* and *fi. fa.* for the residue received by defendant, 10th Sept., 1858, and returned *fieri.*; and up to the 4th August, 1858, three other executions, amounting together to £116, under which writs actual possession of Pickle's goods was taken by the defendant on the 6th August, 1858. After such possession taken the defendant received two writs of attachment against the estate of Pickle, as an absconding debtor, one on the 7th August, 1858, at the suit of the Commercial Bank for £125, the other on the 10th August, 1858, at the suit of one Moore for £888 14s. 4d., and next on 16th August, 1858, he received the plaintiff's execution; afterwards, and between that day and the 7th of February, 1859, he received nineteen writs of attachment for various sums, amounting in the whole to £5896 4s. 8d.

By the sale of Pickle's goods the sheriff realized in gross £2246 18s. 2d. The expenses of insurance, &c., £215 16s. 2d.. The amount of the executions prior to the plaintiff's was stated on the learned judges notes to have been £699, leaving a balance of £1331 17s., which the plaintiff claimed as applicable on his writ.

The defendant gave evidence for the purpose of shewing that plaintiff's judgment was satisfied; which the plaintiff met by strong rebutting evidence. It is necessary to refer to it, as the jury found for the plaintiff on the fifth and sixth issues. There was also evidence to shew that Pickle was considered in insolvent circumstances in the spring of 1858. There was nothing to give rise to a suspicion that the plaintiff was not a *bona fide* creditor of Pickle's. The learned judge, by consent of the parties, directed a general verdict for plaintiff, and £1331 17s. damages, with leave for the defendant to move to enter a verdict for him on the 1st, 2nd and 3rd issues, if the court should be of opinion that the writs of attachment were entitled, under the circumstances, to priority.

In Michaelmas Term *Beard* obtained a rule *nisi* accordingly, referring to *Daniel* v. *Fitzall*, 17 U. C. Q. B. 369. *Gamble* v. *Jarvis*, U. S. O. S. 272.

Wood shewed cause referring to the C. L. P. Act, s. 55; Consol. Stat. ch. 25, s. 21, 22: *Bank B. N. A.* v. *Jarvis*, 1 U.C. Q. B. 182; *Caird* v. *Fitzall*, 2 U. C. Prac. R. 262.

Beard, in support of the rule, referred to the C. L. P. Act, 1856, s. 49 Consol. Stat. c. 25, s. 14.

Draper, C. J. — There are some features in this case which distinguish it from any which as yet, so far as I am aware, has been decided in respect to the conflicting rights of creditors who have got judgment or judgment and execution against an absconding debtor, before his absconding; and creditors who have commenced suits against such debtor by writ of attachment.

1. The plaintiff's judgment, which was on *cognovit*, signed without any process having been first issued, was entered up long before Pickle absconded, and while he was apparently in good credit.

2. When the first of the attacking creditors put his writ into the defendant's hands against the property, credit, and effects of Pickle, his goods had been seized, and were in the sheriff's hands upon several writs of *fi. fa.*

3. The plaintiff's *fi. fa.* was received by the defendant while Pickle's goods were thus in his hands; and, so far as appears, before any proceedings were taken, if, indeed, any could be taken under the two writs of attachment which defendant received, before he received the plaintiff's *fi. fa.*

The sections of the statutes which it appears necessary to consider, are the following, which I cite from the Consolidated statutes: chap 25, s. 14—all the property, credit, and effects, including all rights and shares in any association or corporation, of an absconding debtor may be attached in the same manner as they might be seized in execution; and the sheriff to whom any writ of attachment is directed, shall forthwith take into his charge or keeping all such property and effects, according to the exigency of the writ, and shall be allowed all necessary disbursments for keeping the same; and he shall immediately call to his assistance two substantial freeholders of his county, and with their aid he shall make a just and true inventory of all the personal property, credits, and effects, evidence of title or debt, books of account, vouchers, and papers that he has attached; and shall return such inventory signed by himself and the freeholders, together with the writ of attachment. 19 Vic., c. 43 s. 69.

Sec. 19.—The sheriff having made an inventory and appraisement on the first writ of attachment against any absconding debtor, shall not be required to make a new inventory and appraisement on a subsequent writ of attachment coming into his hands; 19 Vic., c. 43, s. 54.

Sec. 21.—Any person who has commenced a suit in any Court of Record of Upper Canada —the process wherein was served or executed before the serving out of a writ of attachment against the same defendant as an absconding debtor—may, nothwithstanding the suing out of the writ of attachment, proceed to judgment and execution in his suit in the usual manner; and if he obtains execution before the plaintiff in any such writ of attachment, he shall have the full advantage of his priority of execution, in the same manner as if the property and effects of such absconding debtor still remained in his own hands and possession; but if the court or a judge so orders, subject to the prior satisfaction of all costs of suing out and executing the attachment; 19 Vic, c. 43 s. 55.

Sec. 22.—In case it appears to the court in which such prior action has been brought, or to a judge thereof, that such judgment is fraudulent, or that such action has been brought in collusion with the absconding debtor, or for the fraudulent purpose of defeating the just claims of his other creditors, such court or judge may, on the application of the plaintiff on any writ of attachment, set aside judgment and any execution issued thereon, or stay proceedings thereon; 19 Vic. c. 43, s. 55.

Sec. 25 enacts that if the real and personal property, credits and effects of any absconding debtor, attached &c. prove insufficient to satisfy the executions obtained in the suit, the debtors of the absconding debtors may be sued to recover such debts; 19 Vic. c. 43. s. 53.

Sec. 29.—When several persons sue out writs of attachment against an absconding debtor, the proceeds of the property and

effects attached and in the sheriff's hands shall be ratably distributed among such of the plaintiffs in such writ, as obtain judgments and sue out execution upon the same in proportion to the amount actually due upon such judgments; and the court or a judge may delay the distribution, in order to give reasonable time for the obtaining of judgment against such absconding debtor; 19 Vic. c. 43, s. 57.

Ch. 22, s. 236—Final judgment upon a *cognovit actionem*, or warrant of attorney to confess judgment, given or executed before the suing out of any process, may, at the option of the plaintiff, be entered in any office of the Superior Courts; 19 Vic., c. 43, s. 10.

The legislature has not in terms provided for this case. By sec. 21, when the suit is commenced before the debtor absconds, it may be carried on to judgment and execution, and the execution may be satisfied by levying on goods seized under the writs of attachment, if it comes to the sheriff's hands before any execution from any attaching creditor. That section as well as others, and some of the cases, treated goods seized under writs of attachment, as in *custodia legis*.

In *Gamble* v. *Jarvis*, Robinson, C. J., expresses that opinion, and in that event the goods attached could not be taken in execution, unless for the exception introduced in favour of a creditor commencing his suit by process served out, and perhaps also served out before the debtor absconded. It is, however, unnecessary to decide, whether if the facts were simply that the sheriff had first received the two attachments in favour of the Commercial Bank, or of Moore, and had seized under them, and then the plaintiff's execution had come to his hands, the execution ought to be satisfied out of the goods seized on the attachment. My impression is that it ought not; that we could not so extend the construction of the 21st sec.; and that if not, the goods, being in *custodia legis*, could not be taken in execution.

At the same time, I think that the mere receipt of a writ of attachment by the sheriff does not bind the absconding debtor's goods. Treating such writ as primarily, at all events (no more than process to enforce appearance) it cannot, in my opinion, be held to operate as a lien upon the defendant's goods, any more than a writ of distringas to enforce appearance could from the time of its receipt. This point was well discussed by my lamented and very learned predecessor, in *Kingsmill* v. *Warrener*, in appeal, 13 Q B. U. C. 51.

In the present case, the two writs of attachment in question could neither bind the goods by their delivery to the sheriff, nor could he attach the goods by them at any time before their sale, because at the time of the receipt, and until the sale, these goods were bound by the executions previously in his hands, and they continued so bound until the plaintiff's *fi. fa.* was delivered to him. Then, according to the decision of *Jones* v. *Atherton*, 7 Taunt., 56, putting, for the moment, the writs of attachment out of the question, the goods were bound by the plaintiff's *fi. fa.* being already in the sheriff's possession under the former writs, subject to these writs, from the date of the delivery of the plaintiff's writ to the sheriff.

Then the only question is, whether the fact that before the receipt of the plaintiff's execution, the two writs of attachment were placed in the sheriff's hands, makes any difference.

Upon the best consideration I can give the question, I think it does not. While the first execution remained in force, they prevented the application of the attachments on the goods, and consequently suspended their operation. But such was not the case in reference to the plaintiff's *fi. fa.*, which might, and, as I think, did operate the moment it was received, to bind the goods in the sheriff's possession, subject to the satisfaction of the executions under which he held them.

On this ground, therefore, I think the defendant should have judgment, though I express this opinion with much doubt of its soundness.

RICHARDS, J., dissentiente.

HAGARTY, J., concurred.

CHAMBERS.

THE QUEEN ON THE RELATION OF JOHN BLAND v. JOSEPH FIGG.

Municipal Election—Disqualification—Contractor—Proceedings.

A dispute arose between a township treasurer and the council of the township as to the duty of the treasurer, who was paid by salary in lieu of perquisites of office, to fund certain per centages for seven years, during which he held office. He paid the per centages for two years under protest, and refusing to pay more was dismissed, and afterwards became a candidate for the office of councillor, to which office he was elected, and subsequently became Reeve Having, while in office, given a bond to the corporation, as treasurer of the township, conditional for the due performance of the duties of his office.

It was Held, 1.: That the dispute was a matter of contract in the legal sense of the term, viz., the remuneration for services performed, the retention by one party of money claimed by the other, the due performance of the office of treasurer by the defendant, &c.—2.: That although the defendant did not hold the office of treasurer at the time of the election, there then being a dispute in good faith between him and the council of the township, arising out of matters connected with his administration of the duties of that office, he was disqualified as a person having an interest in a contract with the corporation.

Where the affidavit of the relator, though not intitled in any Court, followed and referred to the statement of the relator, which was properly intitled, held sufficient, an objection that the recognizance was not intitled in any Court, was disallowed upon similar grounds. *And semble*, such mere formal objections cannot be urged by defendant after appearance. His proper course in order to raise them would be to move.

The defendant, Figg, had been since May, 1852, to October, 1859, treasurer of the of township Toronto Gore. The office is held during pleasure, and no by-law or formal annual re-appointment was made.

On May 24, 1852, a resolution of the council was passed, giving defendant £12 10s. as his salary as clerk and treasurer, and all perquisites arising from said office to be funded for the benefit of the township.

In February, 1854, a resolution was passed, directing an addition of £5 to be made to defendant's salary. In November, 1854 a further addition of £2 10s. was granted in addition to al others, amounting in the whole to £20 for the then year.

In February, 1856, it was resolved that £5 be granted to him in addition to the salary he already received, making in total, £25 for the year 1856.

By the statutes in force to the end of 1858, the township treasurer was entitled to take to his own use 2½ per cent. on all county rates received and paid over by him. (13 & 14 Vic. ch. 64, schedule A. No. 32.)

The defendant retained this per centage in addition to his salary, and no difficulty occurred till May, 1859.

Contradictory affidavits were filed on the one side, insisting that it was well understood that the salary was in lieu of the per centage, which, as a perquisite of office, was to be accounted for to the township, and on defendant's part that it was understood differently.

In June last, as appeared in affidavit of one Brougham, filed by defendant, the accounts were directed by the council to be examined with respect to these per centages, and they were found to amount to £86, from and including 1852 to the end of 1858, but he says that for the years 1852 and 1853 the per centages amounted to £9 4s. 2d., which sum was paid by defendant last December under protest, leaving £27 odd of per centage, if such are claimable.

The defendant in his own affidavit stated that he paid the per centage of 1852 and 1853 under protest, and in the margin of the copy of resolutions, annexed to his affidavit, are these words: "The amount of the per centage for 1852 and 1853 have been returned by me to the township treasurer under protest, reserving to myself the right of recovering the same, subject to the decision of a competent court of law."

He swore that he duly paid over all monies received, except the per centage on county rates, from 1854 to December 1858, and that he considered he had a right to retain these latter at all events, as a fresh contract was created between the council and himself with respect to his salary, as appeared by the resolutions of that year, annexed to his affidavit.

From the affidavit of Brougham it appeared that the latter person and one Taylor, investigated the accounts, and reported in November last, (after defendant's dismissal) that defendant owed £50 8s. 6d., which sum included the per centage of 1852 and

1853, and this report Brougham swore was in December presented to the council, finally audited and adopted.

A receipt was produced and signed by Slightholme, the treasurer succeeding the defendant, dated December 2nd, 1859, acknowledging the receipt of this sum from defendant, "being the full amount of the balance in his hands due to the township of Gore of Toronto, and paid over by him."

After giving this receipt, the council paid to defendant £15, as the portion of his salary due to him for 1859 up to the date of his dismissal.

On defendant's part it was also said that the council were quite satisfied, as if a final settlement had been made and agreed to give up defendant's bond, which he had given as treasurer.

On the relator's part it was proved that a dispute began in May last, between defendant and the council. That defendant persisted in refusing to refund the per centages, and at length, in consequence thereof, was dismissed in October last, and Slightholme appointed.

The latter swore that the receipt given by him was drawn up by defendant, that he was then well aware of the existing dispute as to the per centages, that in giving the receipt he had no intention to cover the disputed monies but only the amount actually paid, nor was he authorized so to do, that he was Reeve in 1852, when defendant's salary was fixed, and it was expressly understood to be in lieu of all perquisites and per centages. This was strongly denied on the other side.

The township clerk (Hengill) in his affidavit, set forth the audit and report of Brougham and Taylor made to the council, Nov. 25th, 1859, shewing the balance of £50 8s. 6d, and certifying that this was *exclusive of the disputed per centages of former years*, and, also, that the treasurer charged himself with the per centage of 1852 and 1853 under protest, and reserving his legal rights.

A resolution of the council was also annexed to his affidavit of 30th Dec., 1859, directing legal proceedings to be taken against defendant, and his sureties to recover all monies or per centages, withheld by him, due to the municipality, and that a further item of ten shillings is, according to the township books, claimed by defendant as a per centage on money paid over in 1859 to the Receiver General.

It was objected to the resolution of 30th December, 1859, that it was illegal because the council met in a different tavern from the tavern in which the next preceding meeting was held, and as no by-law or resolution to that effect was passed, that the proceedings were void.

Contradictory affidavits were filed as to the willingness or unwillingness of the late council to consider the defendant's responsibility to them at an end.

Harrison, for the relator, contended, 1. That the defendant, by virtue of the resolution of 1852, under which he accepted office, was bound to fund the disputed per centages for the benefit of the township. 2. That the resolutions for 1854 and subsequent years made no alteration as regards his obligation to do so, but only as regards the amount of salary to be paid him yearly in lieu of perquisites of office. 3. That whether the defendant is or is not bound to fund the per centages, there being in truth, at the time of his election, a *bona fide* dispute existing between him and the corporation as to the per centages he was disqualified. 4. That the corporation having his bond, and alleging that there was a breach of it, he came within the principles of the law which disqualifies persons having an interest in a contract with the corporation. 5. That the council having as late as December authorized legal proceedings to be taken against him on his bond, the continued existence of the dispute was manifest. 6. That it was immaterial where the council met where that resolution was passed, as the statute is only directary and not imperative. Mr. Harrison cited *Askin* v. *The London District Council*, 1, U. C., Q. B. 292.

McMichael and Blevins, for defendant, objected that the affidavit of the relator, verifying the statement not being intitled in any Court, could not be read. The same objection was made to the recognizance and to other affidavits filed on behalf of the relator. On the merits it was contended for defendant, 1: That he was not at any time liable to refund the per centages. 2: That if at any time liable to do so, the council had subsequently caused his accounts to be examined, and a balance found against him, which he paid and for which he held a receipt in full. 3: That he was not in debt to the municipality, and could at any moment bring an action for his bond, which they wrongfully withheld. 4: That the fact of their withholding his bond, when there was nothing due by him, did not make hin a contractor or otherwise disqualify him. 5: That the resolution passed in December was illegal as it was not passed by the council convened at the last place where the council met, and at the time of the last adjournment there was no resolution to meet at a different place. *Pringle* v. *McDonald*, 10 U. C., Q. B. 254, was cited for defendant.

Harrison, in reply, submitted as to the technical objections. 1: That defendant after appearance was too late to raise them. 2: That if not too late they were not such as would have any effect, because the affidavit of the relator, verifying the statement, immediately followed the statement, which was intitled in the Court, and in fact part of it, and as to the recognizance, that it having been allowed by the judge who issued the fiat for the writ, no objection as to form could afterwards be raised against it.

HAGARTY, J.—After the appearance of the defendant to a *quo warranto* summons to try the validity of his election as a township councillor for the Toronto Gore, it is objected that the affidavit of the relator, at foot of his statement, is not headed in any Court.

The statement is headed in the Queen's Bench, and the affidavit immediately follows it and refers to it. No form is given in the Rules of Court, and I do not consider that objection fatal, nor that any difficulty would be experienced on that account in supporting an indictment for perjury, which must necessarily set out and rely on the statement, of which the affidavit may be said to be a part (see remarks of the Court in *Doe Park et al.* v. *Henderson*, 7 U. C. Q. B. 188).

A similar objection is taken to the affidavit of caption of the recognizance, which I dispose of by the remarks already made.

A like objection is urged to a long affidavit of Bland, the relator, which I may dispose of by remarking that this case does not require it, and it may be dispensed with.

The form of the *fiat* of Draper, C. J., is also objected to, but, I think, without foundation.

I have great doubts whether such mere formal objections can be urged after appearance. The better course would seem to be to move to set aside the writ for irregularity. The remarks of C. J. Draper, in *Reg. ex rel. Sutton* v. *Jackson*, 2 U. C. Chamber Report, 26, encourage this view. Substantial defects, such as want of interest in the relator, &c., stand on a wholly different footing. The rule of court 16, as to irregularities and defects, is also worthy of note.

I do not feel it necessary to pursue the enquiry into the disputed facts of this case. All that is necessary to enable me to form my opinion may be gathered from the affidavits of the defendant and Brougham.

I do not feel called upon to pronounce any positive opinion as to the liability of defendant to refund the disputed per centages to the council, nor of the latter to return the amount for 1852 and 1853, paid by defendant under protest. I understand that the municipal law, as now settled, provides no appeal from any decision in this election.

If it were necessary for me to decide on the rights of the parties, a very unsatisfactory result might be arrived at. I might determine that no claim existed against either party at the suit of the other. A court of law might take an opposite view. The law does not, I think, tend towards such a result.

If I feel called on to declare that the defendant comes within the clause in the act disqualifying any person from being a member who has a contract with the council. I do not consider myself as pronouncing judgment in favor of either of the disputants. I am to see that there is a claim in good faith subsisting, a matter of "contract" really to be settled between the parties. If it appeared to be a matter too clear for doubt, or that it was raised in bad faith, I, of course, would not hesitate to adjudge it.

I assume the legislature designed to prevent a person taking his seat in a deliberative body, whose first act might be to decide

whether that body should or should not proceed to enforce a claim considered to exist against that person, or whether it should refund or pay to that person a sum of money which he has paid just before his election under protest, and reserving his legal rights to recover it back.

The facts here are very simple: At the last meeting of the old council (it matters little, I think, in which of the two taverns it was pleased to assemble) it was resolved to take legal measures to recover back all the unpaid per centages from the defendant, who had been their treasurer for years, until dismissed three months before the election on disputes connected with this and other matters. The defendant, in the same month of December last, had paid a part of these per centages to the council, stating that he did so under protest, and (in his own words) "reserving to myself the right of recovering the same, subject to a competent Court of Law."

And further, to shew the state of this matter, he swears, in answer to an affidavit charging him with admitting liability and promising to pay, "the only effect of such conversation, and that "intended by it, was, that if by law and by a resolution of the "said council I was obliged to pay over the said per centage, I should not deny that I ever admitted any legal obligation in me to pay over, &c. &c. &c."

As a member of the new council he will be called upon, as one of the five, to decide whether an action is to be prosecuted against himself on the one hand, and whether the council shall or shall not refund to him the sum paid under protest on the other.

I do not pay much attention to the charge on one side or denial on the other, that defendant's motive, in becoming a member of the council, was to influence the decision of this very matter in his favor.

The defendant puts himself in this dilemma. He insists that the council have no claim whatever upon him as to these per centages, but he pays a portion of them under protest, insisting on his right to recover back.

The term used by the legislature: "having an interest in any contract by or on behalf of the corporation," is, although peculiar, wide enough, in my judgment, in the letter, and certainly in the spirit, to embrace such a case as the present. Under his bond as treasurer, or as treasurer without bond, he, of course, was a contractor with the council, and although he no longer holds the office, these disputes arise from matters connected with his administration of that office.

The whole dispute here is on a matter of contract, in the legal sense of the term—the remuneration for services, the retention by one party of money claimed by the other, the due performance of the office of treasurer by the defendant, &c., &c. It may be that the respective claims are quite apart from the bond given by the defendant.

I repeat that I do not form my conclusion from any strong view of the ultimate legal issue of this dispute. It is sufficint for me to see that there is a real money dispute in a matter of contract in which the parties appear to be at issue. I do not see how the defendant can legally sit in a council of five to determine how this dispute is to be decided. It may cease to be a dispute at any time by the joint action of the parties, but at the date of the election, as far as I can judge, it had a real existence.

The amount in dispute is not large, but the principle involved is one of high importance to the honest administration of our Municipal system, which has been justly termed the school in which our fellow subjects in all parts of the world are trained to the due understanding, practice, and appreciation, of the Representative Institutions of a broader range, and of a permanent authority.

I am of opinion that a writ should issue declaring that the defendant was disqualified, that there be a new election for the office, and that defendant do pay the relator's costs, as I do not think, under the circumstances, that he ought to have been a candidate.

No case is, I think, made out for seating the relator.

Order for a writ for a New Election with costs.

MONTHLY REPERTORY.

CHANCERY.

V. C. S. TOWNSEND V. TOWNSEND. *May* 10.

Employment of trust monies in trade—Liability of trustees under a will—Entries in accounts—Articles of partnership—Account—Compound interest.

A representation which admits of being made good by the maker of it will be binding upon him. Therefore, an entry in an account by trustees under a will crediting a legatee with the amount of her legacy is binding on them when it is made knowingly, and there is nothing to show that it is done in error. If trustees under a will use for the purpose of their own trade, trusts moneys which according to the will ought to have been otherwise invested, in a decree against them directing an account, compound interest will be charged.

In a case where, according to the deed of partnership, a date had been fixed for payment of the share of a deceased partner, an account was directed against the surviving partners, who were also executors and trustees of the deceased partner and had improperly retained in the partnership the share of the deceased partner, and accounts in accordance with the deed of partnership were directed up to the date fixed by the partnership deed.

V. C. K. FALCKE V. GRAY ET AL. *May* 2.

Specific performance—Chattels—Inadequacy—Auction—Jurisdiction.

A Court of Equity will decree specific performance of a contract to purchase a chattel which is of a peculiar and unique kind.

Where a purchaser of a chattel which is of a unique kind, with the worth of which he is well acquainted, stands by and permits it to be set down at one fifth of its real value, knowing the ignorance of the vendor and valuer, and after contract signed by the vendor, files a bill for specific performance of such contract, the Court will not decree specific performance.

Although in the case of a contract to purchase a peculiar chattel this Court will under peculiar circumstances, of fraudulent advantage taken by the purchaser, refuse specific performance, it will not set aside the contract on a bill filed with that object by the vendor.

Where a party sells by auction the Court will not relieve on the ground of inadequacy of price.

V. C. K.

IN RE THE H. C. AND G. LIFE ASSURANCE COMPANY, EX PARTE DR. WOOLASTON.

Misrepresentation—Forfeiture.

Misrepresentations made by a director or secretary of a joint stock company, with reference to expected profits or the appointment to a particular office whereby a party is induced to take shares are not representations of the company.

Where by the deed of settlement of a joint stock company it is provided that upon non-payment of calls on a certain notice and after a certain time, the directors may declare shares forfeited, such shares are not forfeited by mere non-compliance with the notice, but there must be a declaration of the directors to that effect.

V. C. K. ROGERS V. ROGERS. *June* 8.

Special case—Construction—Contingency.

A testator gives all his real and personal estate and effects to his three daughters, H, J and S., share and share alike, and in case either of them dying, to be equally divided between the children of the deceased, if any; but in case there shall be no children to claim their mother's share, then that share to be divided equally between his two surviving daughters, their executors, administrators and assigns, absolutely for ever.

Held, that the daughters took a fee simple as tenants in common.

M. R. JACQUET v. JACQUET. *June* 15.

Will—Trust for payment of debts—Practice—Adjourned summons.

Testator directed that his executors should dispose of C estate, and that their receipts should be a discharge to the purchaser, the monies arising from the sale thereof, to be applied to the liquidation of his debts and the overplus to fall into his residue.

Held, that a trust for payment of debts was thereby created.

M. R. *June* 7.

BROMLEY v. SMITH, SMITH v. BROMLEY, BOUSTED v. BROMLEY.

Expectant heir—Setting aside transactions—Costs.

The rule that the burden of proving the fairness of a dealing with an expectant heir lies on the person so dealing, held applicable to a case where the dealing was not a sale, but a charge, where the heir was of mature age, and fully understood the nature of the transaction, and had himself been guilty of misrepresentations in the matter, which, however, did not appear to have been relied on. Limits of the rule that a bill charging fraud which is not proved, must be dismissed with costs, discussed.

Decree made in favor of the heir, without costs, and so much of the bill as charged conspiracy dismissed with costs.

V. C. W. CAMPBELL v. BEAUFOY. *May* 30.

Domicil—Will—Executor—Plea.

To a bill by a legatee against the executor who has proved the will in England it is a valid plea that the testator was domiciled in a foreign country, and that by the laws of that country the dispositions contained in the will are void; the grant of probate being conclusive as to the validity of the instrument, *qua* will, but not as to the validity of its contents.

V. C. W. DUIGNAN v. WALKER. *June*, 16.

Agreement—Carrying on business within certain distance—Mode of measuring

Under an agreement not to carry on business within seven miles of a certain place, the distance must be measured in a straight line upon a horizontal plane, and not by the nearest practicable mode of access.

V. C. W SCOTT v. MILLER. *May*, 30.

Witness,—Privilege.

A defendant claiming to be privileged from giving the discovery required by the answer, must swear positively to his belief that his answer would or might tend to subject him to penalties.

Upon exceptions to answer the Court had held, that the defendant (a solicitor) could not protect himself from answering in respect of an agreement sought to be enforced by the bill, on the ground that he would be thereby subjecting himself to penalities under 6 and 7 Vic., c. 73, the agreement as stated in the bill being perfectly innocent.

In his further answer, the defendant "submitted" that he was not bound to give the discovery sought, because it "would or might show or tend to show," that, under 6 & 7 Vic., c. 73, he was liable to be struck off the roll.

Held, that this further answer was insufficient, the defendant not having pledged his belief that his answer in respect of the agreement, which had been held to be innocent, would criminate him.

COMMON LAW.

Q. B. POOLE v. KNOTT. *May* 31.

Public company—Liability of executor of deceased shareholder.

Where the Act of Parliament which constituted a public company, provided that the shareholders should continue liable for the debts of the company, as they would have been if the Company had not been incorporated; and that, if execution could not be obtained against the property and effects of the Company, there execution might be issued against the person, property and effects of any shareholder, or any former shareholder who was such at the time of the obligation being incurred or being still in existence.

Held, that this did not admit of execution being issued against the executor of a shareholder who had died before the judgment and had been recovered against the company, but who was a shareholder when the obligation was created, and continued to be so, up to the time of his death.

Q. B. MILLER v. MYNN AND OTHERS. *June* 2.

Common Law Procedure Act 1854, *sec.* 61—*Attachment of debts.*

If a judgment be recovered against three, the debts owing and accruing to two of the judgment debtors, out of the three may be attached to answer the judgment debt; the proceeding under sec. 61 of 17 & 18 vic. c. 125, being analogous to execution by *fieri facias*.

EX. C. ROBERTS v. BRETT. *May*, 16.

Covenant—Condition precedent—Assignment of breaches—Construction.

Plaintiff covenanted among other things "forthwith" to procure a vessel and stow a cable on board at a certain wharf, and to have her ready for sea before the 15th July, and defendant covenanted to provide the cable, and to pay plaintiff £5,000 by instalments of £1,000 seven days after the arrival of the vessel at the wharf, and the other instalments at other times with other covenants, and it was mutually agreed that each party should within ten days of the execution of the agreement, give and execute to the other a bond with two sureties in the sum of £5,000 for the due performance of the covenants on his part.

In an action on this agreement the breach assigned being the non-providing of the cable by the defendant, &c.

Held, affirming the judgment of the Common Pleas that the giving of the bond was a condition precedent to plaintiff's right to sue upon the contract.

A breach was thus expressed, after stating that plaintiff was ready and willing to stow the cable above mentioned, but before the time arrived for so doing according to the terms of the said contract the defendant refused to perform the said contract, on his part and dispensed with the said vessel being brought alongside the said wharf. The plaintiff then averred general performance of all conditions precedent, after which he said "yet the defendant did not nor would stow," &c.

Held, that in a declaration so worded the real breach followed the word "yet," and that the words preceding did not set up as a breach, the dispensation by the defendant of plaintiff's performance of condition precedent, but was only intended as inductive to the real breach following the word "yet."

EX. HICKIE v. RODAGONADIE. *May* 11.

Ship—Total loss—Benefit of freight earned by forwarding cargo in other ship.

The under writers of a policy on a ship for a certain voyage are not entitled to any deduction in respect of freight earned by forwarding the cargo in another ship after a total loss of the ship insured, in course of the voyage.

EX. BETTS v. BURCH. *May* 11.

Damages—Penalty or liquidated damages—Sum stipulated to be paid on breach of agreement—Agreement to purchase furniture at a valuation.

By an agreement for the purchase of furniture and stock in trade according to a valuation, it was provided that the goods should be valued and possession given on or before the 13th October 1858, and in the event of either of the parties not complying with every particular set forth in the agreement he should forfeit and pay the sum of £50 and all expenses attending the same.

Held, that the £50 was in the nature of a penalty and was not recoverable as liquidated damages upon breach of the agreement

M. R. REMNANT v. HOOD. *June* 28.

Settlement—Construction—Vesting.

By a settlement a sum of £2,000 was charged pursuant to a power in a will on real estate, for the portions of younger children —to be raised and levied within three calendar months after the decease of the settlor (the tenant for life under the settlement) and to be paid, and payable in manner following, viz:—If only one younger child, for the portion of that one; and of two or more to be divided equally.

Held, that a younger child who attained twenty-one, and died in her father's lifetime, was entitled to a share.

REVIEW.

ESSAI SUR LES LETTRES DE CHANGE ET LES BILLETS PROMISSOIRES. Par Désiré Girourd. Montreal: Imprimé et publié par John Lovell, Rue St. Nicolas, 1860.

This treatise on the Law of Bills of Exchange and Promissory Notes evinces much industry, and is both well arranged and well written. It reviews the law of France, England and the United States, on the very important subject upon which it treats, and carefully points out the difference between the law of Lower Canada and of these countries. Reference is also made to many decisions of the courts both in Upper and Lower Canada, and to our Statute Law as to Bills and Notes. The work is creditable both to editor and to publisher, and if translated might receive some patronage from the profession in Upper Canada.

BLACKWOOD. American Edition. Leonard, Scott & Co., New York.

We have to acknowledge the receipt from the publishers of the January number. In it there is the commencement of a remarkable poem headed St. Stephens. In this poem it is intended to give succinct sketches of our principal Parliamentary orators, commencing with the origin of Parliamentary oratory (in the civil wars), and closing with the late Sir Robert Peel. An article in the same number, intitled The Public Service, shews how much of late has been said and how little done with regard to administrative reform. The number is as usual not only a readable but interesting one.

THE ECLECTIC MAGAZINE. New York: W. H. Bidwell, No. 5 Beekman Street.

The letter-press of the February number is rich and instructive. There are selections in it from no less than twelve leading periodicals. The number opens with two beautiful portraits,—that of Queen Victoria and the great Duke, now gathered to his fathers. We can, with regard to the *Eclectic*, endorse the statement of its proprietor, that "It is not partisan, not political, not sectional, but a large gathering of cream and honey from all the fields and flowers of the English periodicals."

THE WESTMINSTER. American Edition. New York: Leonard, Scott & Co.

The number for the quarter ending January last, just received, contains some very able articles, of which that on "Government Contracts" is one, appears in this number. Favouritism, jobbery, red-tapeism, negligence, corruption, and all the incidents of a government contract, are held up to public abhorrence, but only to be followed by the first person who has the good luck in a worldly point of view to become a pet government contractor. The article on Christian Revivals abound with many facts of interest, and so does that on the Realities of Paris. An article on social organism is very learned and instructive. The number is a good one.

THE LAW OF FAIRS AND MARKETS. By Frederic Stewart MacGachen, Esq., of the Inner Temple, Barrister at Law. London: James Cornish, 297 High Holborn. Price, One Shilling sterling.

Within sixteen pages we have here condensed the law as to fairs and markets. The author as divided his work into three parts:—

1. The Rights and Duties of owners at Fairs.
2. The Tolls to be taken.
3. The General Regulations as to Fairs, &c., including the law of market overt, and of the restitution of stolen goods.

The book is the only one on the subject of which it treats, and is written in the form of a dialogue, condensed in plain and popular language.

Not less than 150 cases, early and modern, are noticed in this unique and useful publication. It is evidently a model law book, as cheap as it is useful.

THE LAW MAGAZINE AND LAW REVIEW. London: Butterworths, 7 Fleet Street.

The number of this welcome quarterly for February is received. It opens with a well written article on the Temple Church, an edifice which the writer hereof had the good fortune to visit. Though quite aware of its antiquity, and fully alive to its beauty, we were ignorant till now that in the course of a few years not less than £80,000 sterling were spent in its repairs. The Church is small but really a gem. No lawyer thinks of visiting London without seeing the Temple Church, hearing its famous choral service, and seeing the "lions" who frequent it. On the Sunday that we attended divine service there we sat face to face to that veteran law reformer and world renowned statesman, Lord Brougham, and felt amazed that an intellect so mighty was encased in a body so commonplace. There he sat, or rather tried to sit, but uneasy he twitched from side to side, as his head did from shoulder to shoulder, in an apparent state of mental excitemen. This, however, was the manner of the man and not the excitement of the mind. None more cool, more collected, than this great lawyer, jurist, statesman and orator.

Other papers in the number before us, such as that on Blasphemy,—Brawling,—Justice and Justices,—The Jurisdiction and Practice of the Admiralty Courts,—Criminal Law of France—Corporation Magistrates, will equally interest, amuse and instruct the reader.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

JOHN R. KANE and GEORGE MURRAY, Esquires, Associate Coroners, County of Essex.—(Gazetted 19th January, 1860.)

JAMES WRIGHT, Esquire, M.D., Associate Coroner, United Counties of Northumberland and Durham.—(Gazetted 19th January, 1860.)

WHEELER P. CORNWALL, Esquire, Associate Coroner, County of Essex.—(Gazetted 28th January, 1860.)

CLERK OF THE PEACE.

DAVID PATTEE, Esquire, to be Clerk of the Peace in and for the United Counties of Prescott and Russell, in the room and stead of D. McDONALD, Esq., deceased.—(Gazetted 19th January, 1860.)

NOTARIES PUBLIC.

THOMAS CHISHOLM LIVINGSTON, of Chatham, Esquire, to be Notary Public in Upper Canada.—(Gazetted 19th January, 1860.)

DARNLEY F. STEVENS, of the City of Toronto, Esquire, Attorney-at-Law, to be Notary Public in Upper Canada.—(Gazetted 28th January, 1860.)

TO CORRESPONDENTS.

A DIVISION COURT CLERK; A DIVISION COURT CLERK; and A. BURROWES.—Under "Division Courts."

VERITAS.—The greater the truth the greater the libel. Cannot insert your communication.

DIARY FOR MARCH.

1. Thursday	Sittings of Error and Appeal begin. Last day for return of Collector's Rolls where time extended by Municip. Council.
4. SUNDAY	*2nd Sunday in Lent.* [day for not. of Trial Co. Ct.
5. Monday.....	Last day for notice of Ex. Ch. Brantford and Kingston. Last
6. Tuesday.....	Chan. Ex. Term, London and Belleville, commences.
11. SUNDAY	*3rd Sunday in Lent.*
12. Monday.....	Last day for notice Ch. Ex. Term. Hamilton and Brockville.
13. Tuesday	Last day for serv. of writ for Toronto Spring Assizes. Quarter
18. SUNDAY.....	*4th Sunday in Lent.* [Ses. and Co. Court Sittings in each Co.
19. Monday.....	Last day for not. of Ex. Ch for Barrie and Ottawa.
20. Tuesday	Chan. Ex. Term. Brantford and Kingston, commences.
23. Friday	Last day for declar. for Toronto Spring Assizes.
25. SUNDAY.....	*5th Sunday in Lent.*
26. Monday	Last day for not. of Ex. Chan. Goderich and Cornwall.
27. Tuesday	Chan. Ex. Term, Hamilton and Brockville, commences.
31. Saturday	Last day for notice of Trial for Toronto Spring Assizes.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

MARCH, 1860.

ERRATUM.

In our report of *Potter* v. *Carroll*, in the last number of the *Law Journal*, it is stated that Richards, J., dissented from the judgment of the Court. We are informed that this is an error, as the judgment pronounced was unanimous. Our readers therefore will please make the necessary correction.

RETURNS OF CONVICTIONS TO QUARTER SESSIONS.

The office of Justice of the Peace is not free from responsibility, and yet there is one duty which, of all others, appears to be very generally neglected. It is the duty which the law imposes upon every Justice of the Peace to make returns of convictions had before him, in the manner prescribed by statute.

To the nature of this duty and the penalty for neglect of it we propose in this number to direct attention.

Extensive powers are entrusted to Justices of the Peace, including the power in given cases to fine and imprison. This power is one which, if not placed under check, may be abused in many ways. If abused to the detriment of the liberty of the subject, the subject has his remedy for damages. But as the fines to be imposed do not belong to the convicting justice, if not called upon to give an account of them there may be an abuse of much magnitude, though no particular individual suffer wrong thereby. The sufferer would be the Crown—the guardian of the public—which would be defrauded if fines were improperly withheld.

The office of Justice of the Peace is not to be deemed one of profit. Nothing would be more revolting to every principle of British justice than that magistrates should make a livelihood out of fines imposed in the discharge of official duty. Were this allowed, the frailty of human nature might lead the justice to impose a fine not so much in proportion to the wrong committed as in proportion to his own actual wants or sordid craving for gain. Thus the liberty of the subject would be at the mercy of avarice, and the administration of justice would become a subject of scorn.

The Legislature has deemed it prudent to provide certain checks as preventives of these abuses.

On 27th August, 1841, an act was passed, reciting that for the more effectual recovery and application of penalties, fines and damages, imposed by Justices of the Peace according to law, it is necessary and expedient that such justices shall, *together* with the convictions, make a due return thereof to the General Quarter Sessions of the Peace of the district in which such penalties, fines and damages, have accrued. (4 & 5 Vic. cap. 12.)

In the case of a conviction, it is very doubtful whether a return of the conviction itself, without the formal return of the particulars rendered necessary by the statute, is sufficient. In *Kelly q. t.* v. *Cowan*, 18 U. C. Q. B. 104, hereafter noticed, which was the case of a conviction by a single justice, the Chief Justice of Upper Canada made some observations that appear to favor the affirmative of this proposition; while in *Murphy q. t.* v. *Harvey*, decided during last term in the Court of Common Pleas, but not yet reported, the Chief Justice of the Common Pleas expressed an adverse opinion—at all events as regards the case of a conviction by two or more justices, which was the case then before the court.

The only safe course for a justice to adopt is in the words of the preamble of 4 & 5 Vic. cap. 12, "together with the conviction, to make a due return thereof, &c."

The act now regulating the returns is chapter 124 of the Consolidated Statutes of Upper Canada.

By section 1, it is provided "That *every* Justice of the Peace, before whom any trial or hearing is had under any law giving jurisdiction in the premises, and who convicts or imposes any fine, forfeiture, penalty, or damages, upon the defendant, shall make a return thereof in writing under his hand to the *next* ensuing General Quarter Sessions of

the Peace for the county in which such conviction takes place, and of the *receipt* and *application* of the moneys received from the defendant."

By the same section it is provided, "That if the conviction takes place before two or more justices, such *justices* being present and joining in such conviction shall make an *immediate* return thereof."

The following is the form of the return given by the statute:

Name of the prosecutor.	Name of the defendant.	Nature of the charge.	Date of conviction.	Name of convicting justice.	Amount of penalty, fine or damage.	Time when paid or to be paid to said justice.	To whom paid over by said justice.	If not paid, why not, and general observations, if any.

All experience proves that it is not enough for the Legislature to enjoin that given things of a public nature shall be done, but must go further, and state that if not done, there shall be a given penalty. So the Legislature has done here.

It is provided by section 2 of the same statute, "that in case the justice or justices before whom any such conviction takes place, or who receives any such moneys, *neglect* or *refuse* to make such return thereof, or in case any such justice or justices *wilfully* make a false, partial or incorrect return, or *wilfully* receive a larger amount of fees than by law authorised to be received, in every such case such justice and justices, and each and every of them, so neglecting or refusing, or wilfully making such false, partial or incorrect return, or wilfully receiving a larger amount of fees as aforesaid, shall forfeit and pay the sum of eighty dollars, together with full costs of suit, to be recovered by *any* person who sues for the same by action of debt or information, in any court of record in Upper Canada; one moiety whereof shall be paid to the party suing, and the other moiety into the hands of her Majesty's Receiver-General, to and for the public uses of the Province."

Every prosecution for any such penalty must be commenced within six months next after the cause of action accrues, and the same is to be tried in the county wherein the penalty was incurred (sec. 3).

The object of the Legislature in passing these enactments is, to compel justices to make a return of whatever fines they impose, in order that their diligence in collecting the fines may be quickened, and in order that it may be known what money they admit themselves to have received, or that they may be made to account for it (*O'Reilly q. t.* v. *Allan*, 11 U.C Q.B. 415).

It seems to be no excuse for neglect to make the return required, that the conviction made was an illegal one. The Court of Queen's Bench expressed the opinion, that if a justice of the peace makes a conviction in fact—not an imperfect one, but one upon the face of it good—there must be a return of it. If he, after conviction, discover that the conviction was illegal, and for that reason forbear to enforce the fine, his obvious course would be to make the return as the law directs, and at the same time explain in the return that the fine is not collected, because the justice doubts the legality of his conviction. (*Ib.*) It is proper, however, to observe, that the late Chief Justice Macaulay, in one case, expressed much doubt as to the correctness of this ruling, and inclined to the opinion that an illegal conviction is no conviction, and therefore not necessary to be noticed in a return (*Spillane* v. *Wilton*, 4 U. C. C. P. 242).

Some doubt has existed as to whether an appeal from the conviction to General Quarter Sessions is a sufficient excuse for not making the return. The point has recently received a judicial exposition (*Kelly q. t.* v. *Cowan*, 8 U.C. Q.B. 110). The better opinion now appears to be, that notwithstanding an appeal, a return of some kind must be made. If the justice return the conviction alone, and in any way make it appear on the face of the proceedings transmitted that the conviction has been appealed from, it seems he cannot properly be convicted of having either *refused* or *neglected* to make the return required by the statute. The appeal should suspend all proceedings as regards the collection of the fine, but, singular to say, the act regulating the appeals from convictions by justices makes no provision for giving notice of the appeal to the convicting justice, or to stay his proceedings to collect any fine imposed by him (*Murphy q. t.* v. *Harvey*, *ubi supra*). If the appeal after the conviction is so returned be abandoned, then it clearly rests with the justice to proceed and collect the fine; and after having collected it, he would be bound to make a return, showing the payment, to the Court of General Quarter Sessions. If the contrary course were adopted, there would be much confusion. One object of the return is, to inform the Court of General Quarter Sessions what has been done by the convicting justice. If the convicting justice make no return of any kind, he leaves the Court without information

of the fact that there has been a conviction. If the appeal be abandoned, the Court of Sessions would not be in possession of the information that a conviction had taken place, and so would not have the means of calling the justice to account, in case he afterwards levied the fine and made no return of it.

Where a justice of the peace committed and fined the plaintiff for carrying away some cordwood, and, after notice of appeal, the prosecutor, finding that the conviction was improper, went to the justice, who drew out for him a notice of discontinuance, which was served on the person acting as attorney for the plaintiff, before the then next Court of Sessions, and the justice made a general return to that Court, including this and another conviction, but ran his pen through the entry of this conviction, leaving, however, the entry quite legible; and made a memorandum at the end of it as follows, "this case withdrawn by plaintiff," the return was held sufficient (*Ball q. t.* v. *Fraser*, 18 U.C. Q.B. 100). The facts of this case, it will be observed, so far from disclosing neglect or refusal, show that the justice did, under the circumstances, all that he could do to comply with the statute; and it would be well for every justice, when in a state of perplexity, to follow his example. The courts will not allow a public officer, such as a justice of the peace, to be vexatiously sued or needlessly harassed. When it appears that everything was done that, under the circumstances of the particular case, could be done, to comply with the provisions of the statute, the justice may rely upon receiving all necessary protection as against vexation or oppression.

In each return, a justice may include as many convictions as have, up to the time of the making of the return, been had before him; but for every conviction omitted from the return, he is liable to be sued for the penalty.

Where a justice at the same time convicted three persons severally, and neglected to make a return of the convictions, he was held liable to a fine of eighty dollars for each one of the three convictions (*Donagh q. t.* v. *Longworth*, 8 U. C. C.P. 437). So in the event of habitual neglect, it may become a matter of most serious consequence. Some magistrates, in the course of three months, make as many as twelve convictions, and, in the event of neglect to make the requisite return to the next Court of General Quarter Sessions, such a magistrate would be liable to a penalty of $960! It is to be hoped that these remarks will not be without due effect upon the many magistrates who, by their inexcusable neglect of plain and known duty, daily lay themselves open to be mulcted almost to ruin.

Another remark, and we have done. It is this: In the case of a conviction by two or more justices of the peace, it is the duty of each and all to make the return. By this we mean that though only one return is required, each justice is liable to a penalty of eighty dollars if that return be neglected. Thus: if three justices convict of an offence, and no return be made, the penalty, instead of being only $80, would be $240, or $80 from each (*Metcalf q. t.* v. *Reeve & Gardner*, 9 U. C. Q. B. 263). The moiety of the penalty is given to any person, that is, to the first person who shall sue for the same. The justice is not liable to be sued by two or more persons for one and the same penalty. If, however, the person who first sues do so without any intention of proceeding to judgment, so as to collect the penalty, but in fact to protect the magistrate from being sued by other parties for the same cause, such device will not be allowed to succeed (*Kelly q. t.* v. *Cowan*, 18 U.C. Q.B. 104).

SPRING ASSIZES, 1860.

Days.	Midland.	Eastern.	Oxford.	Home.	Western.	Toronto.
Wednesday, March 14	C. J. Robinson	C. J. Draper	J. McLean	J. Burns	J. Richards	J. Hagarty
Thursday " 15	Whitby				Sarnia	
Monday " 19				Hamilton		
Tuesday " 20	Peterboro'				Goderich	
Monday " 26	Cobourg		Guelph		London	
Monday April 2			Berlin			
Monday " 9				Niagara		Toronto
Tuesday " 10	Belleville		Stratford		St. Thomas	
Wednesday " 11		Perth				
Monday " 16			Woodstock		Chatham	
Tuesday " 17		Brockville				
Monday " 23		Cornwall	Brantford	Welland	Sandwich	
Wednesday " 25	Picton					
Monday " 30		Ottawa	Simcoe	Milton		
Tuesday May 1	Kingston					
Wednesday " 2				Barrie		
Monday " 7		L'Orignal	Cayuga			
Tuesday " 8				Owen Sound		
Tuesday " 15						

Easter Term, from Monday, 21st May, to Saturday, 2nd June.

CHANCERY TERMS, 1860.

EXAMINATION TERMS.

Toronto	7th February, and 4th September.
Sandwich and Whitby	21st February, and 18th September.
Chatham and Cobourg	28th February, and 25th September.
London and Belleville	6th March, and 2nd October.
Brantford and Kingston	20th March, and 9th October.
Hamilton and Brockville	27th March, and 16th October.
Barrie and Ottawa	3rd April, and 23rd October.
Goderich and Cornwall	20th April, and 6th November.

HEARING TERMS.

From 23rd April, to 5th May. From 19th Nov., to 1st December.

LECTURES

ON THE JURISDICTION AND PRACTICE OF THE HIGH COURT OF ADMIRALTY OF ENGLAND.

BY JOHN MORRIS, ESQ.

(*Continued from our last.*)

4.—WAGES.

Concurrently with the courts of common law, this Court entertains jurisdiction in suits for mariners' wages. Recent statutes have also given summary remedies for the recovery of seamen's wages before justices of the peace, where the amount due does not exceed £50; and in such case no suit can be now brought, either in this court or in a court of law, "unless the owner be bankrupt or insolvent, or the ship be under arrest, or be sold by the authority of the Court of Admiralty, or unless a magistrate, acting under the authority of this Act, shall refer the case to be adjudged by this Court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman is discharged or put on shore."*

The right of the Admiralty to maintain jurisdiction in suits for mariners' wages has often been questioned in common law courts. Ultimately it was settled that mariners might sue in the Admiralty for their wages on the ground chiefly of usage and convenience, although it was admitted to be expressly against the "restraining statutes," where, as is usually the case, the contract is made *on land*. This right of the mariner was said to be at first a mere indulgence, and to be at length justifiable only on the maxim "*quod communis error facit jus*;"† but as was observed by a learned reporter, in a note to one of the cases at common law in which this doctrine was propounded, "surely, it is not consonant to legal principle to hold that usage or common error can abrogate a statute to any purpose, or give legality to what an Act of Parliament expressly prohibits." The right of the mariner to proceed in this court for his wages is now clearly established, although the reasons on which it is founded are open to criticism.

The advantages of proceeding in this court are:—

(1.) That all the crew, however numerous, can join in one suit

(2.) That the ship, or its proceeds if in the registry, may be arrested, and the wages will, in general,* be preferred to all other charges, if the value is insufficient to discharge all the claims upon the ship. In the words of Lord Stowell, "It is the sailor's right to cling to the last plank of the ship in which he has served."

(3.) The Court is open all the year round, and, as has been said, the mariner can enforce, or rather initiate, his remedy by seizure of the ship "between tide and tide."

It appears that a female mariner may earn wages and sue for them in the Admiralty Court. Such a claim was pronounced for in a case† decided by Lord Stowell, where seaman's work was proved to have been done, and well done, by a woman.

It is a peculiar principle of the Court of Admiralty, that a claim for wages is not absolutely forfeited by negligence or incapacity, but the proper deduction would be made to meet the loss. In the words of Dr. Lushington,‡ "in this court where losses have occurred from the negligence or misconduct of the seamen, the amount of the loss only is deducted from the wages; whereas in other jurisdictions, the contract not being fulfilled, the party suing would fail in recovering anything."

The Court of Admiralty has always set its face against agreements entered into by seamen for the forfeiture of their wages, or their remedies therefor. Lord Stowell, in the case of *The Juliana* (2 Dodson, 510), said:—This Court certainly does not claim the character of a Court of general equity, but it is bound by its commission and constitution to determine the cases submitted to its cognisance upon equitable principles, and according to the rules of natural justice. How far a Court of law would limit its views of the question to the letter of the contract, and leave these improvident men to find their way, in a Court of equity, out of bargain which that Court has deemed unreasonable, when it appeared in another form substantially the same, I am not able to pronounce. There are those who might, perhaps, lament if this humble class of suitors were compelled to a pilgrimage through a second court. This court is not disposed to put that burthen upon them; it will, as far as it can, protect these illiterate and inexperienced persons against their own ignorance and imprudence." The principles upon which this judgment proceeded have been repeatedly avowed and acted upon in the courts of the United States; it is cited by Judge Story and Chancellor Kent with approbation, as deciding, "that where a voyage is divided by various ports of delivery, a proportional claim for wages attaches at each of such ports, and that all attempts to evade or invade that title, by renunciations obtained from the mariners without any consideration, by collateral bonds or by contracts inserted in the body of the shipping articles, are ineffectual and void."§

And now, by statute 17 & 18 Vict. c. 104, it is enacted, "That no seaman, by reason of any agreement, shall forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled and that every stipulation inconsistent with this Act, whereby any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be inoperative." The same statute further enacts, in abrogation of the principle of the marine law, "Freight is the mother of wages," that no right to wages shall be dependent on the earning of freight; and that every seaman or apprentice, who would be entitled to demand and recover any wages if the ship in which he had served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to recover the same, notwithstanding that freight has

* Merchant Shipping Act, 17 & 18 Vic., c. 103, s. 189.

† A friend, well versed in foreign law, has favoured me with the following note on this maxim:—"Is it so certain that this is an unsound maxim? It is put in the least prepossessing form, by describing the new law, which prevails over the old, as an *error*. Call it common or consuetudinary law, or case-law, and is there any reason why it should have less power to repeal or vary statutes than we know it has to repeal previous cases, and make new law where statutes and cases are silent? On the Continent, statutes are not considered to be exempt from the overruling power of subsequent consuetudinary law, nor, practically, are they so here, though our constitutional jealousy of a discretionary power in the judges inclines us to say that they are interpreted when we see that they are repealed. The word *issue* in a deed will not create an estate tail, though it is one of the words in the statute *de donis* as much as *heirs of the body* is a phrase of that statute; so *et. de donis* is, in fact, not altogether law now."

* One exception is where there is a bottomry bond, and the wages are subsident to it; so in cases of collision, if the mariners of the damaging vessel are held in fault; in both these cases wages have to be postponed.

† *Jane & Matilda*, 1 Hagg. 187. ‡ *The Thomas Worthington*, 12 Jur. 1057.

§ Abbot on Shipping, p. 458.

not been earned; but that, in all cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo, and stores, shall bar his claim.* Previously to this statute, where no freight was earned, the mariner, as a general rule, got nothing.

The Court of Admiralty will not enforce contracts for seamen's wages which are of a *special nature*. In a case in which the mariner relied on an agreement, to the effect that he should be paid wages at the rate of so much per month, and 1*s.* 6*d.* for every ton of oil which should be obtained in the voyage, which was a whaling voyage to the Greenland fishery, Dr. Lushington, in giving judgment, thus expressed himself:—"Supposing I was to pronounce for the wages as claimed, and to compel the owners to bring in the £800 which it is alleged they have received, in what way am I to apportion the shares of the seamen? I must enter into a difficult investigation, and decide upon hand money in advance, and what is termed striking or fish money, and the shares which the mariners are to take for oil money per imperial ton.

"What must I do besides? Why, when the parties become partners under these circumstances, I should further have to decide between the interests of the mariners and the owners; for could I possibly determine that the persons on board this ship are to take all that has been saved, in total exclusion of the owners? Are they not partners in one and the same adventure.

"Would not the equitable course of proceeding be, that all the parties should come in to share and receive a division of the property which has been saved, in proportion to the amounts to which they may be respectively entitled? This Court is utterly incompetent to enter into any such apportionment. I therefore feel bound to reject this summary petition, and I do so upon three grounds—

"First, because the contract is a special contract, such as is described by Lord Tenterden as ousting the jurisdiction of this Court.

"Secondly, because I conceive that I am confirmed by the authority of Lord Stowell in so doing.

"And lastly, because the contract being in the nature of a partnership, I should have, in entertaining the question, to encounter such difficulties as would render it impossible for the Court to arrive at a just and equitable result."

Foreign seamen can sue in the Admiralty Court, with the consent of their consul, for wages earned on a foreign ship. It appears to have been the notion at one time that the Court had no jurisdiction, save by the consent of the foreign minister or consul.† In a case‡ which came before the present learned judge of the court, he examined the ground upon which this point was supposed to rest, and thus expressed himself with reference to it:—"Now, upon general principle, I apprehend that this court, administering as it does, a part of the maritime law of the world, would have a right to interpose in cases of the present description. Can it then be consistent with the principles of justice that the exercise of this right should depend entirely upon the consent of a foreign minister or consul who should be authorised to prohibit the court altogether, or to induce it from exercising its jurisdiction? How would the question stand in other courts? In other courts of this country I have no doubt that the mariners might have instituted and action, *in personam*, against the master, without reference to any consent at all. Why, then, should not proceedings be competent on their part, in this court, against the ship? For, by the general maritime law, the ship is the primary security for their wages. Is it just or proper that the consent of the foreign representative should be necessary to put this court in motion, and should not be necessary in a court of common law? How is it possible there can be any such difference between them?

"Upon general principle, then, I am inclined to hold that this court does possess a competent jurisdiction to adjudicate in these cases; at the same time, the exercise of this jurisdiction is discretionary with the court; and if the consent of the representative of the Government to which the vessel belongs is withheld, upon reasonrble grounds being shown, the court might decline to exercise its authority. Indeed, circumstances might occur, upon the face of the case itself, in which this difficulty might arise, that the matter in dispute was so connected with the municipal law of a foreign country, that this court would be incompetent to render impartial justice: in such cases, undoubtedly, the court would decline to adjudicate."

Now, the practice appears to be, to require notice to be given to the consul of the foreign country, on the commencement of proceedings; and if no interference takes place, the cause proceeds without requiring any consent.

Formerly a master could not sue the ship under any circumstances, his contract being held to be a personal one with the owner. See Pritchard's Dig. p. 475.

But by stat. 7 & 8 Vict. c. 112, s. 16, the same liens and remedies as a seaman had for the recovery of his wages were given to masters, where the owner became bankrupt or insolvent. Ibid. p. 474.

And now, by the Merchant Shipping Act, s. 191, the condition of bankruptcy or insolvency of owner is withdrawn, and the master has the same remedies as seamen. He can only sue for his wages in the first instance; but if the owners set up any claim of set-off, the Court may then go into all his accounts with the ship, and award him what may be due to him. (*The Caledonia*, and s. 191 of Merchant Shipping Act.)

Where, however, the master has hypothecated the ship, and the proceeds are insufficient to pay both his wages and the bond, his claimed is postponed to that of the bondholder. (*The Jonathan Goodhue*, Dec. 22, 1858: *Shipping Gazette.*)

2.—POSSESSION AND RESTRAINT.

The Court has always exercised a most useful and important jurisdiction as between part owners. The rule it enforces is of a twofold character: (1.) To give possession to the majority as against a minority: (2.) To require the majority who are in possession to give security for the safe return of the vessel, to any part owner who dissents from an intended voyage. To give effect to either branch of this rule, the ship can be *at once arrested* on the application of the majority who want possession, or any one of the minority who require security. The latter cause is termed a cause of restraint—it does not seek possession, but to restrain the majority from sending the ship to sea without first giving security. In a cause of restraint, after a ship has been arrested, security must be given for the value of the applicant's share before the ship is released. The security is satisfied by the safe return of the ship to some port in England, even although that may not be the port to which the vessel belongs. "The Court," in the language of Lord Stowell, "in this operation is not merely ministerial, for it compels the party authoritively to find such security; it likewise compels the party to pay the sum stipulated in the bond given for the security. The bail bond contemplates no other object than the safe return of the vessel, or, in default thereof, the payment of the stipulated sum."

* Sus. 182, 183.

† The same gentleman who favoured me with the note at page 10, has also given me the following:—"I presume that the ambassador's consent was required because the Roman law, which the Court of Admiralty follows, did not in general admit the mere situation of property as a sufficient foundation for jurisdiction. The plaintiff could bring even real actions only in the defendants domicile, until the year 385 A.D., when he was allowed the choice of bringing his action in the place where the thing was situate: *Code*, 1. 3, t. 19, 1. 3. But the words of the imperial constitution here referred to are very general, and have been carried out in practice by rules more or less liberal in different countries. If a foreign seaman contracted for wages abroad, and the ship properly belonged to a foreign port, it would have been far from being generally admitted that the casual presence of the ship here would found the jurisdiction; and, I presume, the ambassador's consent was required as a security, that by exercising the jurisdiction we should not offend the country to which the ship belonged. For personal actions of course the Roman law gave the choice between the *forum domicilii* of the defendant, and the *forum contractus*."

‡ *Golubchick*, 1 W, Rob. 145.

A part owner who thus dissents, and obtains security, renounces all profit in the intended voyage. He does not participate in its risks, and he cannot, therefore, share its profits. If the owners in possession are entitled to an equal number of shares with those out of possession, the Court cannot interfere to give possession to the latter, who are considered in the same position as a minority, and entitled to the same rights as to requiring security, &c., but are not entitled to possession.

Thus, without interfering with the right of property, or attempting to settle disputes which the parties would be more likely, and better able, to settle if left to themselves, the Court, by the simple but just rule which I have stated, prevents the injury which would result if any one part owner could obstinately interfere with the enjoyment of the common property and enforces the maxim that "ships are built to plough the sea, and not to lie by the wall."

The Court cannot go beyond this protective power; it cannot, for instance, as between the part owners, compel the sale of the ship, or of any part owner's share therein.

Having thus the power to take possession of a vessel from the minority, and give it to the majority in interest, à fortiori, it had the power to put the rightful owner in possession, as against a mere wrong-doer or a person having no title. If, however, there was a bonâ fide dispute as to title, the Court could not, prior to the recent statute, have interposed. It had no power to adjudicate on any question of title, as distinguished from a question of mere possession.

These suits, for giving possession of a vessel either to the majority as against a minority, or to the rightful owner as against a mere wrong-doer, or person having no title, are what have usually been termed in this court "causes of possession." They formed a part of the ancient jurisdiction, which the common law courts, after a good deal of conflict, allowed the Admiralty to retain, not because they could not have twisted the restraining statutes to embrace them, but because the common law courts had not themselves any machinery to apply the remedy which the Admiralty enforces by means of its power of arresting the vessel.

Where the shares of the respective part owners are not as certained, the Court of Admiralty had not formerly jurisdiction. (Whether it has now or not depends upon the construction of the statute of Victoria, which we shall presently notice.) In the case of *Haly* v. *Goodson* (2 Mer. 77), the Lord Chancellor said, "Where the shares are unascertained, and their respective amount, which is a matter of covenant and contract between the parties, is the subject of dispute, then if the Court of Admiralty were to proceed, I apprehend that it would render itself liable to a prohibition. Upon that ground it is therefore, that this Court ought to interfere on the present occasion. It was in that case referred to the master to ascertain the shares of the plaintiff, who was seeking security, and to approve of the amount for which the defendant should give security.

At page 137 of the same volume of Merivale, another case *Christie* v. *Craig*, is reported, the marginal note of which is as follows:—"Injunction to restrain the sailing of a ship upon the application of a part owner refused, where the ship was intended to sail the next day, and it did not appear by the affidavit filed in support of the motion that there were any circumstances to account for the plaintiff's delay in applying."

There are few cases reported of applications to the Court of Chancery for injunctions to enforce security as between part owners. No practitioner would think of resorting to that court, if the simple, expeditious and inexpensive remedy of the Admiralty Court were available to him. This Court is open all the year round to applications by part owners. In all ordinary cases this is proper, and the only proper, jurisdiction, and it may be question whether the difficulties which formerly stood in the way of the Admiralty Court interfering in such cases as those just referred to, are not lessened, if not removed by the statute of Victoria.

Hitherto we have considered the position of this branch of the jurisdiction of the Admiralty Court, prior to the passing of the statute of the 3 & 4 Vict. c. 65. By the 4th sect. of that Act, it is enacted, that the Court shall have jurisdiction to decide all questions as to the title to, or ownership of, any ship or vessel, or the proceeds thereof remaining in the Registry, in any *cause of possession*, salvage, damage, wages, or bottomry; thus restoring, to a great extent, one of the most important branches of jurisdiction formerly exercised by this Court. It was not until after the Restoration that the Court appears to have been restrained by the common law courts from instituting questions of disputed title to ships.

The effect of the statute I have referred to is, I take it, to enable the court to decide all questions of title (*i. e.* the *legal* title carrying with it the right to *possession*), not merely where they arise incidentally in the suit, but also where the suit is brought with the sole object of having the question of title decided. *

In the case of foreign owners the Court would not formerly exercise jurisdiction as between part owners without the consent of the consul of the country to which the ship belongs, now I apprehend notice to, and non-interference by, the consul is sufficient; and even under the old practice a sentence of the proper tribunal of the foreign country was deemed equivalent to the consent of the minister or consul; † thus where the Court of Admiralty of Rostock, to which place the ship belonged, had ordered the master to deliver up the possession of the ship, it was decreed by our Admiralty Court to be given up to the majority of owners, in their suit against the foreign master and part owner. Such is the comity existing between this Court and a properly constituted foreign tribunal. It is even part of the ordinary jurisdiction of this Court to enforce, when necessary, the sentence of a foreign Admiralty Court; thus differing essentially from our municipal courts. The Court, however, has no power at the suit of a British part owner of a foreign vessel to arrest her, until bail is given for her safe return to her own port abroad. In the case of the *Arthur Bernstorff* (2 Eccl. & Adm. Reports, 30), in which this point was decided, the present learned judge of the Admiralty Court said, in giving judgment, "there is no doubt as to the jurisdiction of the Court, at the suit of a part of the owners, to arrest a vessel which is going on a voyage of which they disapprove, until security is given for her safe return to port; but, to the best of my recollection, this is the first time where a British owner of a part of a foreign vessel has sought to apply the remedy, and I am of opinion that I have no power to grant it. If a British Merchant thinks proper to embark his property in a foreign vessel, he is at perfect liberty to do so; but this consequence must necessarily follow—he becomes subject to the law of the foreign state to which she belongs, for her government and management. I cannot say what that law may be with respect to the present case; for aught I know the remedy which exists in this country with respect to British ships may exist in the country to which she belongs. But to arrest a foreign ship about to proceed on a voyage, until bail is given for her return, appears to me to be not only without precedent, but contrary to all principle. If, indeed, I was assured by competent information that such was the law of the country to which this vessel belongs, then upon that ground the Court might perhaps be induced to take it consideration. As the matter stands, however, I must reject the motion."

The British owner clearly has a remedy in the Admiralty Court against a foreign ship, in order to obtain possession of it

* See *The Eliza Cornish*, 17 Jurist 738.

† The same rule applies to other cases in which foreigners seek the Court in reference to a foreign ship, as we have already seen in the case of "wages."

from parties having no title,*—and in such cases the Court did not, even before the statute of Vic., feel itself so circumscribed to inquire into questions of title, as it did in an ordinary case as between British subjects; for, as Lord Stowell remarked in one of those cases, "If the British subject cannot have justice done him here, he cannot procure it elsewhere."

(*To be continued.*)

THE LAW OF BLASPHEMOUS LIBEL.

(*From the Solicitors' Journal.*)

The discussions which have recently taken place on the law of blasphemous libel have attracted considerable attention among lawyers, and also among philosophical students of English institutions and English history. Until Mr. Lewis wrote the paper which he read before the Judicial Society, and which was the groundwork of the debate reported in a former number of this Journal, as well as of its continuation, which will be found elsewhere in our columns, there was no serious attempt, that we are aware of, to give any thing like a rational account of the law of England on the subject. Here and there, in the reported cases, there were, no doubt, dicta of eminent judges, which afford some notion of the direction in which they were disposed to seek for principles in favour of a conclusion which, at all hazards, they seem predetermined to maintain. Unlike the severe reasoning which characterises most of the authorities in which great principles are enunciated for the first time, most of the leading cases on the law of blasphemy have been characterised rather more by appeals to sentimental considerations than one likes to see where the liberty of the subject is at stake. Mr. Lewis, however, has boldly undertaken to treat the question from a purely juristical point of view, and has produced a defence of the existing rule of law, such as has not hitherto appeared. Whatever learning or ingenuity could say in its favour, has been said by him. That he has nevertheless failed to convince the majority of those who heard his paper read, only proves that he urges in favour of a position not quite tenable. Accepting the definitions of blasphemy given by Lord Erskine and others, Mr. Lewis proceeds, in his paper, to show that according not only to the law of England, but to the law of society itself, the principle common to all those definitions is sound, and must be enforced in every well-regulated state. He sees in all the reported cases the purely practical aim of protecting the essential interests of society at large, or at least of certain classes of society, which according to his theory require the protection of the State, namely, the young, the ignorant, and the poor. His arguments generally may be stated as follows:—The whole existing fabric of our constitution and government in this country is identified with the christian religion, and "has no other foundation than the oath" which is taken by "the whole judicial fabric, from the king's sovereign authority to the lowest office of magistracy;" "the whole is built," he says, "both in form and substance, on the oath of every one of its ministers, to do justice as God shall help them hereafter. What God? and what hereafter?" His next argument proceeds upon the ground that the standard of morality in this country is the Christian standard, and that it is criminal by scoffing and derision, or as lawyers say, maliciously, to bring Christianity into disrepute, because, by so doing, public morals are thereby undermined. Next, he says, that the great majority of the people being professors of Christianity, they have a right to be protected from insults offered to a creed which, at least, has numerous positive sanctions such as its opponents do not affect to rival.

It is obvious that, however ingenious may be the arguments and illustrations brought forward in support of these propositions, a good deal must necessarily be left to the other side to say. The first thing to be done in such a controversy, as Mr. Collier pointed out on Monday night is, to come to a clear understanding of the terms employed on either side. For instance, granting all that Mr. Lewis asserts in his first proposition to be true, and even admitting that, according to Christian doctrine there is peculiar obligation in an oath, nevertheless, according to the law of England, the oath of a person not professing Christianity, and even of one who might be generally characterised as an infidel, has equal force and validity with that of a Christian. All that the law requires is a belief in a state of future rewards and punishments, which is common to other systems of religion.

As to the argument deduced from the fact that the standard of morality in this country is Christian, it may be said that morals are independent of all religious dogmas; and have a foundation other than a spiritual one, so that there is no necessary connection between morality and any form of religious belief. The question raised as to the right of the great majority of any state to have their religious opinions and sentiments protected from insult, if not so speculative as the last one, is still too diffuse to be treated within our narrow limits. Every legal consideration, perhaps, might be raised equally well upon a narrow issue, by asking whether there is any reason in point of law why persons professing the faith of the majority should be protected from attacks upon their faith of a character such as would not give them a right to protection if directed against opinions or sentiments not affecting religion, entertained by them. There is no difficulty of course, if it be assumed that the attacks are of such a nature as to provoke a breach of the peace, or in any way to come within the category of public nuisance. The question is, whether if a man uses language of such a character, or in such a manner as to be innocent, when applied to any other subject, is to be guilty of a crime if he applies it to Christianity. In other words, is the rule of law to be dependent upon the subject-matter of what is written, or upon the animus and intention of its author and the object at which he aims? Mr. Buckle and Mr. Stuart Mill contend that any rule of law which can justify a prosecution for blasphemy, so far as it is fair and reasonable, must necessarily be applicable to any analogous attack upon the opinions of persons who are not Christians. Mr. Baron Bramwell appears to entertain the same view, and to hold that the only reasonable foundation of any such rule is the preservation of the public peace. According to this doctrine, if honestly applied, there is no doubt that, every week, there issues from the press scores of publications directed against the views of particular bodies of Christians, and containing matter which would be as liable to subject their authors to prosecution as many of those who have been tried for the crime of blasphemy. It is difficult to understand how any prosecution could be attempted according to this doctrine, except where the publication in question endangered the public peace; and therefore the author of any attack upon Christianity, however violent or scurrilous it might be, would be free from all risk, except it could be shown that he had thereby broken the public peace—a conclusion which, if just, may perhaps have the effect of making some converts to the views advocated by Mr. Lewis. He altogether rejects the assumption of equality of rights between the advocates and the opponents of Christianity in this country, or perhaps, we might say, of the adherents of any form of religion, and those who deride religion altogether. "The man which rejects religion," he says, "has nothing to offer which can entitle him to put the Christian under terms. There is no subject-matter for an exchange. The offence is all on one side. How can any one defame infidelity, which, in its very nature, abjures all claims to veneration, and which says, 'Let us eat and drink, for to-morrow we die.'" The

* Would he have an equal right to possession as a part owner against a minority in interest, being foreigners and in possession? Having regard to the above case would not the Court, first enquire, what is the law of the country, to which the ship belongs, on this point?

difficulty which he would have in applying the doctrine here laid down, would be to substantiate against a person accused of blasphemy, that his opinions were of the character and tendency described; because it appears to be the necessary corollary of Mr. Lewis's proposition, that, if the accused held other opinions, and was very far from being such an atheist as is assumed, he *would* have a right to put his accusers *under terms*, and to require that no degree of passion or invective should be allowed to be used against his creed, which he was prevented from using against Christianity.

Practically, the cardinal difficulty of the whole subject rests in the distinction between heresy and blasphemy. According to existing law, there is no essential distinction between the two. Heresy plus invective, passion, or intemperance of expression, *is* blasphemy. But law does not affect to touch insidious attempts upon Christianity, however injurious or wanton they may be, though it will prosecute a man who uses the same weapons with far less effect, if he has not the same regard for conventional forms.

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "The Editors of the Law Journal, Toronto."

OFFICERS AND SUITORS.

PROCEEDINGS OF A MEETING, held by the several Division Court Clerks for the County of Waterloo, at Berlin, on Mondays, the 20th and 27th days of February, 1860; convened for the purpose of mutual information and improvement, by a free discussion on the various matters connected with the operation of the Division Courts.

Present: Messrs. Wm. Davidson, Otto Klotz, H. McCrune, Geo. Colclough, John Allchin, Michael P. Empey and William Hendry.

John Allchin, Esq., was appointed Chairman, and Otto Klotz, Esq., Secretary.

Among the several topics brought under consideration were:

1. The result of the operation of the 91st clause of the Act of 1850; each Clerk having prepared a statement of the proceedings had and taken under said clause during a period of eighteen months,—from the 31st December 1857, to the 30th June 1859,—of which one general statement was compiled, showing that the average per cent. of money realized under the operation of said clause in the county of Waterloo is 51, as will more fully appear from the statement below.

2. The propriety of establishing a uniform mode of procedure of Clerks in the discharge of their various duties, and the necessity of establishing a uniform practice in the taxation of costs.

The discussion on these topics, including the charges for postages, resulted in the adoption of one uniform system.

3. The necessity of further protection to execution debtors.

The meeting expressed the unanimous opinion that a larger amount than that at present exempt from seizure, might with propriety be allowed, under process, as a further protection to a debtor.

4. The necessity of having a garnishee clause embodied with the Division Court Act, which clause was deemed very essential for the benefit of Division Court creditors.

5. The propriety of increasing the amount of claim for which *personal service* of a summons is necessary.

The meeting being of the opinion that it would be proper to increase the same.

6. The subject of furnishing each Division Court office with a Safe, sufficient to contain the court books and valuable papers connected with the office; and the general opinion was expressed that such a safe is required.

7. The appointment of a Delegate, in the event of a convention of representatives of Division Court Clerks from the several counties in Upper Canada being held.

The meeting appointed Otto Klotz, Esq., Clerk of the Second Division Court, Preston, as the Delegate for the Division Court Clerks in the County of Waterloo.

After having made provisions for the incidental expenses, the meeting adjourned.

JOHN ALLCHIN, *Chairman.*
OTTO KLOTZ, *Secretary.*

STATEMENT, Showing the actual working of all the Judgment Summonses issued in the County of Waterloo, from the 31st day of December, A. D. 1857, to the 30th day of June, A. D. 1859; being for a period of eighteen months.

Number of Division Court.	Name of the Clerks of the Division Courts.	Total Number of suits entered during said eighteen months.	Total amount of claim involved in those suits.	Number of Jun't Sum. issued during said period.	Amount of claim involved in such Judgment Summonses.	No. of Judgment Sum. withdr.	Amount of claim involved in such withdrawn Judgment Summonses.	No. of Jun't Sum. dismissed.	Amount of claim involved in such dismissed Judgment Summonses.	Number of Jun't Sum. remaining for adjudication.	Amount of claim involved therein.	Amount of money realised thereon.	No. of orders of commitment under Judg't Sum. process.	Number of actual commitments thereunder.	Number of days committed.	Average per cent. realized on such Judgment Sum. suits.
			$ c.		$ c.		$ c.		$ c.		$ c.	$ c.				
1	William Davidson.	2,765	57,522 21	167	8,614 69	32	1,091 84	29	733 01	108	1,749 84	1,240 65	7	2	30	70
2	Otto Klotz	1,083	25,368 58	41	1,644 92	10	502 17	5	813 70	26	829 05	247 57	2	2	20	30
3	Henry McCrune ...	1,666	43,847 83	19	823 46	2	189 42	1	29 88	16	654 21	438 17	2	...	...	66
4	George Colclough.	832	7,865 68	20	507 23	2	64 98	5	117 82	13	824 48	128 88	5	...	...	89
5	John Allchin.....	1,920	48,887 88	47	1,984 11	6	848 40	5	804 98	36	1,280 78	891 29	8	4	40	81
6	Michael P. Empey.	1,472	37,006 51	25	518 89	3	35 90	3	44 99	19	438 00	256 83	2	...	...	59
7	William Hendry...	1,234	29,390 00	47	1,316 77	12	297 88	8	172 15	27	846 74	437 11	5	1	30	52
	Totals.....	10,372	248,918 14	366	10,355 07	67	2,480 54	56	1,756 48	245	6,184 45	3,184 45	31	9	120	51

[At present we have not time to do more than to notice the above, and to state how pleased we are that in the county of Waterloo so much has been done towards carrying into effect the suggestions from time to time made in this journal. We hope that what has been done in Waterloo is only an earnest of what may yet be done in that county, and that the example there set by Division Court Clerks will not be without some practical result as regards the other counties of Upper Canada.

The Clerks of Division Courts have a great deal in their own hands. By united exertion much can be accomplished in the way of bringing about necessary reforms.

The success of the meeting to which we now refer was, we fancy, in no small degree owing to the active exertions of some energetic and clear-headed officer such as we take Mr. Otto Klotz to be. A Division Court Clerk of his ability, industry and energy, in each county of Upper Canada, would without trouble bring about meetings such as that in his county in every county of Upper Canada.

In all proceedings of the kind, a leader is required. The great majority are more inclined to follow than to lead; and we congratulate the Division Court Clerks of the County of Waterloo on having a leader in whom so much confidence can be placed as Mr. Otto Klotz.

Now that the Legislature is in session is the time for exertion.—Eds. L. J.]

U. C. REPORTS.

CHAMBERS.

Reported by Robert A. Harrison, Esq., *Barrister-at-Law.*

Booth v. the Preston and Berlin Railway Company.

Interpleader for proceeds of goods sold—Action—Staying same upon payment of proceeds—Costs.

Where a Sheriff sold certain goods and chattels under an execution, against the property of defendants, and after sale, but before the Sheriff had paid over the proceeds to the execution creditor, a claim was made on the Sheriff and an action commenced for damages in respect of the goods and chattels sold; but it was not proved that the goods and chattels were sold under value, and the execution creditor abandoned the proceeds, an order was made staying the action upon payment of the proceeds without deduction, and—as it appeared that the Sheriff might have applied for relief before action—upon payment of the costs of the action.

Februrry, 1859.

This was an interpleader summons, granted on 31st December, 1859, at the instance of the Sheriff of the County of Waterloo, calling on the plaintiff and Samuel C. Ridley to appear and state the nature of their claims to the goods seized.

The parties appeared, and on their different applications the summons was enlarged from day to day till the present month.

The facts, as they appear in affidavits filed and on which there was no dispute, were substantially as follows.

The Sheriff, on the 1st October last, seized a quantity of frame timber, boards, door and window frames, ties, rails, truck wheels, timber, 28 dirt cars, &c. &c., and he sold a quantity of them on 17th and 26th of October, the remainder being still in his hands.

On the 4th November, notice of Ridley's claim was given to the Sheriff.

Several communications passed between Ridley's attorney and the Sheriff, and the former would seem to have formally laid claim to a larger quantity of property than he ultimately asserted to be his.

The goods seized were in different places along the line of road, and many communications seem to have passed between the parties, which, as is alleged, induced the Sheriff to delay applying for relief before the 31st December.

On the 23rd December, he was served with process at Ridley's suit.

At the hearing, all parties agreed as to the ownership of the property, and it was conceded that Ridley was entitled to all that he finally pointed out as his in the affidavit of his agent, Carpenter, part of which were sold, and the proceeds were still held by the Sheriff and the others still in his hands.

Several affidfivits were filed as to what passed between the Sheriff and Mr. Martin, the plaintiff's solicitor, the latter contending that he had not instructed the Sheriff to seize any property in particular.

It seemed conceded that the matter must be settled between Ridley and the Sheriff, as it was not clear that substantial justice could be attained by compelling Ridley and the plaintiff to interplead either to the goods or the proceeds, the plaintiff not claiming the goods claimed by Ridley, and it not being clear whether it was at his special instance the latter were taken by the Sheriff.

Harrison appeared for the Sheriff, and cited Consol. Stat. U. C., cap. 30, s. 8, p. 333; *Anderson* v. *Calloway*, 1 Dowl. P. C. 636; *Scott* v. *Lewis*, 4 Dowl. P. C. 259; *Bishop* v. *Heneman*, 2 Dowl. P. C. 166; *Washington* v. *Webb*, 16 U. C. Q. B. 232.

Read, for Ridley, cited *Washington* v. *Webb*, 8 U.C. L.J. 75.

Jackson, for execution plaintiff, cited 1 *Archd.* 1323.

Read suggested that Ridley would not be fully indemnified by awarding to him the proceeds of his goods at sheriff's sale, and that the action should be allowed to proceed.

Hagarty, J.—The affidavits filed on behalf of Ridley contain no assertions that the goods have been sold at an undervalue, or any especial damage sustained at their loss.

In a case in which the claim is not made until after the sale, I do not feel called on to assume that the proceeds in the Sheriff's hands do not represent their full value.

It was also objected that the interpleader relief could not be given as the money was made.

The Stat. Consol. Acts, cap. 30, s. 8, expressly speaks of claims to goods and chattels taken in execution, *or to the proceeds or value thereof*, and enables the court or judge to deal with the case either before or after return of the process, or before or after any action has been brought against the Sheriff, "and to make such rules and orders as appear just according to the circumstances of the case."

I consider the law to be settled, that an interpleader can be directed for the money in the Sheriff's hands.—*Hall* v. *Kissock*, 11 U. C. Q. B. 9; *Scott* v. *Lewis*, 2 C. M. & R. 289, and other cases.

Assuming the jurisdiction to be clear, it remains to be seen how the case should be disposed of on the merits.

In *Abbott* v. *Richards*, 15 M. & W. 195, Pollock, C. B., says, "I find no suggestion in the affidavits of any special damage, and the supposed hardships of the party of having his goods seized and sold, perhaps for less than their value, and receiving only the proceeds of the sale, is a matter which might and ought to be brought before the judges."

There may perhaps be some doubt as to the judge's authority under the act. My impression is that he has a right to do all that is just, proper and equitable, under the circumstances.

Winter v. *Bartholomew*, 11 Ex. 705, is an exceedingly strong case. The Sheriff entered the house of one Mester, and there seized goods in an execution against defendant. Mester claimed some of the goods, and commenced an action against the Sheriff for breaking and entering his house and seizing his goods. The Sheriff obtained an interpleader summons, and Martin, B., ordered the goods claimed by Mester to be given up to him, and the execution creditor he barred as to them. The Sheriff to sell the other goods seized in the house belonging to the defendant, and the action against the Sheriff was ordered to be stayed. The court, after argument, refused to rescind the order so made. *Alderson, B.*—"The object of the interpleader act is the adjusting of adverse claims, but there is incidentally a power to protect the Sheriff when he is subject to an action, and it is unjust that he should be sued. If the Sheriff has been guilty of misconduct, the court will not protect him; but when he has done no wrong, the legislature intended that the court or judge who makes the interpleader order should protect him against vexatious actions. It is much more just that the matter should be left to the discretion of the court or judge, than that the Sheriff should be subject to vexatious actions."

I am of opinion that an order be made that the action brought by Ridley against the Sheriff be stayed upon the Sheriff delivering to him all the goods mentioned in Carpenter's affidavit remaining

unsold in his hands, and paying to him the proceeds without deduction of the sale of his (Ridley's) goods as have been sold, and that on such delivery and payment that Ridley be barred as against the Sheriff and the execution plaintiff of all claims in respect of such seizure or sale. That the execution plaintiff be barred as to the said goods of Ridley and the proceeds.

As the Sheriff might I think have applied before Ridley's action was brought, he must pay the costs of action. But under the circumstances I think the parties must pay their own costs of this application.

PURCELL v. MCKEOWN.

Insolvent debtor—Weekly allowance—Seduction—Consol. Stat. 22 Vic. cap. 26, s. 11

A prisoner in execution in an action for seduction, is not entitled to weekly allowance, and if granted, upon the defendant being recommitted to close custody will be suspended.

CHAMBERS, January, 1860.

RICHARDS, J.—The learned Chief Justice of the Court of Common Pleas, having decided, in the case of *Upthegrove* v. *Winters*, in Chambers, that where a defendant is in prison in execution, under a judgment recovered for seduction, he is not entitled to the weekly allowance, or at all events is not entitled to be discharged from custody for non-payment of such allowance in the first instance, I am not prepared to differ with him on the question.

It may be open to discussion whether, under the 11th section of chapter 26 of the Consolidated Statutes, a judge has not power to recommit where the debtor, as in this case, is confined under a judgment in an action for seduction, though he may apply for his discharge for non-payment of the weekly allowance.

Looking at the facts disclosed in the affidavits filed on behalf of the mother, that the girl seduced was not more than fourteen years of age at the time of the seduction, I do not feel that the imprisonment should be merely nominal. It is true that the defendant denies the seduction, but the verdict of the jury must be considered conclusive on this point.

On the whole, on the application to recommit, I must order the defendant to be recommitted to close custody for six calendar months, to be computed from the first day of January, 1860, and then to be discharged.

The point raised in this case is precisely the same as in the one decided before the Chief Justice of the Common Pleas, to which I have referred.

The order for the payment of the weekly allowance to be suspended during the period of the six months' imprisonment ordered by me.

MCKINNON v. CAMPBELL.

Pleading—Endorsements on Promissory Note—Practice.

An endorsement on a Promissory Note before the same is signed, is considered as part of such note. If made after the signing of the note it will not be so considered, but merely as a memorandum to identify the note.

When there is a reasonable doubt as to certain pleas being good or bad, a Judge will not, on that account, disallow them, but will permit the defendant to plead them, leaving the plaintiff to meet them as he may be advised.

CHAMBERS, September 25, 1859.

This was the usual application to plead several pleas under the C. L. P. Act, and the particulars of the case sufficiently appear in the judgment.

RICHARDS, J.—The first plea is, that the note at the time it was made, and at the time of the delivery thereof to Alonzo Hinds by defendant, was drawn and made subject to a condition written thereon to the effect, that the time for the payment thereof should be extended until the said Alonzo Hinds performed or procure the performance of the condition of a certain Bond therefore made, and executed by him to the defendant, for the conveyance to the defendant by the said Alonzo Hinds, and other parties therein mentioned, of a certain Lot of land therein described; but that the said Alonzo Hinds did not perform the condition of the said bond, or procure the performance thereof; and the defendant further saith, that after the making and delivery of the said note, and before the commencement of this suit, the said note was by the said Alonzo Hinds, without the consent of the defendant, altered and changed in this, that the said condition was obliterated and erased from the said note in order to obtain for the said note currency, and to render the same unconditional, and the said alteration was not made in correction of any mistake originally made in the framing of the said note, or to further the first intention of the parties thereto or either of them.

2nd. That at the time of the delivery of the said note to Alonzo Hinds, there was written or endorsed thereon, a condition in writing to the effect that the time for the payment thereof should be extended, and the defendant should not be required to pay the same until the said Alonzo Hinds performed and procured the performance of the condition of a certain Bond theretofore made and executed by him to the defendant, for the conveyance to the defendant by the said Alonzo Hinds, and the other parties therein mentioned, of a certain Lot of land therein described, but the said Alonzo Hinds did not perform the condition of the said Bond, or procure the performance thereof—that after the making and delivery of the note to the said Alonzo Hinds, and whilst he was the holder thereof, Alonzo Hinds fraudently and without the consent of the defendent, and not in furtherance of the intention of the parties thereto, or any of them, obliterated and erased the said condition so endorsed on the said note, by pasting on the back of the said note, and over the back of the said condition, a piece of paper, in order to conceal the same, and thereby to render the said note negotiable; and the plaintiff's afterward accepted and received the said note with notice of the premises hereinbefore mentioned.

Leeds v. *Lancashire*, 2, Campbell, 205. Declaration on a joint and several promissory notes payable to order, made by defendant and others. It was proven that before defendant signed there was written on the back of the paper as follows: "The within is taken for security of all such balances as we may happen to owe Leeds & Co., (the plaintiffs,) not extending further than the within named sum of £200; but this note to be in force for six months and no money liable to be called for sooner in any case." Lord Ellenborough held this to be an agreement between the parties, and not a promissory note. He added, in the hands of a *bona fide* holder, who received it as a promissory note, it might possibly be considered as such, but the present plaintiffs can only treat it as a guarantee to the amount of £200, as to them the endorsement must be incorporated with the body of the note.

Hartley v. *Wilkinson*, 4 Campbell, 127, sustains the doctrine in *Leeds* v. *Lancashire*, and decides that an endorsement written before the note was signed, must be taken to be part of it, and that as the note was to be void on any dispute arising between Lady Wray and the plaintiff, the payment was a conditional one, and the instrument a promissory note under the Statute of Anne—this rule was upheld by the full court. *Stone* v. *Metcalfe*, 4, Campbell, 218.—An endorsement made after the note is signed, does not qualify the contract.

In *Brill* v. *Crick*, 1 M. & W. 232, the endorsement was written upon the note after it was signed, but the endorsement was not signed. It purported that the note was given upon the conditions mentioned in a memorandum of agreement annexed to the note. In argument *Stone* v. *Metcalfe*, *Hartley* v. *Wilkinson*, and *Leeds* v. *Lancashire*, were referred to, and it was admitted if it had been delivered absolutely as a promissory note, it was not competent to the parties afterwards to limit its negotiability by any endorsement upon it. It was held that it was not a note payable on a contingency, as the agreement was collateral to the note. Parke Baron said, the endorsement was never intended to alter the legal effect of the note; it was intended for the purpose of marking the note only, and to shew it was the note referred to in the agreement, and concluded thus:—"The averment of the endorsement brings it within the principle acted upon in *Stone* v. *Metcalfe*, as he has averred that the note was signed and delivered, and *then* the momorandum was endorsed upon the back of the note.

In *Bowerbank* v. *Monteiro*, 4 Taunton, 845, Gibbs J says: In *Hean* v. *Graham*, (3 Campbell, 57,) the evidence of the undertaking to provide for the Bill was rejected, merely because it was parol and could not be received to control written instruments against an *innocent indorser;* but a party may, by one writing, change or contradict another, and there is no innocent endorser here."

I have not met with any case that decides expressly that an indorsement like the present would prejudice the holder's remedy on the instrument after it had passed into the hands of a third party, and although Lord Ellenborough, in *Leeds* v. *Lancashire*, seems to intimate that, possibly in the hands of a *bona fide* holder, it might be considered a promissory note, yet in deciding on this application, I do not feel warranted in disallowing the plea, and thus shutting out the defendant from raising the point in this case, if he desires to do so. If the instrument was not a promissory note in its inception, it does not seem clear that passing it away to a third party could make it a note afterwards.

Both the pleas would be more clearly brought within the rule, that defendant wishes to apply, by averring that the endorsement was made thereon before the note was signed by defendant.

Webb v. *Spicer*—13 Q. B. 886, and in error at page 852 of the same volume; and *Salmon* v. *Webb*, 3 H. of L., Cases 510, all in fact being on the same point, go to shew that many of the agreements not to enforce the payments of notes, &c., on certain contingencies, can only be enforced as covenants not to sue, and cannot be set up in answer to an action on the notes.

On the whole, I do not feel at liberty to refuse permission to defendant to file these pleas.

It may be that it would be sufficient to plead *non fecit* to bring up the point, but if the facts stated in the plea amount only to a denial of the making of the note, pleading them in the form proposed can do no injury to the plaintiff.

Without deciding whether the pleas are good or not, I do not feel at liberty to disallow them.

Order granted.

In Re Eccles et al.

Attorney's bill—Delivery and taxation thereof—Conveyancing charges.

An attorney's bill for conveyancing, is taxable under our Provincial Statute.

The Master in taxing a bill for conveyancing, must decide as best he can, according to the contract expressed or implied between the parties.

An attorney's bill must have been delivered before it will be referred to the Master for taxation, and if not delivered, the first application should be for the delivery thereof.

Affidavits filed in support of an application for the delivery or taxation of an attorney's bill, must be intitled in some court, (the court in which it is intended to use them,) and under the Statute "In the matter of A. B."

On the 23rd July, 1859, an order was obtained by one Peachy, against H. Eccles, Q. C., and his partners, referring certain bills of costs between attorney and client in this matter, to the Master to tax.

The order was made, on the consent of the parties, to have all matters contained in an account delivered by the said Eccles to his client, (excepting one item, viz., a charge for conveying, amounting to £37 10s.) referred to the Master for taxation.

This application was made on behalf of Peachy, to have the order amended so as to include the charge for conveyancing with the other bills thereby referred.

Eccles, Q. C., objected.

1st. That the papers on which this summons was obtained, had not been filed, and that none of the papers were intitled in any Court.

2nd. That no Common Law Court has power to refer an attorney's bill for conveyancing, or which is composed in part of charges for conveyancing, to the Master for taxation.

3rd. That in this matter no bills of costs had been rendered, but merely an account containing the charges in gross in the different causes.

Richards, J.—I think the variations in our Provincial Statutes, 16 Vic., cap. 175, sec. 20, from the Imperial Statutes 6 & 7 Vic., cap. 73, sec. 57, have the effect of giving to any of the Courts or Judges therein mentioned, the power of directing a reference to taxation of an Attorney's Bill, whilst in England that power is confined to the Judges of some of the Courts, when the business done is of a peculiar character.

The Provincial Statute is equally broad with the Imperial one as to the necessity of an attorney delivering his bill "for any business done by him," before he can maintain any action for the recovery thereof.

The Statute seems to apply to "All business done by any attorney in respect of an employment in his professional character as such." I have no doubt it would extend to the items referred to in the account viz.: drawing an assignment and ordinary conveyancing, such as is usually done by professional gentlemen, when employed as attorneys.

As to the mode in which the master is to ascertain the amount to be allowed for conveyancing, the observations of Pollock, C. B., in *Smith* v. *Dimes*, 4 Ex. 32, will apply. as reported at page 41: "When the Bill is for conveyancing and business not done in Court, the master, or taxing officer, must ascertain the remuneration as well as he can, according to the contract between the parties express or implied."

When an attorney's bill is solely for conveyancing, there may be some question as to whom it is to be referred, but if any of the business charged for is done in any Court, then the Judge may refer it "to the proper officer of any of the Courts in which any of the business charged for in the bill may have been done."

The affidavit and papers in this matter are not intitled in any Court, and I think the objection on this head is fatal to the application.

The parties, however, have, I suppose, sufficiently obtained the object they have in view, by bringing the matter forward.

The application should be first made, that the attorneys deliver their bill. The affidavits to support the application should, according to the general rules of practice, be intitled in the Court in which they are intended to be used, and under the Statute they should be intitled, "in the matter of the attorney." It is recommended that the party applying should shew that he comes within the Statute, and has a right to demand a bill. After the bill is obtained, he should then make another application to tax it.

It is probable on applying to the attorneys, they will deliver their bill and consent to the taxation. If not, the party who seeks to have the bill taxed must take the steps required by law to obtain the bill and have it taxed.

I have no doubt, as I have already intimated, that under the Statute and decided cases, that charges for conveyancing, when done by an attorney, as such are taxable, and when these charges and others for business done in Court are included in an attorney's bill, they may be referred to the master to be taxed with the other charges in the bill rendered.

This Summons will be discharged, but Mr. Peachy may apply again if he find it necessary to do so.

Summons discharged.

Reported by T. C. Wallbridge, Esq., *Barrister-at-Law.*

Canniff v. Bogart.

Replevin—Verdict for part—Costs.

In an action of replevin for 900,000 feet of sawn lumber, alleged to have been wrongfully taken by the defendants, there were the following pleas: 1st. *Non cepit.* 2nd. Goods not plaintiff's. 3rd. Goods defendant's. The jury found a verdict in favor of the plaintiff, for 350,000 feet of lumber, and for defendant as to the remaining 550,000.

Held, 1st. That plaintiff having obtained a verdict which entitled him to damages, was entitled to the general costs of the cause. 2nd. That defendant having succeeded with respect to a portion of the property in dispute, was entitled to the proportion of costs occasioned by that part of the case, and to deduct them from the plaintiff's bill

(Chambers, 7th December, 1859.)

This was an action of replevin for 900,000 feet of sawn pine boards, alleged to have been wrongfully taken by the defendant.

Pleas: 1st. *Non cepit.* 2nd. Goods not plaintiff's. 3rd. Goods were defendant's.

At the trial before Draper, C. J., the plaintiff proved the same title to the whole of the property. The jury, however, divided the property in their verdict, finding 350,000 feet for the plaintiff, and 550,000 feet for the defendant. The plaintiff moved for a new trial, and his rule was discharged; and the question then arose as to who should pay the costs.

The costs were taxed by the deputy officer at Belleville, who allowed the plaintiff the general costs of the cause, and allowed the defendant so much of his bill, as was occasioned by his defence to the quantity for which the verdict was for him.

The defendant gave notice of revision of taxation, at the principal office in Toronto, under the Common Law Procedure Act, and the Master then allowed the defendant also, the general costs of

the defence, and deducted the amount from the demand of plaintiff. Against this taxation application was made in chambers.

BURNS, J.—The principle upon which the Master has proceeded, of allowing to each party, plaintiff and defendant a full bill, cannot be supported, therefore there must be a revision.

The plaintiff having obtained a verdict which entitles him to damages, is therefore entitled to the general costs of the cause.

The defendant has succeeded, not on any plea which entitles him to the judgment, for I conceive that judgment must be entered for the plaintiff, but he has succeeded with respect to a portion of the property in dispute.

In such a case, I think it would be proper for the Master to tax to the defendant the proportion of costs occasioned by that part of the case, and deduct them from the plaintiff's bill.

Had there been several pleas, and a verdict on some one way, and some another, that would be the rule in replevin. Vide 2 T. R. 235, and 5 Taunt 594. I think a similar rule should prevail on a plea being found devisably in respect of property.

THE QUEEN ON THE RELATION OF GEORGE CROZIER V. EMERSON TAYLOR.

Municipal election—Innkeeper—Disqualification—Costs.

The defendant being an Innkeeper on the eve of a municipal election, leased the Inn to a person who was formerly his bar-keeper, and notwithstanding the lease, himself and family continued to live in the Inn, occasionally attending bar as before the lease.

Held, 1st. That if the transfer of the business was in good faith, it was no valid objection. that the object of it was to enable the defendant to be legally elected to the office of Township Councillor. 2nd. That the parties to the transaction, having expressly negatived collusion or want of good faith, the boarders in the house, and those who had dealings with the defendant before the transfer, and those who were in the habit of visiting the house frequently, and had opportunities of knowing if there had been any change in the business, having expressed their belief under oath, that the defendant had nothing to do with business of the inn. that the transaction must be taken to have been *bona fide*, and defendant, therefore, entitled to his seat. 3rd. That the relator having acted in good faith in bringing forward, the matter should not be amerced in costs.

(Chambers, February 20, 1860.)

The defendant was elected on the 18th day of January last, a Councillor for Ward No. 1 of the Township of Toronto, in the county of Peel.

The objections urged to his sitting were, that before and at the time of his election, he was an Inn-keeper in the village of Springfield, in the said Township and Ward, and that he was a saloon-keeper there.

There were about 20 affidavits filed, ten on each side. Those on behalf of the relator stated, in effect, that defendant had kept a hotel for many years past, at Springfield; that one Shook had resided with him for a number of years, and for several years past had attended the bar; that defendant and his wife were also in the habit of attending at the bar at times; that Shook worked at some mechanical business in a small shop near the hotel, that the sign in front of the hotel, was "Springfield Exchange," with the name E. Taylor (the defendant), under it. That at time of the application, the sign remained unchanged. That defendant and his wife and family, still continued to reside in the building, and that defendant and his wife, both were in the habit of attending at the bar, and that to all appearance the business was conducted as it was before.

Most of the affidavits filed by the relator stated, that the deponents believe defendant still kept the tavern as before, and was equally interested in it.

In one or two of the affidavits this was not stated, and in one of them, that part of the affidavit referring to the belief of the deponent that defendant kept the house as before, was struck out.

The defendant filed his own affidavit and that of Shook, stating that defendant leased the hotel to Shook for one year from the 1st of January last, and that Shook went into possession on 31st December last. That he assigned the license to Shook on the 31st of December, having first procured the written consent to the transfer of the license, of Andrew Davidson, the only Inspector of Houses of Entertainment in the Township, pursuant to the Township By-law to that effect. That Shook was to give him $200 a year for the house, besides boarding defendant and family, and furnishing them with necessary rooms, &c.

A lease also was put in, executed by the parties, and witnessed by one Hammond, who made an affidavit as to his belief that the defendant had nothing to do with the hotel this year.

Defendant and Shook both swore to the *bona fides* of the transfer and transaction generally, and denied in the strongest terms, that defendant had any thing to do with hotel business.

There were other statements in the affidavits, showing that defendant, at the time of the application, devoted most of his time to the carrying on of the business of building fanning Mills, whereas he formerly attended mostly to the business of the hotel, and that the hotel business was attended to by Shook, that he bought the necessaries for the house and stables, and paid the servants, and, in fact, that the business was under his entire control.

One of the deponents was a miller, who supplies the house with flour. Defendant paid for the supplies to the end of the year, and then notified him that he would not be responsible for what might be delivered after, and that Shook paid for the subsequent supplies.

Other affidavits were by boarders in the house, who spoke of the change of occupancy, and paying their board to Shook instead of the defendant as formerly, all expressing their belief that defendant had nothing to do with the hotel business.

As to the defendant and his wife attending the bar since the 31st December last, it was sworn that this occurred only on one or two occasions when Shook was absent, and was a mere matter of personal convenience to him, without their having any interest in the hotel business.

Harrison, for the relator, cited section 70 of the Consolidated Statutes for Upper Canada, p. 54. declaring that no Judge of any Court of Civil Jurisdiction, &c., no Inn-keeper or Saloon-keeper, &c., shall be qualified to be a member of the Council of the Corporation. He contended, 1st. That the object of the Legislature, was to prevent the influence which inn-keepers exercise over municipal elections, from having any operation in the composition of Municipal Councils. 2nd. That the evil contemplated being evident, and the words used general, they ought to be construed to extend to all cases which come within the mischief intended to be guarded against, and which can fairly be brought within the words. 3rd. That it is not the making of a lease or transfer of a license, which makes an inn-keeper, but the actual following of that occupation. 4th. That the making of the lease by the defendant in this cause, to his own bar-keeper, a man without means, was a colorable transaction. 5th. That the fact of his sign remaining after the transfer, himself attending the bar, and his family still residing in the house, were strong facts in proof of this position. 6th. That whether the transaction were *bona fide* or not, defendant came within the meaning of the act, and ought to be excluded. On these points, Mr. Harrison referred to *McKay* v. *Brown*, 5 U. C. L. J. 91. He also asked leave to have the parties orally examined, or to have an issue directed to be tried by a jury.

A. F. Scott for the defendant, submitted, 1st. That the transfer of the license, &c., though on the eve of the election if *bona fide*, removed the disqualification. 2nd. That the transfer was *bona fide*, as proved by the affidavits of boarders, and others who had dealings at the inn. 3rd. That it was not necessary that after the transfer there should be an actual and continued change of the possession of demised premises. 4th. That if necessary, there was, in fact, an actual and continued change of possession. 5. That defendant attended the bar only on one or two occasions, and then for the personal convenience of his lessee. 6th. That defendant remaining at the inn was only as a boarder, and his being there consistent with the terms of the lease. 7th. That on the day of the election, he was not an inn-keeper within the meaning of the act, and so not disqualified to be elected a member of the Township Council.

RICHARDS J.—Looking at the affidavits on both sides, there is little doubt that defendant leased his house to Shook for the year, for the purpose of enabling himself to come forward as a candidate for municipal honors.

If the transfer of the business to Shook was in good faith, and really intended to lease the same to him, then I apprehend that it is no valid objection, that the object of the transfer was to enable the defendant to be legally elected to the office he sought.

The whole case, then, turns on the *bona fides* of the transaction.

The parties to it expressly negative any collusion or want of good faith. The boarders in the house, and those who had dealings with defendant before the transfer, and those who were in the habit of visiting the house frequently, and had opportunities of knowing if there had been a change in the business express their opinion under oath, that they believe that the defendant has not now anything to do with the business of the hotel. These persons who appear to have the best opportunities of knowing the real facts of the case, do not seem to doubt that the transaction was a real one. It has not been suggested to me, that the parties who make the affidavits are not entitled to credit; such being the case, I do not feel at liberty to decide that the defendant is an inn-keeper now, because he was one last year, though he may now be a boarder in the hotel he formerly was keeper of, and may not have removed his sign. There are facts shown, which unexplained, would raise the presumption that defendant is still the keeper of the tavern. I think the affidavits filed on behalf of the defendant, sufficiently rebut the presumption. I must therefore decide in favour of the defendant.

If the Legislature think the facility with which inn-keepers may assign their licenses and transfer their business to other parties, is likely to encourage colorable transactions for the purpose of evading the law, they can so far amend the act as to say, that no person shall be elected a Councillor, who has carried on the business of an Inn-keeper, at any time within a certain number of months before the holding of an election.

As to the question of costs, I cannot say that the relator has not acted in good faith in bringing forward this matter. What took place might, in the absence of the explanations given in the statements filed on behalf of the defendant, induce persons to suppose that the lease, if any had been given, was colorable, and that the whole transaction was a fraud upon the Statue. I am not, therefore, prepared to amerce the relator in costs. I think I shall best exercise the discretion I have as to costs, by withholding them from either party.

My judgment is in favor of the defendant, and without costs to either party.

McKay v. Mitchell, and Trust and Loan Company Garnishees.

Mortgagor and Mortgagee—Sale of mortgaged premises—Surplus to mortgagor—Order to attach—Judgments.

The surplus money arising out of the sale of mortgaged premises in the hands of the mortgagee, is a debt such as may be attached on a judgment against the mortgagor.

And although the plaintiff's judgment be subsequent to that of several others registered as against the land sold, still if plaintiff first attach the surplus of proceeds of sale, he is entitled to be paid the amount of his judgment, to the exclusion of the prior judgment creditors.

There is no priority in respect to debts due to a judgment debtor, in favor of any judgment creditor.

This was a garnishee Summons. The amount due from the garnishee was admitted. They were mortgagees of the judgment debtor, with a power of sale, and having sold under the power, a sum remained in their hands after their claim was satisfied. The mortgage deed contained a covenant on their part, to pay over any such sum to the mortgagor, his heirs, executors or assigns, but subsequent to the mortgage, there were several registered judgments against the judgment debtor.

Draper, C. J.—In my opinion, this is a debt within the meaning of the Common Law Procedure Act.

It appears, however, there were other judgments against the defendant in this cause, registered before that of the plaintiff, and therefore apparently entitled to satisfaction out of his land in priority to the plaintiff, or more properly speaking, which formed a prior lien or charge on his lands.

The garnishees' mortgage must, on the facts stated, be assumed to be the first lien or charge. The purchaser from them, is not, I presume, bound in any way to see to the application of the purchase money, and holds the land free from the subsequently registered judgments. The garnishees have notice of the judgments, and of their priority to the plaintiff. Can that affect them or prevent an order in plaintiff's favor, to pay the plaintiff?

I do not see that the garnishees paying the money in obedience to a judge's order, can, on the fact appearing, be compellable to pay it over again. The order will discharge them.

Then as to the propriety of making the order, I do not see any sufficient ground for holding that the money in the hands of the garnishees, can be treated as affected or bound by the judgment of any of the prior creditors.

The registry of the judgments, would bind nothing, at least at law, but the interest of the judgment debtor in the land. The mortgage and the power of sale were paramount to the judgments, and the surplus money is only a debt due by the garnishees, arising, it is true, out of the land, but not of the land as affected by the judgments registered.

There is no priority in respect to debts due to a judgment debtor, in favor of any judgment creditor, nor is there any machinery provided for bringing other judgment creditors before the Court, when any one of them appear for or obtains the usual attaching order.

As far as I can see, the judgment creditor who gets the first attaching order, will gain in priority over other judgment creditors to be satisfied out of the debts attached, due to the judgment debtor. Such was the effect of an absconding debtor law as at first passed, and such is the consequence of getting the first execution against goods, into the sheriff's hands.

Griggs v. Firley.

Equitable Plea—Setting aside.

If, on the state of facts presented by an equitable plea, it appears that the restraining of the action would not do complete justice between the parties, but that something more might be necessary to ascertain which, enquiries taking of accounts, &c., would be requisite, the plea will be set aside.

In an action on a covenant for the payment of money, the plea for defence on equitable grounds, was as follows:—The defendant, by A. B., his attorney, says, that shortly before the making of the covenant in the declaration mentioned, the plaintiff had agreed to sell to the defendant, and to assign and transfer to the defendant, a certain term, estate and interest of the plaintiff in a certain furniture store, and the goods, chattels and stock in trade therein, and the said covenant was so made to secure to the plaintiff $2,000 as part of the consideration money for the purchase by the defendant of the plaintiff, of the said term and stock in trade, but the plaintiff, after the making of the said covenant, and after having delivered to the defendant possession of the said furniture store, goods, chattels and stock in trade refused to complete the said sale and purchase, and to assign, or procure to be assigned to the defendant, the said term, estate and interest, and afterwards entered into possession of the said store, and dispossessed the defendant of the same, and of the said furniture, goods, chattels, and stock in trade, and hath since remained in possession thereof, and kept the defendant so dispossessed, and the consideration for the making of the said covenant hath wholly failed.

Plaintiff obtained a summons calling upon the defendant to shew cause why this plea should not be set aside, and the plaintiff allowed to sign judgment, or why the plaintiff should not have leave to reply, and demur to the plea on the grounds that the plea is inapplicable as an equitable defence to a declaration in a Court of Law, because the plea and the decree of the Court upon it would not complete all the equities arising out of the matters referred to in the plea, as it would be necessary to do complete justice between the parties, that plaintiff should be ordered to complete the purchase, by making him assign the term, and accounts would have to be taken, which the process of a Court of Common Law cannot direct or enforce.

H. B. Morphy for the plaintiff, and *A. Prince* for defendant.

The following authorities were cited in the argument: Har. C. C. P. A., 468, *Wood* v. *The Copper Miner's Company*, 17, C. B., 561; *Drew* v. *Harvey*, 17, C. B., 257; *Burgoyne* v. *Cotterel*, 24, L. J. Q. B. 28; *Miner's Royal Society* v. *Magnay*, 10 Ex., 489; *Steele* v. *Huddock*, 10 Ex., 643, *Woodhouse* v. *Farebrother*, 5, E. & B. 277.

Draper, C. J.—I do not wish to be understood as denying that this may not be a good plea in equity against the plaintiff's claim to enforce this covenant. But I think that I should not allow it to stand, because even if true, it does not shew that both parties are restored to the same position as if there had never been any agreement.

There has been a change of possession, both of the realty and of the personalty; there may have been sales, payments of rents, in short such a dealing with the subject matter of the contract as to require something more to be done than to restrain the action on the covenant, which alone might not do perfect justice between the parties, and to ascertain how this is, an enquiry, or taking of accounts, is necessary. For any such purpose, a Court of Law has not the fitting machinary, and I think, therefore, the plea should be disallowed, and the defendant left to his remedy in the Court of Chancery. The only judgment a Court of Law could give for the defendant, would be that he should go without day, &c., and that might do very incomplete justice.

Mearns v. Grand Trunk Railway Company.
Mearns and Spence v. Grand Trunk Railway Company.
Spence v. Grand Trunk Railway Company.

A claim for interest on a demand for specific goods and chattels sold, indorsed on a writ of summons is good, and cannot be disputed after judgment signed in default of appearance, but if a claim for interest is endorsed, in order to gain an improper advantage and judgment be signed for a larger amount than a plaintiff is really entitled to, such judgment will be set aside.

A judge in Chambers has power to set aside a final judgment on the merits under the C. L. P. Act.

In these cases applications were made on 22nd December, 1859, by *Jackson*, on behalf of the defendants, and summonses granted by Mr. Justice Hagarty, calling on the plaintiffs to shew cause why the final judgment signed in default of appearance, and the *fi. fas.* issued thereon, and all proceedings subsequent thereto, should not be set aside on the following grounds:

1st. That said judgments were signed on specially indorsed writs and the indorsements were not such as would warrant the signing of *final* judgment.

2nd. That the judgments were improperly signed for interest.

3rd. That nothing was due from the defendants (in the joint suit) to the plaintiffs jointly.

4th. On grounds of merits, or why the *fieri facias* should not be set aside on grounds aforesaid, and that the judgments on which they issued had been paid or satisfied prior to issuing said *fi. fa.* Or why the amounts indorsed on said *fi. fas.* should not be reduced with costs, on the grounds that said *fi. fas.* are indorsed for more than is due and include 25*s.* for certificate of judgment and on grounds disclosed in affidavits filed.

The special indorsement on the writs was as follows: "amount due for wood sold and delivered," stating the sum claimed which was different in each case. The affidavits and papers filed by the defendants covered some 200 folios but the material facts of the cases appear in the judgment delivered below.

S. J. Vankoughnet shewed cause, contending in the first place that the applications were too late, the judgments having been signed in March, 1858, and 21 months having elapsed before any steps was taken to set them aside. He referred to new rules of Court No. 106, *Farher* v. *French*, 5 L. & M. 658, *Brooks* v. *Hodgson*, 7 M. & G. 520, *Bate* v. *Lawrence*, *Ib.* 405. He contended that such an application could not be made after execution executed unless the applicant had no notice until then of the judgment which was not pretended in the present cases. Archbold's Practice 10th Ed. p. 943. Then again the irregularity if any had been waived by the action of the defendants, the attempt to enter an appearance, and the payments made after judgment signed. *Fox* v. *Meney*, 1 B. & P. 250, *Steels* v. *Morgan*, 8 D. & R. 456.

As to the first ground taken in the summonses he contended that under the 41st section C. L. P. A, 1856, looking at the different clauses of that section and especially the latter part authorising the indorsement of particulars of claim in the form contained in Schedule A. No. 5, in which examples were given quite as unliquidated as in the cases under consideration, that in these cases the indorsement on the writs was quite sufficient to warrant the signing of final judgment and that the judgments ought not to be disturbed on that ground. As to the 2nd ground, he contended that the Court would not after judgment signed persume the claim for interest improperly made. The defendants should have appeared to the writs, by their non-appearance they had admitted the propriety of the claim, *Rodway* v. *Lucas*, 10 Ex. 667.

As to the 3rd ground, that only applied to one of the actions, and even if maintainable in that which was not clear, could not affect the other cases. The last ground was on the merits. Was there jurisdiction in a case of this kind? There seemed an absence of authority on the point, but it appeared doubtful whether the 60th section C. L. P. A., 1856, applied in such a case.

As to the setting aside the executions, that would depend on the fate of the judgments; if the judgments were successfully assailed, then the executions must fall with them; if not, then they must stand.

Jackson supported the applications, referring to the affidavits generally and contending that they ought to be made absolute in the terms moved.

Draper, C. J. C. P.—After carefully reading over the case of *Rodway* v. *Lucas* 10 Ex. 667, cited by Mr. Vankoughnet, it appears to me as the result that a plaintiff may claim interest on a demand for specific goods and chattels sold and that if the defendant means to dispute the claim he must appear to the writ.

If the endorsement is made on the writ for interest in order to gain an improper advantage, and judgment be signed for a larger amount than the plaintiff is really entitled to, such judgment will be set aside.

In the case of *Mearns* v. *The Grand Trunk Company* and *Spence* v. *The Grand Trunk Company*, I do not find in the affidavits filed for the defendant sufficient reason for concluding that the interest was claimed in order to gain an "improper advantage" except in one respect. It was very fairly admitted by Mr. Jackson, that on a writ specially indorsed for goods sold and delivered it is the general practice to indorse a claim for interest also, but he says that interest was claimed from August, 1857, and that the affidavits shewed clearly the claim could not have existed *then*, and that the accounts the correctness of which Mr. Armour, at least *prima facie* admits by signing the receipts at the foot of them, shew that the Plaintiffs demands accrued as follows: Mearns' first claim for £318 2s. 6d. on 30th September, 1859, and his second claim for £15 15s. on the 31st October, 1857, and Spence's claim for £108 10s. on 31st August, 1857, while the writs were endorsed for interest from 1st August, 1857.

But though the writs were served on 16th March, 1858, no appearances were ever entered, and this arose, it is suggested rather than sworn by their being sent too late to be filed. This fact ought to have been known to defendant's attorney, if he took proper care, for it is to be presumed he employed an agent to file them. Mr. Bell's letter 20th March, 1858, refers to the receipt of the writs, at least I can put no other interpretation on it, and therefore, Mr. Bell knew the actions were commenced—meant to appear—but by some accident not set forth, omitted to do so, and paid the bare principal of the debt on the 6th or 7th of April—a week at least after judgment had been signed.

Under these circumstances plaintiff in strictness is entitled to his costs unless the arrangement stated in Mr. Shanley's affidavit, affords an answer.

As to this, I do not entertain the slightest doubt but that Mr. Shanley, both intended and believed the free pass given by him should be and was accepted as a compensation for all claims which Mr. Armour, was then setting up. But Mr. Armour's affidavit unequivocally denies that such was his understanding or intent, and I am in one particular inclined to agree with him. For interest and for costs in suits, he had a legal means of asserting the claim as a right appertaining to the plaintiffs in the action. If the suits had been unsuccessfully defended, he would certainly have recovered one if not both. But his individual claims as the assignee of the debts for journeys, in trying to get a settlement and the loss or inconvenience resulting from delay he had no legal remedy and he may have had these only in his name when Mr. Shanley would draw no such distinction, and would materially conclude *all* Mr. Armour's claims were compensated by the free pass. At all events, Mr. Armour's affidavit denies Mr. Shanley's conclusion and this denial prevents any action on the latter as an established fact.

In these two cases therefore, I think the judgments and writs cannot be set aside. But the defendants claim to have the amount of interest endorsed upon the executions reduced as the interest is calculated for too long a period.

I should not have felt inclined to interfere at all for so trifling an amount but for a consideration to which I shall presently advert.

There is a third action, of *Mearns & Spence* v. *The Grand Trunk Railway Company*. In this the summons was endorsed for £147 17s. 6d., and interest from the 1st August, 1857. The summons in Mearns's suit was endorsed for £333 17s. 6d., and that in Spence's suit for £147,—together, £480 17s. 6d. Mr. Armour received, as the full amount of principal on Mearns's suit, £333 17s. 6d., and in Spence's $108 10c., the latter being £38 10s. more than the special endorsement claimed. The aggregate of debt which Mearns & Spence had a right to was £441 7s. 6d. It was sworn on the part of the defendants that there was no debt due to them jointly, and Mr. Armour does not deny this, but receives in full of both the debts due, a sum less than that claimed in the two separate suits.

There seems therefore to have been no foundation whatever for the third suit. These facts exclude all idea of it, and Mr. Armour offers no explanation. In this case judgment has been signed for £153 15s., and costs £5 15s. 2d., and the writ is endorsed for 9s. 11d. balance of damages as well as costs.

The joint plaintiffs had no claim, and this Mr. Armour must have known when he received payment if not before. In the absence of any explanation from him, and when the affidavits on the defendant's side so pointedly call his attention to the matter, I cannot avoid the conclusion that he knew he had no evidence to sustain this action, and that his issuing a *fi. fa.*, founded on a judgment which he knew was not founded on any just claim, shows that he made the special endorsement in order to obtain an improper advantage, and that he signed judgment for a sum to which he had no title.

I think, therefore, the judgment should be set aside with costs. The only hesitation I feel is as to the authority of a judge at chambers to set aside a final judgment on the merits; but the 60th section of the Common Law Procedure Act of 1856, favors the view that there is such authority, and certainly there could be no fitter case for its exercise.

As to the other suits, I think the charge on each of £1 5s. for certificate of judgment should not be allowed. Mr. Armour has not attempted to show that such a certificate was taken out or filed. I cannot make out that the sums endorsed on the executions for balance of damages—in other words, interest—go back in computation as far as 1st August, 1857. The amounts fall far short of the interest at the rate of six per cent., computed from the time that the defendants' accounts show the debt became due.

I have felt some doubts as to the question of the costs of the *fi. fas*, and indeed of the suits. It certainly seems that the actions might have been successfully defended, and but for Mr. Shanley's interference the plaintiffs would not have recovered anything. Such, I say, is the apparent conclusion from what is shewn.

But when Mr. Bell paid the debt, he knew the actions were pending, and that the plaintiffs claimed interest as well as principal, and he ought to have known that his appearances were not entered—and that judgment was signed; for that was the only ground on which the appearance could be too late. But he pays the money unconditionally, and as I cannot for reasons already given, act upon Mr. Shanley's statement, though I have no doubt as to the truth of his representation, Mr. Bell should not have left the question open.

It is certainly a very ungracious return for the active interference of the defendant's officers to whose exertions Mr. Armour apparently owes the recovery of a large amount of money, that he should take advantage of the legal right to enforce costs when if their suits had been defended the defendants might probably have recovered them. But I cannot say his proceedings are made out to be irregular or in bad faith. The only objection is to the amount endorsed on the *fi. fa.* This should be reduced by the sums charged for certificate. I do not see my way clear to any further reduction and in these two cases I shall give no costs.

Swift v. Jones.

Seduction—Arrest—Setting aside—Affidavits.

There must always be great reluctance to set aside the order of a county judge directing the issue of bailable process, when there are reasonable grounds from which he might draw the conclusion that the defendant was about to leave the Province of Canada.

Semble:

1. It is not necessary for the copy of the writ of capias served to show the debt on which the order authorizing the issue of the capias issued.
2. It is not necessary that the writ should show the *name* of the county judge who made the order.
3. An affidavit showing facts and circumstances sufficient to satisfy the judge that the defendant, unless apprehended, is forthwith about to leave, will be sufficient, though it is only sworn that defendant is about to leave Upper Canada.
4. If any of the foregoing were held to be irregularities, amendments might be allowed.

Held, that where the order for bailable process was made upon two affidavits, one of which was intitled in the Queen's Bench, and the other not intitled in any court, and the process afterwards issued from the Common Pleas, that the affidavits were irregular, and the arrest was set aside, with costs.

March 5, 1860.

This was a summons to show cause why the order of the judge of the County Court of the county of Brant, the writ of capias issued in this cause, the copy and service thereof, and the arrest of the defendant Jones on the said writ, should not be set aside, with costs, on the following grounds: 1. That the two affidavits on which the order was made, do not show any ground for arresting the defendant, it not being therein sworn or stated that the defendant was about to leave Canada. 2. That the writ was issued out of the Court of Common Pleas, and one of the affidavits on which it was issued was intitled in the Court of Queen's Bench, and the other not intitled in any court. 3 That the order of the learned Judge of the County Court does not show at whose suit the defendant should be arrested; or, 4. Why the arrest of the defendant on the writ of capias should not be set aside, and the bail bond given to the sheriff of Brant be given up to be cancelled, on the grounds already stated; also on the ground that there is no endorsement on the copy of the writ of capias served, of the amount for which bail was to be taken. 5. Because there was no date in the said copy of writ, as to when the order issued. 6. Because the writ does not state the name of the judge of the county court making the said order. 7. Because there was no sufficient cause stated in the affidavit, to warrant the belief that the defendant was about to leave Canada. 8. Because the affidavit only stated that the defendant was going to leave *Upper* Canada.

Harrison showed cause, and contended, 1. That the granting of the order to hold the bail, was a matter in the discretion of the county judge; and as he in the exercise of that discretion, granted the order on the affidavits produced to him, the exercise of his discretion cannot be reviewed either as to the grounds of making the order, or the form and title of affidavits (Eng. Stat. 1 & 2 Vic. cap. 110, sec. 3; Consol. Stat. U.C. cap. 24, sec. 5, p. 277; *Hargreaves* v. *Hayes*, 5 El. & B. 272; *Terry* v. *Comstock*, M.S. Chambers, Draper, C. J.). 2. That although the deponent stated his belief that the defendant was immediately about to leave Upper Canada, yet he stated facts to show that he (defendant) "has no ties which particularly bind him to the Province of Canada, and is so situate that he can leave without inconvenience at any moment;" and also that the defendant had failed to meet him in relation to the matter, as he had promised; and that the judge might well infer from this his intention to leave Canada as well as Upper Canada (*McInnis* v. *Macklin*, 6 U. C. Law J. 14). 3. That the affidavits on which a capias issues need not be intitled in any court, as the statute is only directory, not imperative (Consol. Stat. U.C. sec. 6, p. 278; *Ib.* p. 7). 4. That affidavits might be read without being intitled in any court, if sworn before an officer of the court in which read. (*Perse* v. *Browning*, 1 M. & W. 361; *White* v. *Irving*, 5 Dowl. P.C. 261; *In re Fraser*, 10 U.C. Q.B. 286; Consol. Stat. U.C. cap. 89, ss. 3, 8, 9, p. 434.) 5. That an affidavit intitled in the wrong court is not a nullity (*Saunderson* v. *Cummings*, R. & H. Dig. Arrest, I. 24). 6. That although there was no endorsement on the back of the writ of the amount for which bail was to be taken, yet such endorsement was on the face of the writ, and thereupon substantially complies with the form given in the statutes (Consol. Stat. U.C. cap. 22, sec. 3, p. 186, and Forms on pp. 260, 261, 262; *Chamberlain et al.* v. *Woodell*, 1 U. C. Prac. Rep. 195; 1 Chit. Archd. 713). 7. That it is not necessary to show the date of the

order on which the writ was issued on the copy of the writ served; that the original order was dated, and that was sufficient. 8. That there is nothing which requires the name of the county judge who made the order to be stated in or on the writ; that it was stated on and in the margin of the writ, "Bail for £50, by order of the judge of the County Court of Brant." 9. That the 7th and 8th objections had been already referred to by him. 10. That this being an action for seduction, and the defendant having admitted his guilt, is not entitled to much consideration from the court.

Benson, contra, argued: 1. That the discretion of the county judge was a legal one, to be exercised in a rational manner, and subject to review. 2. That he might well assume, on these affidavits, that the defendant was only going to *Lower* Canada; and if so, the plaintiff could not properly cause him to be arrested. 3. That the irregularity as to the affidavit could not be got over; that although by the Consolidated Statutes of Upper Canada, chapter 24, section 6, it is not necessary that an affidavit to hold to bail should at the time of the making be intitled of or in any court, but the style and title of the court out of which the process issues may be added at the time of issuing out the process, and such style and title, when so added, shall be for all the purposes and in all proceedings whether civil or criminal, taken and adjudged to have been part of the affidavit *ab initio*, that this enactment clearly contemplates the title of the court is to be added when the writ is sued out, and omitting to add it is an irregularity for which the arrest should at all events be set aside. 4. That even admitting an affidavit not intitled in any court might be read, yet in this cause the affidavit that was intitled, was intitled in the *wrong* court, and the other not intitled in any court. The affidavit was intitled in the Court of Queen's Bench, whilst the writ was issued out of the Court of Common Pleas. That the case of *Sanderson* v. *Cummings*, referred to, merely decided that an affidavit intitled in one court and used in another was not a nullity, but the note of the case states that it is an irregularity. 5. That to the form of the writ in appendix to the Common Law Procedure Act, under the head of "Indorsement on the writ before the service thereof," among other things was the following: "Bail for $——, by order of —— (naming the judge who makes the order)." And by Consolidated Statutes, chapter 22, section 28, that every writ of capias, with every memorandum or notice subscribed thereto, *and all indorsements thereon*, shall be delivered with the original writ to the sheriff, who is to serve it on the defendant. That this implies that the name of the judge who made the order, and not his name of office, is to be endorsed *on* the writ. That the proper notice was endorsed on the writ in this cause, except that the name of the judge is not given; but no copy of the notice was on the copy of the writ served on the defendant, and thus it was irregular on both grounds. He considered, however, that the objection to the title to the affidavits was the strong ground of his application.

RICHARDS, J.—The case cited from 5 E. & B. seems to me to be a strong one in favor of the plaintiff, and there would always be great reluctance to set aside the order of a judge directing the arrest when there are strong grounds from which he might draw the conclusion that the defendant was about to leave the Province of Canada. At all events I am not prepared, even if I had the authority so to do, to set aside the arrest on the ground that the learned judge of the county court ought not to have ordered it, from the insufficiency of the affidavits placed before him. I think the other formal grounds of objection, from the fifth to the eighth inclusive, ought not to prevail; at all events I should not hesitate to amend the irregularities complained of. The third objection is without foundation; the fourth seems to me to be the most formidable.

I have looked at the cases cited, and many others. They doubtless go to show that the courts have permitted affidavits to be read when sworn before the proper officer of the court, though not intitled in the court. The modern cases do not go to the length of deciding that when intitled in a wrong court, they are not irregular. The case referred to in 16 M. & W. merely decides that when the affidavit is sworn before an officer of both courts, it might afterwards be used in either court. Baron Park says that "the affidavit might be taken before him (a commissioner of common pleas and exchequer), to be intitled and used in either the common pleas or the exchequer, as the case might require."

In the case from 5 E. & B., Lord Campbell says: "If, indeed, there had been a cause in court, and the affidavit had omitted to name it, that would be bad, because no perjury could then be assigned on the affidavit; but where there is no cause, the names are mere surplusage, *and you have the name of the court.*"

One of the affidavits here is intitled in the Court of Queen's Bench, and the other is not intitled at all. It may be argued that the affidavit might now be intitled, which has a blank for that purpose; but that would not get over the difficulty as to the other, and *both* affidavits are necessary to justify the arrest.

I have seen no case which goes so far as to decide that a plaintiff is not guilty of an irregularity when he intitles his affidavit in one court and uses it in another. The general doctrine with regard to affidavits is this, and laid down in Lush's Practice, at page 762: "The formal parts of an affidavit which require notice are, first, the title, &c. The title consists of two parts, viz., the style of the court and the names of the parties to the action or proceeding. If either be improperly omitted, the affidavit will not be heard, though the opposite party consent to waive the objection."

It is true, as I have already stated, that affidavits of debt have been permitted to be used, when sworn to before the proper officer, in England, though not intitled in the court; but I think, independently of the question of irregularity in using the affidavit intitled in one court for the purpose of issuing a bailable process out of another, that our statute was intended to provide expressly for the mode in which affidavits to hold to bail were to be sworn and intitled, when used in either of the courts. The plaintiff not having followed that course is, I think, clearly irregular in his proceeding. He can gain no support from the argument that the affidavits, when produced before the judge, were in their present state or not intitled at all, for the statute contemplates that they are to be intitled when used, and the judge undoubtedly supposed the plaintiff would have them properly intitled when issuing his capias. On the whole I feel bound to give effect to the objection to the affidavits, so far as to order the arrest to be set aside, and the bail bond to be given up to be cancelled, on the defendant's entering an appearance to the action.

The order will go, with costs.

CHANCERY.

(Reported by THOMAS HODGINS, Esq., LL.B., Barrister-at-Law.)

ALLAN v. MCDOUGALL.

Costs—Mortgagor and Mortgagee—Redemption.

A mortgagee is always entitled to his costs; and therefore when a subsequent mortgagee who has filed a bill to foreclose, offers to consolidate his suit in that of the prior mortgagee who has filed a bill after him, he will be allowed his prior costs in such suit.

In this case, three mortgagees had filed separate bills in the following order—the second mortgagee filed his bill first; then the third mortgagee, and then the first mortgagee. Decrees had been made in favor of the second and third, and now the bill of the first mortgage came on by way of motion for a decree.

Freeland for the plaintiff, asked for the usual decree for enquiries and for foreclosure.

Hodgins for the second mortgagee, had no objection, and consented to consolidate his suit with that of the plaintiff, provided his client would be allowed the costs already incurred; and cited *Loftus* v. *Swift*, (2 S. & L. 642) *White* v. *Bishop of Peterborough*, (Jac. 402) *Brace* v. *Duchess of Marlborough*, (Mos. 50) *Detillen* v. *Gale*, (7 Ves. 583) *Lee* v. *Lockhart*, (10 Beav. 328) *Barlow* v. *Gains*, (28 Beav. 244).

Freeland, in reply, contended that the second mortgagee could not obtain such a relief in the present decree.

ESTEN, V. C.—This is a case in which three mortgagees have filed bills of foreclosure or sale, the plaintiff being first mortgagee. The second mortgagee has obtained a decree against the mortgagor and the third mortgagee. The third mortgagee has also filed his bill against the mortgagor and second mortgagee, praying a sale, subject to the first mortgage. The second mortgagee, being a party to the present suit, undertakes to discontinue his, and asks

to be allowed in this decree, the costs already incurred. We think he should have them, on a redemption in this suit, by either the third mortgagee or the mortgagor; and the third mortgagee cannot redeem the estate in either suit, without paying the second mortgagee his costs in both suits, nor, of course, could the mortgagor. It would be advisable that the third mortgagee should be a party to this arrangement, as he is, of course, entitled to the same benefit.

WORTHINGTON v. ELIOT.
ELIOT v. WORTHINGTON.

Mortgage—Trust and Trustee—Evidence—Cross suit.

A party procurred a release of a mortgage from a mortgagee in order that a mortgage might be made to another party by way of trust to raise money. The trust was never carried out, the party for whose benefit it was intended having died. His executors then filed a bill to foreclose; and thereupon the mortgagor filed a bill on the ground that the trust having failed, the mortgage should be delivered up to be cancelled.

Held, that he was entitled to the relief.

The bill on the first suit was filed for the foreclosure of a mortgage made by the defendant Eliot, to one Davidson, deceased, for $10,000. The defence to that bill and the foundation of the bill in the second suit, was that this mortgage was made to Davidson, at the request of the defendant Eliot, in order that the former might negociate it and hand over the proceeds of it to the latter, for the purpose of distribution among the accommodation endorsers of one Berryman. To this it was answered that although the arrangement might be so between the parties yet,—*first*, it was made in pursuance of a prior engagement between Berryman and Davidson, that the property should be mortgaged to secure an endorsement to Davidson; and *secondly* that at any rate Davidson being one of the *cestui que trusts* interested in the trust funds was entitled to retain the moneys after negotiations in respect of his own liability.

The evidence failed to show any knowledge on the part of Eliot of the alleged agreement between Berryman and Davidson.

ESTEN, V. C., delivered the judgment of the Court.

I think the bill of foreclosure should be dismissed with costs, and the mortgage delivered up to be cancelled. I think that the cross relief could have been obtained in the foreclosure suit, and therefore, if the foreclosure bill was filed first, I think the decree in the cross suit should be without costs, as it was unnecessary; but if Eliot's bill was filed first, he is entitled to his costs in that suit also. Miller's evidence may be finally excluded from consideration, because, among other reasons, he does not pretend to be personally cognizant of the facts. Dunn's evidence is, I think, inadmissible. The agreement he proves, would, if valid, entitle him to a large part of the £2,500, sought to be recovered in this suit. Holden's evidence, however, is equally free from objection and suspicion, and I think it is clearly proved by his evidence, that an agreement such as he mentions, was made between Berryman, Davidson, and Dunn. It does not appear, however, that so much of it as concerned the intended mortgage to Davidson, was ever made known to either Eliot or Jones. It seems that Berryman was to procure the mortgage from Jones to Davidson and Dunn, and Davidson relied upon him for that purpose, and acting in good faith, he should have communicated the understanding to Jones. I conclude that he did not, but having procured the release from Dunn, that he afterwards procured the creation of the trust from Jones. To execute a mortgage to Davidson for the purpose of sale, and to pay Dunn, would not have been according to the trust, and to indemnify Davidson against Dunn's claim, although not perhaps at variance with the trust, is not a probable fact; for Jones and Eliot were both endorsers for Berryman, and Eliot would naturally protect himself and Jones, in the first instance. I conclude, therefore, that the mortgage was not to Davidson, in pursuance of the agreement between Dunn, Berryman, and Davidson. It is agreed on all hands, however, that it was made for the purpose of sale, and the only question is, what disposition was to be made of the money to be thus produced? It necessarily follows, that it was to be paid to Eliot for distribution according to the trust, and that Davidson held the mortgage as a mere agent; that Eliot could have recalled it at any time; and that Davidson not having succeeded in executing his trust, the mortgage must be delivered up, and the foreclosure suit is utterly inadmissible. With this view, all the conduct, and expressions, and letters of Davidson agree. I do not think either Dunn's or Jones' evidence is admissible, but Water's I think is, and at all events Claney's. When Davidson found that the agreement with Dunn had not been carried into effect, he seems to have received the mortgage from Eliot, on the full understanding that he was merely to negotiate it, and pay the proceeds to Eliot, he was, in fact, a mere agent, and I think so understood himself to be. My view is, that Dunn having incautiously released his mortgage before the new one was made, and Berryman having procured the creation of the trust, without communicating the whole of his engagement with Dunn, and the trust having been created, and the mortgage executed *bona fide*, by Jones and Eliot, and Davidson having received the mortgage on the understanding that has been mentioned, of course foreclosure is out of the question, and, the purpose having failed, the mortgage must be delivered up, and all parties will stand in the same position as if the mortgage had never been made. The trust will remain in the same plight, as if the abortive attempt that has been made to carry it into execution, had not been made. Whether if Dunn released his mortgage, and Davidson assumed his debt, on the condition that it was to be collaterally secured by another mortgage; that agreement not having been carried into execution, Dunn or Davidson's representatives have any right to impeach the trust, is another question, upon which I express no opinion, and which must be settled, if at all, in another suit; but this mortgage having been made under this trust, and for the purpose that has been mentioned, must, in the event that has happened, be delivered up.

Subsequently the question of costs was spoken to, when ESTEN, V. C., decided that although Eliot's bill had not been filed until after the other, in which the full relief could have been obtained, yet since the plaintiffs in the first suit might at any time have disappointed Eliot by dismissing their bill, he was justified in filing his own, and should receive the costs of the suit.

SUPREME COURT OF ILLINOIS.

Railroads—Common Carriers.

THE CHICAGO AND AURORA RAILROAD COMPANY, Appellant, v. JAMES THOMPSON, Appellee.

Railroad Companies are common carriers, although their charters do not, in so many words provide that they shall be.

Bank bills are not, in common parlance, included in the phrase, "goods and chattels," when used in connection with insurance companies and transportation by land or water.

Alleging and proving that a railroad company is a common carrier of "goods freight, etc.," does not establish it to be a common carrier of bank bills.

Authority to receive goods and freight does not imply power to receive bank bills at the ordinary tariff for the risk.

If common carriers are to be held as insurers, they must be treated with good faith and concealment, artifice, or suppression of truth, would equally relieve the insurer and common carrier from liability.

Common carriers are not liable for the loss of money packed among other goods in a box in such a way as to deceive and mislead them. If to be held liable, they should be told of the contents.

Where a party examines a wi ness as to a converration, the opposing party can only examine the witness upon the conversation about the same suject-matter; but not about a conversation upon a different subject, not related to the primary conversation.

BREESE, J.—This was an action on the case, brought to the November term, 1854, of the Kane Circuit Court. The declaration contains two counts essentially alike. The first count alleges, that on the 19th of January, 1854, the defendant was, and now is, a common carrier of goods and chattels for hire, from Aurora in the county of Kane, to Earlville, in the county of La Salle; that on that day, at Aurora, the plaintiff delivered to the defendant, and the defendant received a certain box containing goods and chattels, to wit: one new suit of broadcloth clothes, one small trunk, three fine shirts, three pairs of woolen stockings, seven hundred and fifty dollars in bank bills, fifty dollars in silver money, and one rifle, at the value of one thousand dollars, the property of the plaintiff, to be carried from Aurora to Earlville, and at Earlville to be delivered for the said James Thompson, for certain reasonable reward in that behalf; that the defendant disregarded his promise, and did not carry the box from Aurora to Earlville, nor there safely and securely deliver it for the plaintiff, and that

through the carelessness of the defendant the box was broken open and its contents lost to the plaintiff.

The second count alleges that they agreed to deliver it in a reasonable time.

The general issue was pleaded and tried by the court by consent and verdict and judgment for the plaintiff, and appeal prayed and allowed to the defendant. The evidence is all preserved in the record, and it is assigned here for error: permitting Lester Harding, a witness for the defendant, to answer this question, put to him by the plaintiff: "What did he (plaintiff) tell you when he paid you the three hundred dollars?" in deciding that the plaintiff was entitled to recover for the money contained in the box mentioned in the declaration; in deciding that the plaintiff was entitled to judgment therein, without alleging or proving that the defendant was a common carrier of bank bills: and in giving judgment for the plaintiff without such proof.

The appellee contends that the first error is not well assigned, for the reason that the appellant had called out a part of the conversation with Harding, and therefore the whole must come out. As a general principle this is true, but it must be confined to conversation as to the subject-matter about which his conversation had been called out, not a different subject, having no connection with it, or relation to it. But the record does not show that appellant had called out any conversation of appellee with Harding. Harding stated simply that he lived at Paw Paw Grove; knew the plaintiff since 1853; he bought land of me; paid me $200 Dec. 31, 1853, and $300 March 13, 1854, also at the same time, $105, for a yoke of cattle. These were all acts done. The question then, "What did he, the plaintiff, tell you when he paid you the three hundred dollars?" was inadmissible. It put it in his power to strengthen his case very much by the reply he might make to it. Whether he did so or not, is not material—on principle the question was improper.

But this is a very small matter in this case, involving, as it does, one of the most important questions we have been called on to consider.

The declaration alleges that the defendant, when the box was delivered to him, was "a common carrier of goods and chattels for hire," and plaintiff's counsel contends that being such, he is liable for the value of the box and its contents.

The appellant denies that he is a common carrier, that the charter of the company does not make him so for any purpose, much less of bank bills, and there being no express contract, and the charter of the company not making the company a common carrier of bank bills, whether it was such or not, was a fact to be alleged and proved.

We suppose it is not necessary the charter should provide, in so many words, that the railroad companies created by them shall be common carriers.

The authorities are numerous to the point that such companies, using cars for the purpose of carrying goods for all persons indifferently, for hire, and whose custom and uniform practice is to do so, are common carriers and liable as such. There can be no doubt on this point. There needs no Legislative declaration to make them such; they are so in virtue of their uniform business. As was well said by the Court in *Thomas* v. *Boston and Providence Railroad Company*, 10 Metcalf R. 475, they advertise for freight, they make known the terms of carriage, they provide suitable vehicles, and select convenient places for receiving and delivering goods, and as a legal consequence of such acts, they have become common carriers of merchandise, and are subject to the provisions of the common law, which are applicable to carriers.

Their character or vocation as common carriers of goods and freight, and passengers is sufficiently shown by the testimony of Mr. Allen, who shipped the box from Aurora for Earlville. He says, in January, 1854, he was in the warehouse business at Aurora; knows that defendant has a railroad for carrying freight and passengers between Earlville and Aurora, and was then a common carrier of "goods, freight etc., for hire."

Now, the question is, are these terms equivalent to the term "goods" and chattels," as used in the declaration, and do they reasonably include bank bills?

The term "goods and chattels" includes choses in action. 1 Atkins, 182. The term "chattels" is more comprehensive than the term "goods," and will include animate as well as inanimate property, slaves, horses, cattle, etc., being chattels, but "goods," will, not be included, as that term is understood.

Every moveable thing which can be weighed, measured or counted, is included under the general term "chattels," which, Lord Coke says, is a French word, signifying goods.

Blackstone says the term is, in truth, derived from the technical Latin word *catalla*, which primarily signified only beasts of the husbandry, or as we still call them, *cattle;* but, in its secondary sense was applied to all moveables in general. 2 Com. 385.

We may remark here, that in the English statute of limitations (21 James I, chap. 5) this phraseology is used, as regards the action of replevin: "goods and *cattle*," and not as in our modern statutes, "goods and *chattels*."

Chattels personal are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. 2 Blackstone's Com. 387.

Money is a chattel, and as a chattel, according to Lord Coke, signifies goods; money is goods, and not only that, but goods and chattels. Choses in action are goods and chattels: bank bills are goods and chattels, and must be comprehended under the word "goods," as used in the phrase of the witness, "goods," "freight," etc.

This being true as a general proposition, that the term "goods and chattels" would include bank bills under certain circumstances, does it follow that, at all times, for all purposes, and under all conditions bank bills must be regarded as goods and chattels merely?—In practical life, among business men, in many commercial transactions, bank bills, though having no intrinsic value, are used as money, and perform the functions of money for home purposes. The supposed representatives of real value—gold and silver—and convertible readily into gold and silver they have thereby a value imparted to them by the consent of the community in which they circulate, which entitles them to more special regard and care than the ordinary goods and chattels which they can buy, and when bought, are boxed up and sent off, by the most ready conveyance, wheresoever and to whomsoever ordered.

Bank bills are not therefore, in common parlance, supposed to be included in the phrase "goods and chattels," and though they are such, to be taken on execution, to pass to executors or administrators, to assignees in bankruptcy, and in some cases, to devisees in a will, under the term goods; yet, in connection with insurance policies, and transportation by land or water, they are not so regarded.

In 1 Arnold on Ins. 214, it is said, that it is not necessary, in most cases, for the merchant who wishes to insure his merchandise against sea risks, to do more than give a general description of it, as "goods" or "merchandise."—Though doubt was entertained whether money, bullion or jewellery were covered by the general denomination of "goods, wares and merchandise," it is now settled that they may be so insured, though in actual practice, they are generally insured under a specific description. *Ib.* 216.

Under the term "goods and merchandise," specie, dollars, the proceeds of the sale of the goods covered by the policy were held to be included. *Am. Ins. Co.* v. *Griswold*, 14 Wend. R. 389.

In a time policy, effected by the owner of the vessel, who was also the captain or master, it was held, that the term "property" include current bank bills owned by the captain, and on board the vessel for the purpose of the coasting business, and that the underwriters were bound to pay for the loss of such bills by fire on board the vessel. *Whiton* v. *The Old Colony Ins. Co.*, 2 Metcalf R. 1. The court say that the term "property" is a term of the largest import, more extensive than "goods, wares and merchandise." The case shows distinctly the bank bills were not on freight, or received as freight for transportation; the inference is, that had the terms "goods, wares and merchandise" been used, bank bills would not have been embraced, clearly not then, if the word "goods" was alone used in a policy on "goods," meaning only, such goods as are merchantable, that is to say, the cargo put on board for the purposes of trade—tenchnically, *merces*. *Brown* v. *Stappleton*, 4 Bingham R. 121; *Hill* v. *Patten*, 8 East R. 373.

In Manning's Index, 165, Justice Dampier is reported to have

said, that the term "goods, wares and merchandise," will cover dollars, if entered at the custom house, but not bank notes or bills of exchange; they must be specially described. This is the principle in insurance policies.

Now, as the term "goods" will not, as generally understood, include bank bills, neither will the word "freight," for, though carried, they are never received and taken as freight, in the popular sense of the term as part of a cargo or carload.

Technically, it is the reward the common carrier receives for the use of the means he provides for transportation and for his own care over them, and should be in some proportion to the risk run.

What the "&c." may be supposed to mean, will not be considered, it is too indefinite. Alleging then, and proving that the appellants were common carriers of "goods, freight, &c.," does not establish that they were common carriers of bank bills.

It is true, they may make themselves such carriers, but there is no proof that they have done so. No portion of the proof goes to the point that they at any time, carried bank bills, or money of any kind, or held themselves out to the public as carriers of such property. No express contract to carry these bank bills, has been proved, and none can be implied from the nature of their business, as carriers of "goods, freight, &c., and passengers."

It not being then, the business of the company to take bank bills as freight, it should be proved that in this particular case, they authorized their agent to receive them, before the company can be liable. Authority to receive goods and freight, does not imply this power to receive bank bills at the ordinary tariff for the risk.

It is no answer to say the agent was authorised in the course of the business to receive the box as freight, and consequently the company is responsible for all the box contained. This would be so, if the box contained nothing more than such articles, known in common parlance, as goods and chattels, which the company was accustomed to carry for hire, their charges being proportioned to the value of the articles and the risk incurred.

If the bank bills, when out of the box, were not "goods" in the ordinary acceptation of that term concealing them in a box would not make them so, nor would they thereby lose the distinctive character the whole community accords to them.

A case bearing on this has been cited on both sides. *Allen* v. *Small*, (2 Wend. R. 327,) in which it appears, by act of the General Assembly of New York, the members of a certain steamboat company were made individually liable in the same manner as carriers at common law, for the transportation of all goods, wares and merchandise delivered to the agents of that corporation, and for all contracts made by such agents relating to the business of the corporation.

Allen put on board the steamboat "Sun," belonging to the company, a packet containing $14,847 50 in bank bills, and $1,800 in a draft on a bank at Albany, to be transported to Albany and delivered to a cashier of a bank there. The packet was delivered to the captain of the boat, and informed that it was very valuable, and who engaged to take charge of it and deliver it according to its direction.

The packet was not delivered to the person to whom it was directed.

It was a general practice to send money in steamboats. For carrying specie a fixed price was paid, which went to the company; the carriage of packets of bank bills was a perquisite of the captain.

The "Sun" was employed as a passenger boat, though she carried light freight. For the carriage of boxes a charge was made, but none for small bundles; and when freight was carried, an extra price was charged. Nothing was charged for the ordinary baggage of passengers. The company did not receive pay for packets carried by the captain, who was instructed not to carry money, though such instructions were never published.

It was argued, as in this case, that bank bills were goods within the meaning of the act incorporating the company, that they were treated as money, and might be levied on as goods and chattels of a defendant on an execution; that they represent our circulating medium; that the packet was delivered to the captain as the agent of the defendant; that it was a proper article for freight or transportation in a steamboat; no mode of conveyance could be more safe and expeditious; that a person may be a common carrier of money as well as other property.

The defendant's counsel contended that bills, notes, drafts, etc., were not goods, wares and merchandise within the meaning of the statute.

The Court said, in giving judgment for the plaintiff against Sewall, a member of the company, that the term "goods" is synonymous with personal chattels; that money has been accounted goods and chattels, though things in action are not generally so accounted. This court had considered bank bills money, and held that as such they might be levied on; persons can be common carriers of money, and they are responsible for its safe delivery; no ground for the imputation of fraud, in concealing the fact that money was sent, to exonerate the carrier, for that was disclosed.

This case was taken up to the Court of Errors, and is reported in 6 Wend. R. 345, as *Sewall* v. *Allen*, and the judgment reversed, that court deciding that a company, incorporated for the transportation of goods, wares and merchandize, and liable as common carriers for such, are not common carriers of packages of bank bills, unless it be shown they have made the carriages of such packages a part of their ordinary business.

Walworth, Ch., was for affirming the decision, but he says, if the contents and value of a package is improperly or fraudulently concealed from a carrier, for the purpose of depriving him of a part of the compensation he would otherwise have claimed for the transportation and risk, he would not be liable if he uses the ordinary vigilance which a prudent man would exercise of his own property of the same *apparent* value.

Senators McLean, Oliver and Talmadge held, that the terms "goods, wares and merchandise" as used in the act of incorporation, did not include bank bills; that though they are, under certain purposes, considered and treated as goods, under other circumstances they are not; they could not be given in evidence under a declaration for goods, wares and merchandise, or of demanding them on a promissory note made payable in goods, etc.; and if they do mean bank bills, yet the company were not obliged to carry them, for it does not follow they become common carriers of all things of which they might by their act of incorporation, or otherwise, have become common carriers. A common carrier may limit his business as he pleases, and their character as carriers of bank bills must be made out by proof, that they have become such carriers, etc. So there were six senators with the Chancellor for affirming the judgment, and fifteen senators for reversal.

Justice Story, in his comments on this case, *Citizens' Bank* v. *Nantucket S. Boat Co.*, 2 Story C. R. 49, says: "If I were compelled to choose between the relative authority of these decisions, upon the ground of the reasoning contained therein, I should certainly have deemed that of the court of Errors the best founded in the principles of the law."

In 2 Kent's Com. 609, there is in note *b*, a reference to this case, and the author finds no fault with the decision.

But admitting that it is fully established that the appellants were common carriers of bank bills for hire, they became, on receiving them, insurers against everything but inevitable accident, and the principle appertaining to the relation of insurer or underwriter, and insured, must apply. The company is the insurer, the owner or party freighting, the insured, and the premium is the price paid for transportation, or freight charges, bearing some proportion to the risk, their insurance being in respect of the reward they are to receive.

Now, to make a contract of insurance valid and binding, there must be good faith on the part of the insured.

As said by Lord Mansfield, in *Carter* v. *Boehm*, 3 Burrow, 1905, insurance is a contract upon speculation; the special facts upon which the contingent chance is to be computed, lie, most commonly, in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is *deceived*, and the policy is void; because the risk

run is really different from the risk understood and intended to be run, at the time of the agreement.

The reason of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately *knows*, and the other is ignorant of and *has no reason to suspect*.

So it seems that concealment, or the suppression of any fact or circumstance material to the risk, is fatal to the contract; without any special agreement it is a species of fraud, a *suppressio veri* rendering the contract void *ab initio*. But it is not solely on the ground of fraud that concealment avoids the contract; the omission to state material circumstances, though the omission be the result of accident or negligence, will avoid it.

Representation, as here used, is a material fact stated by either party to the other before completing the contract, and a misrepresentation is the statement of such a fact, which turns out not to be true. By a material fact is meant one that shows the nature and extent of the risk, and may induce the other party to enter into the contract. A concealment, on the other hand, is the suppression of a material fact within the knowledge of either party, which the other has not the means of knowing or is not presumed to know, (1 Philips on Ins. 214,) and it is equivalent to a false statement, and amounts to fraud. *Lockridge* v. *Foster et al.*, 4 Scam. R. 678.

Testing this case by these principles, these carriers can not be held liable for the loss of the bank bills, for although there were no verbal representations of any kind made by the appellee, there was that which was equivalent to it, in the structure and appearance of the box in which it is said these bills were placed. That, according to the description given of it by the witnesses, told only the plain and simple tale, that tables, bed-clothes and bedding, and some other cheap articles were in it, such as were usually carried in such boxes, for the usual freight charges. The fact most important for the insurers to know, that among this paltry stuff was a valise, with seven hundred and fifty dollars in bank bills in it, was not disclosed. The owner, treating the box of no particular value—shipping it as common freight, concealing its true value, deludes and deceives the carrier, an imposition is practiced upon him to deprive him of the compensation he is entitled to, in proportion to the value of the article entrusted to his care, and the consequent risk he incurs, and it tends to lessen the vigilance he would otherwise bestow. 2. Kent's Com. 608; 3 W. & S., *Relf* v. *Rapp*, 25.

A case very similar to this is to be found in Burrow's R. 2298, the case of *Gibbon* v. *Paynton and another*. It was an action against the Birmingham stage coachman for one hundred pounds in money, sent from Birmingham to London by his coach, and lost. It was hid in hay in an old mail bag. The bag and hay arrived safe, but the money was gone. Notice was brought home to the plaintiff that the company had advertised in a public newspaper that the coachman would not be answerable for money or jewels, or other valuable goods, unless he had notice that it was money, etc., that was delivered to him to be carried.

It was proved that money was not carried from Birmingham to London at the common and ordinary prices of the carriage of other goods, and it likewise appeared, from a letter of the plaintiff, that he knew this, and that he was conscious he could not recover by reason of the concealment. Verdict for defendant. It was argued —as it is in this case, by the appellee—on the motion for a new trial, that the coachman was answerable, though he did not know it was money; that a carrier is always answerable, unless he accepts the goods specially; that he made no enquiry or objection, and is therefore answerable. It is incumbent upon him to see that he is not cheated. He is bound to receive the goods, and must run the risk, citing, among other cases, that of *Fitchburn* v. *White*, 1 Strange R. 145, in which, Lord Chief Justice King held, "that if a box is delivered, generally, to a carrier, and he accepts it he is answerable, though the party did not tell him there is money in it."

Lord Mansfield held, that a common carrier, in respect of the premium he is to receive, runs the risk of the goods, and must make good the loss, though it happen without any fault in him the reward making him answerable for their safe delivery, and the reward ought to be proportional to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards, or other methods of security; and therefore he ought in reason and justice, to have a greater reward. Consequently, if the owner of the goods has been guilty of a fraud upon the carrier, such fraud ought to excuse the carrier. And here, the owner was guilty of a fraud upon him; the proof of it is over-abundant. And if he has been guilty of a fraud, how can he recover? *Ex dolo malo non oritur actio.*

Justice Yates said: By the general custom of the realm, a common carrier insures the goods at all events, and it is right and reasonable that he should do so; but he may make a special contract, etc. And certainly, the party undertaking, ought to be apprised what it is that he undertakes, and then he will, or at least may, take proper care. But he ought not to be answerable when he is deceived. Here he was deceived. The money was hid in an old mail bag, and it was hid from him that it was money.

Mr. Justice Aston, who tried the cause, said, "he never had any doubt about the justice of it. It manifestly appeared that this money was sent under a concealment of its being money. The true principle of a carrier's being answerable, is the reward. And a higher price ought, in conscience, to be paid him for the insurance of money, jewels, and valuable things than for insuring common goods of small value, Mr. Justice Willis concurred.

The court here did not, as distinctly as we have attempted to do judge this case upon the principles of insurance, but all their arguments lead to it. It is a very clear case, and very like the one before us, and not much stress is laid upon the fact of notice. The whole bearing of the case is on the fraud and deceit.

We have looked into the case of *Fitchburn* v. *White*, 1 Strange R. 145 and find it as cited. A reference, in that case is made to this case of *Gibson* v. *Paynton*, and to *Sir Joseph Tyley et al* v. *Morrice*, Carthew R. 485, where it is held that the carrier was liable only for what "he was fairly told of." See, also; *Great Northern Railway Company* v. *Shepherd*, 14 Eng. L. and Eq. 370; *Boston et al.* v. *Donovan et al.* 6 ib. 378.

In this case as in Paynton's case, the owner of the money was guilty of a fraud upon the carrier, in concealing, in a rough box, stuffed with feather beds, bedding, tin ware, dishes, guns, etc., a very large sum of money. This artifice, giving the box a mean or common appearance, and thereby inducing the carrier to think it of no particular value, and so prevent him from making inquiries, ought to be regarded as pregnant proof of fraud. It is no answer to say, that the carrier made no inquiry about the box; the artifice resorted to prevented it; it was complete; there was nothing about it to excite special attention to it. The owner gave out that the box was not more valuable than it appeared to be, by treating it with so little care as he did, provoking a corresponding care only, on the part of the carrier. It seems to have been a plan laid to get his money—if he really had any, which we must doubt—safely carried, and cheaply, without paying any premium for the risk.

We say, it is doubtful if the money, or bank bills, was really in the box, after it left Sacranton, or even while there. The witness, Charles Labor, who speaks to that point is not at all positive. He says the goods were repacked at Sacranton, on the suggestion of the railroad agent there, and a box made at the Company's shop, the dimensions of which he gives. He saw the goods put into this box, and "one valise was put into the box, by himself between the beds, and the box fastened up. James Thompson was written on the box, and directed to him at Paw Paw, Illinois, and box placed in the care of railroad agent at Sacranton. Saw valise opened and saw plaintiff take out a comforter for the neck, and a small roll of money, which plaintiff *said* was one hundred dollars, and put it in his pocket. Plaintiff showed him, a large pile of bank bills, in the valise, a large pile of bank bills, containing, *he should say*, from six to eight hundred dollars, which remained in the valise. It was fastened up in the valise in the box by plaintiff and himself. To the best *of his knowledge* plaintiff had, when he left Pennsylvania, from $950 to $1,100, principally in bills. Plaintiff received $600, besides some interest from his father's estate; received funds before he left: one hundred dollars from Zeba Bennett; over two hundred from E. S. Thompson & Brother, and over two

hundred dollars from goods sold at auction, and also several other small sums."

This witness does not state how he knows these facts. It is manifestly all hearsay, derived from the plaintiff himself. The plaintiff told him how much money he had, graduating the amount to the appearance of the pile in the valise. As to that, to what does his testimony really amount? What is more deceptive than a pile of bank bills? and how could any one speak of the amount, unless he knew the denomination of each bill? He could not possibly tell whether there was one hundred dollars or one thousand dollars in the pile, for the smallest sum will make the largest pile if in small bills, the other pile being composed of bills of a large denomination.

But, besides all, there is no proof whatever that these bills, if they were in the valise, were genuine bills, and of value. It is not an uncommon circumstance for spurious bills to be concealed in a valise, and for aught that appears, all these bills may have been spurious—counterfeits. Nor does this witness state, that he remained with the plaintiff and the box until he started on the cars, and saw him and the box on board.

It was in the plaintiff's control at the station house at Sacranton. He had free access to it there, and an opportunity to commit a fraud, if he designed one.

The plaintiff, however, does show, by competent evidence, that in December, 1853, he did receive, in Pennsylvania, seven hundred and ninety dollars, viz, one hundred dollars from Zeba Bennett; from A. T. McCormick, five hundred dollars, in a draft, which was paid at the Wyoming bank, at which time Jones, a clerk in that bank, testified plaintiff drew out of that bank "a large amount in gold," the amount not stated. In August preceding, McCormick had given him another draft for one hundred and ninety dollars, which, it is quite likely, "was the large amount in gold" he drew out. All these sums make seven hundred and ninety dollars.

L. Harding testifies that on the 31st December, 1853, plaintiff paid him two hundred dollars on a land purchase, and on the 18th March following, three hundred dollars, and, at the same time, one hundred and five dollars for a yoke of oxen; in all, six hundred and five dollars; to which is to be added the one hundred dollars in bills Labor says he took out of the valise, at the station, and put in his pocket, Here is seven hundred and five dollars, of the seven hundred and ninety, plausibly accounted for.

The six hundred dollars received from his father's estate, if received, which is not proved, was long before the receipt of these moneys in December, and the two hundred dollars for goods sold at auction is not proved, so that the whole amount of money he is proved to have had; when he left Pennsylvania, was seven hundred and ninety dollars, for nearly all of which the testimony of Harding fully accounts.

But be all this as it may, we have attempted to show that bank bills do not, in common business affairs, come under the denomination of goods and chattels, or goods and freight, and therefore, the company is not chargeable for them, not having been received by them as such.

That if they were common carriers of bank bills they were entitled to be informed that this box contained bank bills, so that they might have a corresponding premium for the risk incurred and care to be bestowed upon it. Suppressing or concealing this fact, in the manner and by the means resorted to by the plaintiff, was a fraud upon the defendant, and makes the contract void, for there can be no action where the plaintiff has practiced deceit and fraud.

Had this issue been tried by a jury, the court should have put the fraud in the concealment of the contents of the box, home to them, and should have told them it was such an artifice to deceive, as to render the contract to carry void, and released the company from liability.

The judgment is reversed, the cause remanded, and a *venire facias de novo* awarded for further proceedings in conformity with this opinion.

Judgment reversed.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Municipal Law—County Rate—Lands of Non-residents.

Southampton, 7th March, 1860.

Gentlemen,—Many difficulties have arisen in several Corporations, as well as various opinions been expressed by several Reeves of the County Council of the United Counties of Huron and Bruce, respecting the right of residents paying the taxes for the lands of non-residents, every year, for county purposes.

I have always contended in the County Council, and argued that they had no right to have done so. For it is in my opinion the duty of the County Council, in conformity with the 31st sec. of 16 Vic. cap. 182, to make every due allowance for the taxes of the lands of non-residents, at the time when the estimates are made up for county purposes.

Suppose, for example, that the County Council takes no notice of the non-resident rolls of the several corporations of the United Counties of Huron and Bruce; and that a by-law is passed to raise a certain sum of money, at the rate of four cents on the dollar, for general county purposes, on the basis of the total aggregate amount of the assessed value of the whole of the real and personal property of the said United Counties; and that a certain corporation, whose assessed value is $30,000, one half of which property belongs to non-residents; and the clerk of said corporation gets instructions, by order of the County Council, to raise 30,000 times 4 cents, equal to $1,200. Now the important question arises, how can the $1,200 be raised? There is no money in the treasury. It is evident that in consequence of one-half of the property belonging to non-residents the corporation will have to pass a by-law to raise the requisite sum of $1,200 from the residents, at the rate of eight cents on the dollar (double the amount of the county rate). If they do not pass a by-law, they must carry the County Council by-law into effect, and by so doing it is evident that the sum of only $600 will be raised,—half of the sum required for county purposes. Therefore by reasoning from such premises, I think no local corporation can legally pass a by-law to raise money for county purposes. For councils of municipalities, less than counties, have not the power to assess themselves in aid of any county requirements. Their aid is limited.

If the above reasoning be correct, it is evident that the County Council has a right to take into consideration the non-resident lands when they make up their estimates for the year. They are then in possession of the non-resident rolls, and every other information necessary for their guidance, so that if any deficiency should thus be likely to arise, either from the non-resident rolls or other causes named in the 31st sec. of 16 Vic. cap. 182, the County Council has the power to issue debentures for such deficiency, so that they can meet the demands before the money is wanted.

If the County Council neglects to make due allowance for the non-resident lands, the fault undoubtedly rests with that corporation. All that the corporation, which is assessed for

$30,000, has to do is to collect four cents on the dollar from the residents, in conformity with the County Council by-law, as above referred to, and claim credit for $600, the amount of tax of non-resident lands.

By giving your opinion on the above, in your next issue, you will much oblige

Your humble and obedient servant,

James Telfer Conaway,

Reeve.

[We greatly doubt the power of a Township Council to pass a by-law such as that mentioned by our correspondent, in aid of a county rate.

1. It is the duty of the County Council, when making an estimate of the sum required for county purposes, to make due allowance in such estimate for the cost of collection and the abatements and losses which may occur in the collection of the tax, *and for taxes on non-resident lands which may not be collected.* (Consol. Stat. U. C. cap. 55, sec. 11, p. 652.)

2. It is then the duty of the County Council, in every case in which any sum is to be levied for county purposes, to *ascertain* and by by-law direct what portion of such sum shall be levied in each township, &c., in the county. (*Ib.* sec.75, p. 666.)

3. In apportioning any county rate among the different townships, &c., in order that the same may be assessed equally on the *whole ratable* property of the county, the County Council is to make the amount of property returned on the assessment rolls as finally revised and equalized of such townships for the preceding financial year, the basis upon which the apportionment is to be made. (*Ib.* sec. 72, p. 666.)

4. When the sum for each township is ascertained, it is the duty of the county clerk to certify the amount for such township to the clerk of that township, so that the clerk shall calculate and insert the same in the collector's roll of the year. (*Ib.* sec. 76, p. 666.)

5. Moneys at any time received on account of taxes on non-resident lands are made to constitute a fund, to be called "the non-resident land fund." (*Ib.* sec. 154, p. 679.) Upon which fund, in anticipation of moneys to be collected, the County Council can issue debentures. (*Ib.* sec. 160, p. 180). The surplus of which is to be apportioned among the municipalities ratably according to the moneys received and arrears due on account of the non-resident lands in each municipality. (*Ib.* sec. 163, p. 681.)

6. Therefore we coincide with our correspondent in his conclusion that it is the duty of the County Council to take into consideration non-resident lands when they make their estimate for the year, for that they are in possession of the roll and every information necessary for their guidance; so that if any deficiency be likely to arise, either from the non-resident rolls or other causes specified, the County Council has the power to issue debentures to meet the deficiency.

Money required for county purposes, it appears to us, is to be raised upon the whole ratable property of the county. Now the lands of non-residents are as much ratable as the lands of residents. If the latter only are compelled to bear the rate, the rate is not one raised upon the *whole* ratable property of the county, but, on the contrary, one unlawfully and unjustly raised upon a portion only, viz., the lands of residents. Such we believe the Legislature never intended.

Fletcher v. *the Municipality of the Township of Euphrasia*, 13 U. C. Q. B., 129, is in point.—Eds. L. J.]

To the Editors of the Law Journal.

Township Clerk's Office, Onondago,
March 1, 1860.

Gentlemen,—I take the liberty to address you respecting the duties of Inspectors of Weights and Measures, and your opinion as to their fees.

They are required to inspect yearly. Would they be entitled to an annual fee for all pieces inspected, and how must they be sworn into office? I may say that I am an Inspector of the County of Brant.

I have the honor to be your obedient servant,

Wm. D. Soules, *T. C.*

[Our correspondent puts two questions, both of which we shall endeavour to answer.

1. As to fees. An inspector of weights and measures is a public officer, and entitled only to such fees as the law of the land expressly authorizes him to collect for services performed. It is provided by Con. Stat. U. C. p. 696, cap. 58, sec. 13, that "every inspector may demand and receive ten cents, and *no more*, for *every* weight or measure he marks or stamps." We know of no other fee than this, which an Inspector of Weights and Measures is authorized to collect. Certainly there is nothing of which we have any knowledge, to authorize the collection of an annual fee.

2. As to the oath of office. An Inspector of Weights and Measures is a municipal officer—that is to say, owes his appointment to the council of the county or city for which he is authorized to act. The form of the oath of office is given in sec. 9 of the above mentioned statute, to which, for more full information, we refer our correspondent. Though the statute does not state before whom it is to be taken, we presume that it may be taken "before some court, judge, recorder, police magistrate, *or other justice of the peace*, having jurisdiction within the municipality." (Con. Stat. U. C. p. 563, cap. 54, sec. 179.)—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

V. C. W. Re Clulon's Trusts. *June* 15.

Will, accumulation—Thelluson Act.

Testator devised lands upon trust for his son A during the joint lives of A and B, and after the death of either of them (A and B) which should first happen, upon trust to receive and invest the rents in stock and to accumulate the dividends, &c., by way of compound interest, until the trustees should have laid out £3,000 in the purchase of stock and subject to such investment upon trust for A with remainder to A's first and other sons in tail, with remainders over to testator's other sons, &c. As to the accumulations the trustees were to stand possessed thereof upon trust for the benefit of the child or children of A, and in default of such issue upon trust, as A should by will appoint, and in default of appoint-

ment for the next of kin of A living at his death according to the statute of distributions.

The testator died in August, 1822. A died without issue in 1839, in the lifetime of B, having bequeathed to C the £3,000 directed to be accumulated.

Held, that the trust for accumulation was not a provision for a portion within section 2 of the Thellusson Act, and that the accumulation was void except for the period of 21 years from the testators death.

Held also, that C was entitled to the accumulations made between A's death and the expiration of 21 years from testator's death, and that subject to such right of C, the remaining accumulations belonged from time to time to the persons entitled to the rents and profits under the limitations contained in the will.

V. C. S. RE HOBER'S ESTATE. *June* 25.

Will—Construction—General gift controlled by subsequent words.

M. H. being entitled under a will to land at L, for life with certain limitations over (which afterwards failed) and with remainder to her own right heirs, a portion of the said land was taken by a poor law union, under the compulsory powers given them, and £800 the purchase money was paid into court and afterwards invested. M. H. by her will devised her freehold land at L, to W. H. for his life with remainder to her own right heirs, W. H. being such right heir. She afterwards gave the interest of the sum of £800 stock (the fund in court) to W. H. for life; and after giving certain legacies, and referring to the surplus of her effects and monies, she, subject to the payment of her debts, and of the life estates aforesaid, gave devised and bequeathed the same to the children of W. H. as tenants in common, to be paid to them on attaining twenty-one.

Held, that W. H. had only a life interest in the fund in court; and that on his death his children were entitled to it.

V. C. K. THOMPSON V. WEBSTER. *June* 28.

Voluntary settlement—Creditor.

A voluntary settlement made without valuable consideration, the settlor being at the time in embarrassed circumstances, is not void, under 13 Eliz. cap. 5, unless it is the spontaneous act of the settlor, and there is proved to be an intent on his part to delay, hinder or defraud creditors; the onus of proving such intent lying on the party alleging it.

To render a deed void as against creditors, it is not sufficient that it is merely voluntary, but it must be proved that the party making it intended to delay, hinder or defraud his creditors.

On the question of a voluntary deed being void under the statute of Elizabeth, all the surrounding circumstances must be looked at, and each particular case must depend upon these circumstances.

L. J. NELSON V. STOCKER. *June* 1.

Infancy—Misrepresentation as to age—Marriage settlement.

By a marriage settlement the husband covenanted to settle £1,000 on his wife and children. At the time of the marriage the husband was an infant of eighteen years of age, but he represented to his wife, or to her solicitor that he was of age. The wife carried on the business of a pawnbroker before marriage, and the husband upon his marriage took possession of the stock, in trade, which was worth several hundred pounds, and carried on the business, but did not settle the £1,000 according to his covenant. After the death of the wife, the trustee filed a bill to enforce the covenant.

The court being of opinion that the result of the evidence was that the wife was not deceived as to the age of her husband, but knew herself that he was an infant, dismissed the bill.

The protection which the law throws around an infant, is a legal previlege, and ought not to be broken in upon on slight ground.

If a person pleads that he was led into a contract with an infant by misrepresentations on the part of the infant as to his age, he must show that he was actually deceived by such misrepresentations.

V. C. W. JOHNSTONE V. LORD HARROWBY. *July* 1.

Will—Construction—Cumulative legacy.

Testator by his will gave a legacy of £500, to be paid out of his pure personalty to a charity. By a codicil he "gave and bequeathed to the said charity the sum of £1,000."

Held, that the two legacies were cumulative, but that in the absence of the indication of any intention by the testator to blend the two legacies together, and subject them to the same conditions as to payment, &c., the second legacy was not payable out of the pure personalty, like the first.

L. C. & L. J. J. KING V. CLEAVELAND. *July* 2.

Will—Construction—Legacy—Substitution—Personal representatives.

Gift by will to nieces then living, or their legal representatives, share and share alike. One of the neices died before the time without issue.

Held, that her next of kin and not her administrator was entitled.

M. R. MELLISH V. KEEN. *July* 12.

Partnership—Lunatic—Dissolution by notice.

When parties enter into a partnership at will, notice to one by the others, that they wish to dissolve the partnership, must be considered as an overture for an effectual dissolution. For this purpose, a notice to a person of unsound mind, not found lunatic by inquisition, held good, and dissolution decreed from the date of the notice.

COMMON LAW.

C. C. R. HENDERSON V. MEARS. *June* 4.

Landlord and tenant—Eviction—Direction to jury.

When unfinished apartments were let by the occupier of a house to the defendant, who put a man in the possession to show the appartments in order to underlet them and where the man was turned out by the occupier as being personally disagreeably to him, it is acorrect direction to the jury to ask them whether the man was turned out for the purpose of expelling him or for the purpose of evicting the defendant.

Q. B. TAUVAGO AND OTHERS V. LUCAS AND OTHERS.

Cargo of ship—Sale of goods—Varience between quantity of goods contracted for and delivered.

By a contract the plaintiffs sold a cargo of wheat of about 2000 quarters, say from 1800 to 2200 quarters at the price of 52s. per delivered quarter of 492lbs free on board at Taganrog to any safe port in the United Kingdom, the wheat to be shipped between certain dates, the measure for the sake of invoice to be calculated at the rate of 100 chetwerts equal to 72 quarters, sellers guarantee the delivery of invoice weight, sea accidents excepted, buyers to pay for any excess of weight, unless it be the result of damage or heating. Payment, cash in London on exchange for usual shipping documents. The shipping documents showed a quantity between 1,800 and 2,200 quarters, but the quantity actually shipped was less than 1,800 quarters.

Held, that this fact released the buyers from their contract.

Q. B. *June* 16.

THE L. AND W. LOAN AND DISCOUNT CO., V. DRAKE.

Mortgage of fixtures—Surrender.

A having mortgaged to the plaintiffs, the fixtures in a house of which he was tenant, before the fixtures were severed, surrendered his lease to his landlord who demised to the defendant. The defendant then entered and took possession of the house, together with the fixtures.

Held, that the mortgagor could not defeat his own act by the surrender, and that the plaintiffs had a right to enter and sever the fixtures notwithstanding; and that they were entitled in an action of trover for the fixtures, to recover their value.

EX. SOLOMON v. THE VINTNERS' COMPANY. *May* 6.

Easement—Right to support—Intervening house—Houses falling out of perpendicular—Prescription.

The plaintiff and defendants were respectively the owners of houses separated by a house the property of a third person, and which three houses immediately adjoined each other.

The houses were built on a declivity, the defendants house being lower down than the plaintiffs'; and for a period exceeding twenty years they had fallen out of the perpendicular in such a way that the plaintiffs' house projected over the ground of the next house and that again over defendants' land. The defendants took down their house for the purpose of building a new house on the site; and the consequence was that the plaintiff's house was damaged.

Held, that the plaintiff had not acquired a right to the support of the defendants house; and that he could not maintain any action against them for the damage so sustained.

EX. C. BROWN ET AL v. HARE ET AL. *May* 18, *June* 23.

Mercantile contract for purchase of unascertained goods—Property lost at sea passing to vendee upon shipment—Bill of lading making goods deliverable to shipper's order—Indorsement.

The defendants, merchants at Bristol, through a broker, contracted to levy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape oil, to be shipped "free on board," at Rotterdam, in September 1857, at £48 15s. per ton, to be paid for, on delivery to the defendants of the bills of lading by bill of exchange, so be accepted by the defendants, payable three months after date, and to be dated on the day of shipment of the oil. On the 8th of September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a general ship trading between Rotterdam and Bristol, five tons of the oil. The master signed a bill of lading by which the oil was deliverable "unto shippers' order," and the plaintiffs endorsed the bill of lading specially to the defendants. On the same day the plaintiffs enclosed in a letter to the broker the bill of lading, invoice, and a bill of exchange drawn on the defendants, in accordance with the contract. On the night of the 9th, the ship, with the oil on board, was run down in the Bristol Channel, and the oil totally lost. The plaintiffs' letter of the 8th arrived at Bristol, on the afternoon of the 10th, in due course of post, but after business hours. On the morning of the 11th, the broker left with the defendants the bill of lading, invoice, and bill of exchange, for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards, the defendants returned to the brokers the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil.

In an action for not accepting the bill of exchange, and for goods sold and delivered,

Held (affirming the judgment of the Exchequer), that the property in the oil vested in the defendants on its delivery free on board the ship in performance of the contract, and consequently the plaintiffs were entitled to recover on both counts, and that the form in which the bill of lading was taken, making the oil deliverable "unto shippers' order," did not prevent the property from passing.

EX. C. MARQUIS OF CAMDEN v. BOTTERBURY. *June* 27.

Landlord and tenant—Action for use and occupation of building land—Building articles—Agreement not amounting to an actual demise—Rent—Tenancy from year to year when to be implied—Liability of assignee—Evidence.

In an action for money payable for the defendants use of lands, messuages and premises, by the plaintiffs permission, the particulars of demand claimed £241 as a years rent due Lady-day, 1858.

It appeared that by Indenture made Feb. 4th, 1853, between plaintiff and E, the plaintiff agreed to grant leases of the whole or part of certain ground, whereon houses then proposed to be built should be erected, so soon as one or more houses should be erected. To hold the same and the other premises agreed to be demised to E and his assignees, from 29th September, 1852, for ninety-eight years, paying for the first, second, third, fourth and fifth years, from £30 to £285. E. covenanted, for himself and his assigns, to pay the several yearly rents reserved; and there was a proviso for re-entry if the said yearly rents should be behind. During 1853, E. built on the land five houses, which were duly demised to him at rents amounting to £35; and until January 31st 1854, paid the several yearly sums covenanted to be paid.

On the 31st January, 1854, E. assigned the indenture and all his interest under it, to the defendants, who, till Lady-day, 1857, paid to the plaintiff's agent the several yearly sums, and took receipts which in general, purported, on the face of them that the payments were made by the defendant as rent due to the plaintiff under the deed of February 4th.

In 1854, and 1856, the defendant built on the land a house and stables, and obtained two leases according to the said indenture of agreement, reserving rents amounting to £9. The two last mentioned rents, added to the £35 reserved on the demises to E when deducted from £285, the highest rent, leave £241 the sum claimed in the action; and except these sums of £9 and £35, no payment was made to the plaintiff after Lady-day 1857. On the 25th May, 1857, the defendant assigned to one W, the indenture of the 4th February, and all interest thereon.

Evidences were also given for the plaintiff of the defendant having employed an auctioneer to let the property, and that some of it was a mere ballast hole.

Upon the facts above, the Common Pleas held, that the defendant was not liable; that the indenture of February 4th, 1853, did not amount to an actual demise; that the several annual sums reserved as rent were collateral sums paid for the right to occupy for the purpose of building, under the agreement; that the tenancy of E if any, was not a tenancy from year to year is implied from payment of rent, it is because there are no other circumstances to account for the payment, except that it ts paid for the occupation but that in this case the facts showed that the payments were made by the defendant, not as rent, but in discharge of the obligation upon E to pay them.

Held (affirming the judgment of the Common Pleas.) that the plaintiff was not entitled to recover; that the facts afforded no ground for implying a new tenancy from year to year between the plaintiff and the defendant; and that the form of the receipts showed that the payments by the defendant were made, not as rent for the occupation of the premises but in discharge of his engagements with E.

APPOINTMENTS TO OFFICE, &c.

SOLICITOR GENERAL FOR UPPER CANADA.

The Honorable JOSEPH C. MORRISON, to be Solicitor General in and for that part of the Province of Canada called Upper Canada.—(Gazetted 25th February, 1860.)

JUDGE.

JOHN MAJORIBANKS LANDER, Esquire, Barrister-at-law, to be Judge of the County Court of the County of Lincoln.—(Gazetted 4th February, 1860.)

COUNTY ATTORNEY.

RONALD McDONALD, of St. Catherines, Esquire, Queen's Counsel, to be County Attorney for the County of Lincoln.—(Gazetted 4th February, 1860.)

CLERK OF THE PEACE.

RONALD McDONALD of St. Catherines, Esquire, Queen's Counsel, to be Clerk of the Peace for the County of Lincoln.—(Gazetted 4th February, 1860.)

CORONERS.

JAMES SILL and JAMES GORDON, Esquires, to be Associate Coroners, County Haldimand.—(Gazetted 4th February, 1860.)

WILLIAM PIPE, Esquire, M.D., Associate Coroner, County of Waterloo.—(Gazetted 18th February, 1860.)

JOHN ROY PHILIP, Esquire, M.B., Associate Coroner for the County of Waterloo.—(Gazetted 18th February, 1860.)

GEORGE METHERELL, Esquire, M.D., Associate Coroner, County of Wentworth. (Gazetted 18th February, 1860.)

ALFRED LANDER, Esquire, M D., Associate Coroner, United Counties of Huron and Bruce.—(Gazetted 18th February, 1860.)

TO CORRESPONDENTS.

OTTO KLOTS—Under "Division Courts."

JAMES TELFER CONWAY—WM. D. SOULES—Under "General Correspondence."

EDWARD R. KENT—ROWLEY KILBORN—PAUL DUNN—Too late for this number. See our next.

A JOHNSONIAN—No notice taken of anonymous communications.

DIARY FOR APRIL.

1. SUNDAY ..... *Palm Sunday.* [der's Court begins.
2. Monday..... County Court Term and Surrogate Court Term begins. Recor-
3. Tuesday..... Chan. Ex. Term, Barrie and Ottawa, commences.
6. Friday ..... *Good Friday.*
7. Saturday..... County Court and Surrogate Court Term ends.
8. SUNDAY..... *Easter Sunday.*
9. Monday ... . Toronto Spring Assizes.
10. Tuesday ..... Chan. Ex. Term, Goderich and Cornwall, commences.
14. Saturday..... Last day for notice of hearing, Chancery.
15. SUNDAY..... *1st Sunday after Easter.*
22. SUNDAY..... *2nd Sunday after Easter.*
23. Monday..... Chancery Hearing Term commences.
29. SUNDAY..... *3rd Sunday after Easter.* [den's to give lists of their lands.
12. Monday..... Last day for comp'g Assessment Rolls. Last day for Non-Resi-

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

APRIL, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60" *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The* "60" *has reference to the year, and not to the amount represented as due.*

THE 91ST CLAUSE.

Some one observes that the generality of mankind is governed by words and names, and that he who would set up as a skillful manager of the masses, so long as they have ears to hear, need not enquire whether they have any understanding whereby to judge, but with two or three popular empty words well turned and humored, may whistle them backwards and forwards, upwards and downwards, till he is weary, and get upon their backs when he is so.

It may be very convenient to raise the cry, "down with *imprisonment* for debt!" "abolish the 91st clause," which sanctions it. But it happens *to be false* that the 91st clause sanctions imprisonment for debt.

Not being entire believers in the observations we have quoted, but assuming that those interested in the question have "understandings whereby to judge, as well as ears to hear," we purpose noticing what the 91st clause does actually authorise, though we have examined the subject before, and may perhaps go over some of the ground a second time.

It is easy enough to establish *our* position, but it is truly difficult to lay hold of anything having the resemblance of an argument in all the sentimental matter, which has been published, urging a repeal of the 91st clause, or to discover any point urged sufficiently tangible for the purposes of discussion.

One writer says "the law has worked harshly," another declares "it serves no good purpose for the creditors," another says "it is an unenviable monument to the memory of its framers," others again say "no one should be allowed to sue for a debt under $100." And one who claims some affinity to the law, bolder still declares, "'tis strange, we (the Editors of the *Law Journal*) do not see the *point* at issue between the advocates of the abolition of imprisonment for debt, and those in favor of imprisonment and 91st clause. The point is simply this, should *an honest* but *poor creditor* be incarcerated like a felon for a certain number of days or months. The sentiment of universal humanity says 'no;' but if the debtor commit fraud then let him be as a felon."

We accept the *issue* not because of any merit in the communication of the particular writer who proposed it, but because it is a re-hash (in brief form) of what has been said by several others on the same subject.

We also say, *do not punish the honest but poor creditor, but* if a debtor *commit fraud* let him be punished not as for a felony (we would be unwilling to deal with him so severely) but as for a misdemeanour. And we repeat that the honest debtor, however poor and unfortunate, has nothing to fear under "the 91st clause."

Surely the creditor has some rights. The man who has lent his money or sold his property to another, may reasonably enquire what means his debtor has of liquidating the demand. And he *may* summon that debtor to appear before the judge to give a statement of his affairs. But the debtor has two courts, in general about three months to think over the matter before *he is* bound to appear, and if there should be any sufficient reason for his not attending at the end of three months, and it be shown to the Court, he is in no danger of imprisonment.

When he appears he is not required, as a recent writer in a somewhat inflated and sentimental strain, says, to be interrogated "in the presence of any gang who may choose to assemble from the filthiest crevices of society;" for the examination is not a public one but in the Judge's Chambers or in the Court room after the ordinary suitors have retired. The direction in the 162nd section of the Division Courts Act makes provision for this.

Should a defendant be summoned for the purpose of annoyance or insult or if indeed on any ground, it appears that the defendant ought not to have been summoned, the judge may and ought to award him compensation for his trouble and attendance, and for the amount of such compensation the debtor will be entitled to an execution against his judgment creditor (sec. 166); but on the other hand if the debtor refuses to be examined or on his examination "fences" and equivocates, will not give a candid statement of his affairs, or say what property he has or whether or not he has means of paying the debt, is it not reasonable to presume that there is some fraud at the bottom? "Truth fears nothing but to be concealed."

In a word, if his answers are clearly unsatisfactory in these particulars, why should he not be punished?

This brings us to the *fourth* ground authorising a commitment which is divided into four heads. (1) That the party obtained credit from the plaintiff or incurred the debt or liability under false pretences or (2) by means of fraud or breach of trust, or (3) that he wilfully contracted the debt or liability without having had at the time, a reasonable expectation of being able to pay or discharge the same, or (4) has made or caused to be made any gift delivery or transfer of any property, or has removed or concealed the same with intent to defraud his creditors or any of them." All these are frauds and as such are punishable by imprisonment, if proved to the satisfaction of the court out of the defendants own mouth, or by examination of witnesses. And lastly if it be satisfactorily established that the debtor *has means and ability to pay*, and will not pay the judgment against him, such being clearly a fraud on his creditor, he is liable to be committed to gaol, but in no case whatever can he be committed for a longer period than forty days.

There is this provision also in favor of the debtor (as mentioned in the letter of "Another Law Student," which we publish), that after once having been examined and discharged he cannot be again summoned, unless the creditor previously satisfies the judge on affidavit that proper grounds exist for his being again called up to be questioned.

Now the foregoing embodies the whole "91st clause" provision (as it is called) and the law as consolidated to be found in secs. 160 to 173 of the Division Court Act.

One cannot well understand how any person capable of judging, can with the act before him venture to assert that "the 91st clause" authorizes imprisonment for debt. It is false to say that it does. Those who have an interest in misrepresenting the effect of the law we may expect will tax their ingenuity for the purposes of deception; but with those who have not such designs it can only be great simplicity of mind or strange perversion of judgment which leads them to advocate a repeal of the law on the grounds so absurdly urged. The law enables fraud to be punished—nothing more.

But some of these persons, such as "An Old Barrister" in this number, change their ground and say, "Oh, but *whatever the law authorizes*, the fact is, poor debtors *are* imprisoned simply because they do not pay their debts." A strange argument against a law, and not we believe founded on fact. We challenge proof,—let "cases in point" be shown. We do not believe they could be produced, and if they could the objection would not be to the provision of the law but the mode in which it is administered,—quite a distinct matter.

Now from time to time we have presented facts and figures showing how well, how beneficially, and how humanely the law has been worked, and in our last number we showed a return from the County of Waterloo embracing 10,372 suits for an aggregate of $248,918, and on these suits 245 "91st clause summonses issued" for an aggregate of $10,355, and upon the unwithdrawn ones over 59 per cent. was realized, while but 9 actual commitments took place.

The public are indebted to the Clerks of this County for the full and detailed information given, and in spite of the sneering remark that "clerks are interested witnesses," their testimony will be believed. They speak from their books. It is not conjecture with them. They give their names and are men whose testimony is on every ground entitled to credence and respect. Nor are they to be threatened into silence by menace from any quarter. They speak out as becomes them when the public need reliable information, which they, the clerks, are peculiarly well qualified to furnish.

But still another ground has been taken. It is ignorantly asserted that a substantial difference exists between judgment debtors in the Division Courts and in the Superior Courts, that it is in the Superior Courts *alone* wherein fraud *must* be established to reach the debtor. False again, as we have shown.

The provision in the Superior Courts is, that the creditor may apply to a Judge for an order, &c., for the examination

of the debtor touching his estate and effects, &c., (nearly the same language as in the Division Court Act,) and "if such debtor does not attend as required by the order, &c., and does not allege a sufficient excuse for not attending, or if attending he refuses to disclose his property or his transactions respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, a Judge may order the debtor to be committed to the Common Gaol of the County *for any time not exceeding twelve months* (sec. 41 cap. 24 U. C. Consolidated Statutes, p. 286).

Let any one compare this with "the 91st clause," and say in which Court the debtor has greater protection.

In the main particular both provisions are alike, both are for the *punishment of fraud*, and neither authorize "*imprisonment for debt.*"

What then are we to think of the case which needs false assertions for its support; what of the arguments based on such assertions?

If the wisdom of any measure is to be judged by its effects, we say with confidence the "91st clause" has attained the end for which it was designed,—*the prevention and punishment of fraud.*

SALE OF DEADLY POISONS.

Our attention has been directed to this subject, and we would refer to the Consolidated Statute of Canada, chapter 98, the provisions of which are not generally known. At all events, they are violated in every part of the country. This law, before the Consolidation was by many persons supposed not to apply to Upper Canada, and the question, whether it did or did not, was in truth somewhat complex. The Commissioners for revising the Statute appear, judging from the schedule, to have arrived at the conclusion that it did, on the strength of Stat. 14 & 15 Vic., c. 61, Sec. 5, 19 Vic. ch. 94, and 22 Vic. ch. 103.

There is no doubt now that the law is in force in Upper, as well as Lower Canada, and the Consolidated Statutes not yet being generally distributed, persons may go on ignorantly violating the law, in the absence of a timely warning. We, therefore, give the substance of the enactment.

Sec. 1. Prohibits Apothecaries, Chemists, Druggists, Vendors of Medicine *and other persons*, from selling or delivering "any arsenic, corrosive sublimate, strychnine, or other poison, "mineral, or vegetable, simple or composite, commonly known "as deadly poisons, &c.," to any person who does not then produce and deliver a certificate from a legally authorized Physician or Surgeon, or from some Priest or Minister resident in the locality, addressed to the person selling, and mentioning the name, residence, and business of the person requiring the poison, and stating the purpose for which it is required, and that it ought to be so sold. And this certificate or note is required to be kept by the person selling for his justification.

The second Section imposes a penalty of $40 on any person contravening the foregoing provision, and in default of payment, authorizes committal for three months to the Common Gaol.

And Section three, authorizes prosecutions by a Common Informer, (who gets half the penalty), before a Justice of the Peace.

We will endeavor to procure from some medical friend, and publish in our next number, a list of the poisons that would in a medical point of view, come within the first Section which is most extensive in its range. In the meantime, we recommend those who sell Drugs and Medicines to act with caution, and require the note or certificate in every case where there is any doubt, whatever, as to whether the article sold is a deadly poison.

The certificate may be in the following form:

To Mr. A. B., Chemist and Druggist, (*or as the case may be*), (state residence).

Mr. C. D. of the (*state residence*), requires [*one pound of arsenic for manufacturing purposes in his business of* (as the case may be)], and in accordance with cap. 98 of the Consolidated Statute of Canada, I certify that it ought to be sold to the said C. D.

Date, &c. E. F.,
Church of England Minister, (or as the case may be.)
Residing at ——, in the county of ——.

The foregoing form may be varied according to the circumstances of each case. The seller of the poison ought in all cases to make a note of the sale upon this certificate for reference, in case of an after judicial investigation.

PROCEEDINGS IN ERROR IN A PLAIN CASE, TO REVERSE A JUDGMENT ON DEMURRER.

By F. Stewart MacGachen, Esq., Barrister-at-Law.

Note.—The references, Sec. 1, &c., refer to the Sections of the Consolidated Statutes for Upper Canada, c. 12, and those to Orders 1, &c., refer to Orders of Court of Error and Appeal, July 3rd, 1850.

Before any other step is taken, security for costs, as required by Stat. 12 Vic. c. 63, s. 40. must be given.

It must, unless otherwise specially ordered, be given by Bond, (Order No. 3), to the defendant in 100*l.* to the satisfaction of the Court appealed from, that the appellant will effectually prosecute his appeal, and pay such costs and damages as may be awarded in case the judgment is affirmed, or in part affirmed. (s. 15.) It is to be executed by the appellant, or one of them if more than one, and two sufficient sureties, (or if the appellant or appellants are absent from, or do not reside in Upper Canada, then by three sufficient securities), in the following form. (Order 4.)

"Know all men by these Presents, that we, A. B., of——, C. D., of——, and E. F. of——, are jointly and severally held and firmly bound unto G. H. of——, in the penal sum of £——, of lawful money of Canada, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, our and each of our heirs, executors and administrators, respectively, firmly by these presents. Witness our hands and seals, respectively, the — day of —, in the year of Our Lord —,

Whereas (the appellant) alleges and complains that in the giving of judgment in a certain suit in Her Majesty's Court of Queen's Bench, (or Common Pleas), in Upper Canada, between (the defendant) and (the appellant) manifest error hath intervened, wherefore the said (appellant) desires to appeal from the said judgment to the Court of Error and Appeal. Now the Condition of this obligation is such, that if the said (appellant) do, and shall effectually prosecute such appeal, and pay such costs and damages as shall be awarded in case the judgment, aforesaid, to be appealed from, shall be affirmed, or in part affirmed, then this obligation shall be void, otherwise shall remain in full force. (Order 5.)

The parties to the bond as sureties are then to make an affidavit in this form:—

In the (style of Court.)

A. B., *Plaintiff* v. C. D., *Defendant.* } E. F., of——, and G. H., of——, severally make oath and say: and first this this deponent, E. F., for himself saith, that he is a resident inhabitant of Upper Canada, and is a householder (or freeholder) in——, and that he is worth the sum of (the sum in which he stands bound by the penalty) over and above what will pay all his debts: and this deponent G. H., for himself saith, that he is a resident inhabitant of Upper Canada, and is a householder (or freeholder) in——, and that he is worth the sum of (as the case may be), over and above what will pay all his debts.

(Signed) E. F.,
G. H.

Sworn by the above-named deponents, E. F. and G. H., at——, in the County of——, the — day of——, 18—, before me,

X.Y., a Commissioner, &c.
[Order 9.]

The bond and affidavit are then to be filed in the principal office of the Court appealed from. (Order 3.) Fee for passing the bond, 5*s*, for filing, 1*s*.

Fourteen days notice is to be given of the time and place at which application will be made to the Court from whose judgment it is intended to appeal, or to a Judge in vacation, for the allowance of the security, which is to contain the names and additions of the obligors, (Order 10) and may be in this form:

In the (style of Court).

A. B., *Plaintiff,* v. C. D., *Defendant.* } Take Notice, that a Bond for the security required by the statute 12 Vic. c 63, s 40, and by the Consolidated statute for Upper Canada, cap. 13, s. 15, has been executed by the plaintiff and by two Justices, and that the names and additions of the said sureties, are E. F. and G. H., both of the——, of——, in the county of——, in the Province of Canada,——, and that they have by affidavit respectively made oath, that they are resident freeholders in Upper Canada, and severally worth the sum of One Hundred Pounds, over and above what will pay all their debts. And further, take notice, that on——, the — day of—— instant, at noon, application will be made to the presiding Judge in Chambers for the allowance of such security.

Dated the — day of——, 18—.

——, Plaintiff or Defendant.
Or ——, Plaintiff or Defendant's Attorney.

To ——, Plaintiff or Defendant's Attorney,
Or to ——, Plaintiff or Defendant's Attorney,
and to ——, his Agent.

The allowance of the security may be opposed by affidavit. In the absence of any such opposition, the affidavit above mentioned is to be sufficient in the discretion of the Judge to warrant the allowance of it. (Order 10.)

If allowed, the officer of the Court is to endorse on the Bond, the word "allowed," prefixing the date, and signing his name to it, upon which the security is to be deemed perfected. (Order 12.) Upon perfecting the security, the action is to be stayed in the original cause. (Sec. 16.)

1. When, however, the judgment directs the payment of money, the bond is to be double the amount of the judgment, unless it is in debt, or bond, for a penal sum, or upon a warrant of attorney, or cognovit, or otherwise, exceeding in amount the sum really due, in which case it is to be in double the true and real debt and costs only; and the amount recovered, and of such true and real debt and costs is to be stated in the condition, or recital to the condition, to the bond, or security, immediately after the statement of the nature of the action, and the condition shall be to the effect that the appellant shall effectually prosecute such appeal, and if judgment so to be appealed from, or any part of it, is affirmed, shall pay the amount directed to be paid by the judgment, or the part of it as to which the judgment is affirmed (if it is affirmed only in part), and all damages which shall be awarded against the appellant in the appeal. In cases, however, where the security to be given is in a sum above 500*l*, it is to be in the discretion of the Court appealed from, or of a Judge thereof in vacation, to allow security to be given by a large number of obligors, apportioning the amount among them as appears reasonable. (Order 6.)

2. When the judgment appealed from is in ejectment, the security last mentioned is to be in double the yearly value of the property in question. (Order 7.)

3. When the matter relates to the taking of any annual or other rent, customary, or other duty, in fee, or such like demand of a general and public nature affecting future rights, the amount in which security is to be taken, in addition to the security required for costs, is to be fixed by an order of a Judge. (Order 7.)

4. Where the Judgment directs the assignment or delivery of documents or personal property, execution is not to be stayed till the things directed to be assigned or delivered have been brought into Court, or placed in the custody of

such officer or receiver as the Court appoints, nor till security has been given to the satisfaction of the Court appealed from, in such sum as that Court directs, that the appellant will obey the order of the appellate Court.—(Order 16–1.)

5. When it directs the execution of a conveyance or any other instrument, execution is not to be stayed till the instrument has been executed and deposited with the proper officer of the Court appealed from, to abide the order of the appellate Court. (Sec. 16—2.)

6. When it directs the sale or delivery of possession of real property, or chattels real, execution is not to be stayed till security has been entered into to the satisfaction of the Court appealed from, and in such sum as that Court directs, that during the possession of the property by the appellant, he will not commit, nor suffer to be committed, any waste on the property, and that, if the judgment is affirmed, he will pay the value of the use and occupation of the property from the time of the appeal, to the delivery of the possession thereof; and also, in case the judgment is for the sale of property, and the payment of the deficiency arising upon the sale, that the appellant will pay the deficiency. (Sec. 16—3.)

In the cases mentioned, 2, 3, 4 and 6, the recitals and conditions in the bond, are to be such as shall conform to the provisions of the rules, with such further or other conditions, in cases where the judgment is not for the payment of a sum of money only, as the Judge approving the security may think fit to order. (Order 8.)

When the security in these last mentioned cases has been perfected and allowed, any Judge may issue his *fiat* to the Sheriff to whom any execution has been issued, to stay the execution, which is to be thereby stayed, whether a levy has been made under it or not. (Sec. 17.)

The party alleging error, must also deliver to the clerk of the Crown of the Court where the suit was instituted, a memorandum in writing, (Sec. 33), in this form:

In the (style of Court).

The — day of ——, in the year of our Lord, 18—,
(*day of lodging note of error*).

A. B., vs. C. D. } The plaintiff (*or* defendant) says, that there is error in law in the record and proceedings in this action, and the defendant (*or* plaintiff) says, there is no error therein.

(Signed) A. B. plaintiff (or C. D. defendant, or E. F. attorney for plaintiff *or* defendant). (Sec. 34.)

The Clerk is to file the memorandum and give to the party lodging it a note of the receipt of it, (Sec. 34), which may be in this form, and which may be written at the foot of a copy of the memorandum.

Received on the — day of ——, A. D. — from the attorney in this cause (or the above named plaintiff *or* defendant), (*if there is any attorney, or* the plaintiff or defendant above named), a memorandum in writing, in the above form, and which has been filed by me according to cap. 13, of the Consolidated statutes for Upper Canada.

(Chitty's Forms, p. 259.)

M. M. (signature of clerk.)

The attorney must then serve on the opposite party or his attorney, a copy of the note of receipt, together with a statement of the grounds of error intended to be argued (sec. 34), which may be in this form.

In the (style of Court).

A. B., plaintiff, v. C. D., defendant,

Herewith is a copy of the note signed by the Clerk of the Crown, of the receipt of the memorandum alleging there is error in law in the record and proceedings herein, which memorandum has been lodged with him, under the provisions in that behalf, in the cap. 13 of the Consolidated Statutes for Upper Canada, and the grounds of error intended to be argued herein, are that (here state the grounds of error or some of them)

Dated ———

Yours, &c.,
Plaintiff (or Defendant's) attorney.

To the above named Plaintiff,
(*or* Defendant), *or* A. Z. his attorney.

(Chitty's Forms, p. 259.)

The Roll is to be made up, and a suggestion (see below) entered by the appellant, within ten days after the service of the note of receipt of the memorandum alleging error. In default of it, the respondent may sign judgment of *non pros.* unless the Court appealed from, or a Judge gives further time. (Sec. 39.)

(SUGGESTION.)

The — day of ——, in the year of Our Lord, 18—.
(*Day of making the entry on the Roll.*)

The plaintiff, (or defendant) says, there is error in the above record and proceedings, and the defendant (or plaintiff) says, there is no error therein. (Sec. 37.)

Upon the suggestion being entered, and after security required to be given by the appellant has been duly allowed, the attorney for the appellant makes out copies of the pleadings, together with the reasons of appeal and the reasons relied on for supporting the judgment, as also the opinions of the court below, when not published in the Reports. They are submitted to the attorney for the opposite party, and when agreed upon are printed, and copies are then to be considered the printed cases of the appellant and respondent respectively. (Order of Court of Error and Appeal, 27th June, 1856.)

They are to be printed on one side only, on good paper, in demy quarto form, with small pica type. (Order of Court of Error and Appeal, 21st December, 1858.)

The appeal is then to be entered with the Clerk of the Court of Error and Appeal (the Registrar of the Court of Chancery, sec. 7), the fee for which is four dollars, and the cause may then be set down for argument in that Court (Sec. 42). Notice of its being set down for argument,

should be given to the opposite attorney, of which this may be a form:

In the (style of Court.)

A. B., plaintiff, v. C. D., defendant.

Take notice, that this cause was this day set down for argument, on ——, next, and that the same will be argued accordingly.

Dated the — day of ——, A.D. —

Yours, &c.,

——,

Plaintiff (or defendants) attorney.

To ——, Esq.,

Defendant (or Plaintiff) attorney. (Chitty's Forms.)

The appellant must, at least four clear days before the day appointed for hearing the argument, deliver to the Clerk, a printed copy of the appeal book for each of the Judges, or, in default, the appeal may be dismissed with costs. (Sec. 45 and Order of Court of Error and Appeal, 27th June, 1858.)

When in an appeal against a judgment in any action personal, the Court of Error and Appeal gives judgment for the defendant in error, interest is to be allowed by the Court for such time as execution has been delayed by the appeal. (Sec. 50.)

When the judgment of the court is delivered it is to be entered, for which the fee is two dollars. It is then to be certified by the clerk of the court to the proper officer of the clerk below, who is thereupon to make all proper and necessary entries thereof; and all subsequent proceedings are to be taken thereupon, as if the judgment had been given in the court below (sec. 12), the first proceeding being to make the judgment of the court above a rule of the court below, which is done as a matter of course by the clerk of that court on payment of a fee of 2s. 3d., and 4d. for each paper filed.

LAW SOCIETY, UPPER CANADA.

TRINITY TERM, 1859.

ARTICLED CLERKS' EXAMINATION.

SMITH'S MERCANTILE LAW.

1. By whom must a notice of dishonour be given to an indorser of a bill or note, so as to render him liable, and will such notice enure to the benefit of any other party than the one giving it.
2. How is the property in a bill or note payable to bearer, or to a specified person respectively, transferred?
3. What is a guarantee? State what is essential to render it binding.
4. In what case is the insured entitled to a return of the whole or part of the premium?
5. What are the two ways in which a lien arises?—give instances.

WILLIAMS ON PERSONAL PROPERTY.

1. What is the distinction between a specific, a demonstrative, and a general legacy?
2. What is an executor *de son tort?*
3. What are a husband's rights over *choses in action* of his wife?
4. If a less sum than the amount due is paid by a debtor, to which of the several items can the creditor appropriate the payment?

BLACKSTONE'S COMMENTARIES.

1. How are Justices of the Peace appointed, and what are their duties?
2. What are waifs?
3. On what grounds can a master justify an assault in defence of his servant?

WILLIAMS ON REAL PROPERTY.

1. Is a woman in any and what cases entitled to dower in her husband's equitable estate? Does her right to dower out of such estate depend on common law or statute?
2. How must a rent charge be created?
3. What is the effect of a release of a part of the lands subject to a rent charge?
4. What right of deposition has a husband over a term of years belonging to his wife?
5. What covenants for title is a purchaser entitled to in a conveyance from a trustee for sale?

STORY'S EQUITY JURISPRUDENCE.

1. In what cases will a Court of Equity restrain waste by one of two tenants in common at the instance of the other?
2. Will the publication of private letters by the receiver be restrained by injunction at the suit of the writer?
3. What will be sufficient in a Court of Equity to open a stated account?
4. In what cases will a bill to perpetuate testimony lie?
5. Will the Court of Chancery restrain by injunction, proceedings in other Courts, of a criminal nature? Is there any exception to the general rule on this subject?

STATUTES AND PRACTICE.

1. In what case does the Statute of this Province permit actions of replevin to be brought?
2. Where a party pleads and demurs to the same pleading, in what order are the issues of law and fact to be tried?
3. Where a *Ca. Re.* has been obtained against a defendant, is any thing further necessary to entitle the plaintiff in the same cause subsequently to issue a *Ca. Sa.*?
4. In what case is attachment for contempt abolished?
5. What is the effect of pleading a plea on equitable grounds without leave of a Judge?
6. If a sole plaintiff die before decree, what steps must be taken by the defendant to obtain an order for the dismissal of the bill for want of prosecution?
7. At what stage of the cause can a defendant in a suit in equity obtain an order to elect? and how is such an order obtained?
8. In what cases is the Court of Chancery authorized by statute to make a "vesting order?" What is the effect of such an order?
9. Is a party to a suit in equity entitled to treat an order clearly irregular as void, and disregard it; or is he bound to obey it until set aside?
10. Is a defendant against whom a *pro confesso* decree has been made entitled, upon any and what conditions, to have the cause re-heard?
11. Can a bill be taken *pro confesso* against an infant defendant?

EXAMINATION FOR CALL.

BYLES ON BILLS.

1. If a bill is dishonoured by non-acceptance, and afterwards by non-payment, from which time does the Statute of Limitations commence to run? Give your reasons.
2. Is there any exception to the rule that a party taking a note over due takes it subject to all its equities? Does the position of his assignor make any difference in this respect?

3. Who is the principal debtor in a bill of exchange? Does the fact that the bill was an accommodation one make any difference in this *at law* as regards other persons?

4. Upon what does the negotiability of bills of exchange and promissory notes respectively depend?

5. When a bill or note is transferred without indorsement, in payment for goods, is the party transferring it, as a general rule, liable for the price of such goods, if the bill or note is not paid? Give your reasons.

TAYLOR ON EVIDENCE.

1. What is the meaning of the rule "that the best evidence which the case is susceptible of should be presented to the jury?" Does this rule supply any and what test for distinguishing between primary and secondary evidence?

2. What will amount to such an inducement held out to an accused person as will render such confession inadmissible as evidence against him; and by whom must it have been held out to have this effect?

3. In what class of cases is reputation admissible evidence?

4. What is the effect of a judgment *in rem* and a judgment *inter partes*, respectively?

5. In what cases and against whom are depositions taken on former trial admissible as evidence?

6. What are the several functions of a Judge and of a jury with regard to written instruments produced at a trial?

SMITH'S MERCANTILE LAW.

1. Where a sale has been made to a broker dealing in his own name, but in reality as an agent, whom can the vendor treat as liable to him; and does the fact of the principal being a foreigner make any difference?

2. What is the distinction between a bill of lading and a charter party?

3. At what time is it necessary that there should be an insurable interest to render a life policy valid; and how does life insurance differ in this respect from other contracts of insurance?

ADDISON ON CONTRACTS.

1. What is the distinction between a pledge and a mortgage as regards—1st, the right to the property; 2nd—the right to possession during their continuance?

2. What is the difference between dependent and independent covenants?

3. What is the rule with regard to consideration in 1st—simple contracts; 2nd—bills and notes; 3rd—contracts under seal?

4. What is essential to render a contract binding for goods above the value of ten pounds?

BLACKSTONE'S COMMENTARIES.

1. What are the rights of individuals?

2. In what light does the law of England regard marriage?

WILLIAMS ON REAL PROPERTY.

1. Where is the legal estate in the following limitations: bargain and sale to A. B. and his heirs, to the use of C. D. and his heirs? Lease and release to A. and his heirs, to the use of B. and his heirs. A statutory deed of grant to A. and his heirs, to the use of B. and his heirs? Give the reasons for your answer.

2. Who becomes entitled to the residue of an estate *pur autre vie*, upon the death of the original tenant living *cestui que vie* where no special occupant is named in the grant? Upon what statutory enactments does this disposition of such an estate after the death of the original tenant depend? What alterations in the law do these statutes make?

3. Was a limitation in a deed of estate to take effect after the determination of a precedent estate in fee, good at common law? Is there now any and what mode of assurance by deed in which such a limitation would be valid?

4. An estate is limited to A. for life, remainder to B. for life, remainder to C. in tail, remainder to D. in fee, how can C. convert his estate in tail into an estate in fee?

5. Give an instance in which the person entitled to a first charge upon an estate by way of mortgage would formerly have lost the benefit of that charge by the effect of merger? What alteration in the law on this subject has been made by statute in Upper Canada?

6. If tenant in tail in possession enter into a written agreement for the sale of his estate, can the purchaser enforce specific performance of the contract in equity? Would the Court of Chancery decree a specific performance of such a agreement against the heir in tail? Give reasons for your answers.

7. Define a contingent remainder, and distinguish it from an executory devise, and from a shifting use. Is there any and what statutory enactments in Upper Canada as to the destructibility of contingent remainders?

STORY'S EQUITY JURISPRUDENCE.

1. Will a Court of Equity, in any and what cases, decree specific performance of an agreement for the sale of chattels?

2. If an infant enter into an agreement for the purchase by him of land, can he maintain a bill for the specific performance of the contract? Give reasons for your answer.

3. Will the Court of Chancery decree the delivery up for cancellation of a deed or other instrument void at law, and to an action on which there would be a good defence at law? Will such a decree be made where the instrument is upon its face void at law?

4. Give a definition of a *Donatio mortis causa*. What are the distinctions between such a gift and a legacy; and how does it differ from a gift *inter vivos?*

5. Is there any and what difference in the principle upon which a Court of Equity acts in setting aside a purchase by a solicitor from his client, and that upon which it proceeds on setting aside a purchase from a *cestui que trust* by his trustee?

6. Give an instance in which the equitable doctrine of marshalling of securities is applicable.

STATUTES AND PRACTICE.

1. In what way may the performance of conditions precedent be now stated in pleading; and how must the performance be traversed by the opposite party?

2. What are the usual conditions in a replevin bond?

3. What must a Judge certify to entitle plaintiff to full costs, in an action of trespass where the verdict is for less than forty shillings?

4. In what cases has a Judge the power to order a compulsory reference, and at what time can this be done?

5. Who are the necessary parties to a bill filed to carry into execution the trusts of an ordinary deed of assignment for the benefit of creditors?

6. What is essential to make a suit in equity *lis pendens*, so as to be constructive notice?

7. What alteration has been made in the practice as to granting commissions of lunacy, by a late Act of Parliament?

8. At what stage of a cause can the plaintiff give notice of motion for a decree?

9. What is the abatement of a suit? In what manner is an abatement before decree remedied?

LECTURES

ON THE JURISDICTION AND PRACTICE OF THE HIGH COURT OF ADMIRALTY OF ENGLAND.

BY JOHN MORRIS, ESQ.

(*Continued from our last.*)

3. MORTGAGES.

Prior to the statute of Vic., the Court had no jurisdiction either to enforce a mortgage, or to recognise the claims of a mortgagee as a part owner, &c. He had not the legal title; consequently, he had not any *locus standi* in this court. Whether he could have appeared in a suit instituted by some

one else, merely to protect his interest, appears to have been doubtful; but now, by the statute of Victoria, when any ship is under arrest by process from the Admiralty, or when the proceeds have been paid into the registry of the court, it has full jurisdiction to take cognisance of all claims and causes of action of any person in respect of any mortgage of such ship and to decide upon any suit instituted by any such person in respect of any such claim or cause of action.

A mortgagee cannot now, any more than he could formerly, *initiate* a suit in the Admiralty Court. He cannot arrest a vessel as a part owner. If a vessel only, but not the freight, be arrested for wages, the mortgagee may come in as against the ship; but he cannot, by an independent suit, assert his claim as against the freight. In the case of *The Fortitude* (2 W. Rob. 217; 8 Jur. 23), in which this point was raised, some remarks were made by the present learned judge of the court, in giving judgment, from which I have made a few extracts. Referring to the question which was raised as to the jurisdiction of the Court, the judge pointedly remarked,—"When I look to the question as one of jurisdiction, I find that if the Court has jurisdiction, and refuses to exercise it, the remedy is by mandamus; if the Court has not jurisdiction, the remedy is by prohibition; if the Court has jurisdiction, and yet, under peculiar circumstances, it could not be exercised advantageously for the suitor, then an injunction would properly come from the Court of Chancery." Then, referring to the construction to be put on the 3rd section of the statute of Victoria, which relates to mortgages, he said, "Two conflicting constructions are sought to be put on this section; they appear to be these —on behalf of the mortgagees, the parties taking out the warrant, it is said, that this vessel having been arrested, and being in mortgage, this question arises out of the mortgage, and comes fairly within the words 'any mortgage.' The construction put on this by the other party is this;—he says, 'No, it does not mean any question arising out of the deed of mortgage, but simply any question arising as to the ship being mortgaged.' I confess, my mind leans to the latter construction, because I think it assimilates to the principle on which the Act was passed; it is a remedial Act, intended to remedy the inconvenience sufficiently, but not to carry it further. The circumstances of the present case do not, as appears to me, bring it within the remedy, or within the principle of the Act; not within the principle, because the Court exercises its ordinary jurisdiction with justice, without resorting to the statute; not within the words, because I think the more proper construction is to restrain the enabling power to the ship alone. In this form of action, if maintainable in this Court, the Court might be called upon to adjudicate upon the right to freight, without reference to any other question as to the nature of the suit. This is not a proceeding to make freight contribute *pari passu* to other liens; that is not the question; but to adjudicate as to the title to the freight itself—a question quite independent of the jurisdiction belonging to this Court. That question was forced upon the Court in the *Dowthorpe* (2 W. Rob. 73); freight being in its hands, and being in its power having been arrested by the ancient ordinary process of the Court; the Court did not voluntarily call it in for a special purpose." See contra as to the present practice, 17 Jur. 744.

4. BOTTOMRY.

We have just seen that the court has no jurisdiction in the case of an ordinary mortgage, except under special circumstances; but where the ship is hypothecated by a bottomry bond, the Court has jurisdiction. The reason given for this, in one of the cases at common law in which a prohibition was applied for, was, that it was not reasonable that the Common Law Courts should hinder the court of Admiralty from giving a remedy where they can give none themselves.

Where the master is in a destitute situation in a foreign port, and unable to obtain the necessary supplies for his vessel on the personal credit of himself or his owners, he can, by a bottomry bond, pledge the ship as security for such supplies, whether obtained in money or goods. It is essential to the validity of a bottomry bond—(1) That the ship is pledged, and not the owners; the repayment of the money must be dependent upon the safe arrival of the ship at its destination. This is what is termed sea-risk, which the lender must undertake, or the bottomry bond is not valid as such, nor can the Admiralty Court maintain jurisdiction without sea-risk (*The Royal Arch*, 30 L. T. 199). (2). As a general rule, the bond must be taken in a foreign port, but this is liable to exceptions. Thus, in one case (where a British vessel was in an English port, on her homeward voyage from the East Indies, the owner, who resided in Scotland, had died insolvent, and his representative declined to make any advances for necessary repairs, without which the vessel could not proceed to her destination), Dr. Lushington said, that the validity of these bonds "does not depend upon the mere locality of the residence of the owner." He added, "it depends, I think, upon the absolute necessity of the case, where the master is in such a condition that it is impossible for him to meet the necessary disbursements, and he has no means of procuring money but upon the credit of the ship." It is quite clear that a valid bottomry bond cannot be made in an English port where the owners reside in England; even, I apprehend, if they are first communicated with, and assent to it, because such an instrument would be within the Restraining Statutes, not being made on the sea nor out of the realm. An hypothecation by the owners in a home port, although in form a bottomry bond, would be open to the same objection—it would be construed to be, in effect, a mortgage; although in America the Admiralty jurisdiction has been exercised in such a case. Recent decisions show that, even when given in a foreign port, the owners must, if possible, be communicated with before giving a bottomry bond, and that a very strong case is required to dispense with the necessity for such previous communication. Where the telegraph is available, it would, I should think, be impossible to uphold a bottomry bond without first communicating with the owners. (3.) The next test is necessity. Mr. Edwards says, that necessity is as much looked too in the Admiralty Court in these cases as is the consideration on an ordinary contract in the common law courts.

The rule, where there are several bottomry bonds given on the same ship, is, that the last in order shall be the first to be paid; thus reversing our ordinary common law notions of priority. The ground of this rule is, that the last loan furnished the means of preserving the ship and bringing it to its destined port, and that without such assistance the former lenders might have lost their security.

The master has power to hypothecate the cargo as well as the ship and freight, but the former cannot be made available till the latter have been exhausted. Dr. Lushington said, in one of the cases, "it appears, that where the bondholder has directly, or by intendment of law, a lien on the freight and cargo, the owner of the one may have the aid of the Court of Admiralty to bring the other into contribution, and that the Court will apportion the liability between the two; and where there are several bonds, some binding the ship and freight, others the ship, freight, and cargo, that the Court will marshal the assets, directing one claim to be satisfied from the cargo, and another from the ship and freight." *

* The doctrine of this case, however, seems much shaken by a late case, were three bottomry bonds had been taken: 1st, on ship and freight; 2nd, on ditto; 3rd, on ship, freight, and cargo; and the proceeds of ship and freight were sufficient to pay the last two bonds only

Application by the holder of the first bond that assets might be marshalled, so as to compel the owner of third bond to go upon the cargo (which was sufficient to pay him) leaving proceeds of ship and freight applicable for first and second bonds; opposed by owners of cargo on the ground that their cargo was not on board when first bond given, and that effect of such marshalling of assets would be to make the cargo pay the first bond, and that it had been decided by Lord Stowell, in the case of the *Prince Regent*, cited in that of the *Dowthorpe*. 2 W. Rob. 85, that were ship, freight, and cargo were all hypothecated, the bondholder must, nevertheless, exhaust his remedies against ship and freight, before he could call

These remarks illustrate the powers of the Court: it is a court both of law and equity. † Not that it has any general equitable jurisdiction, it can and does administer most enlarged equity. It even goes to the extent, in bottomry cases, of controlling extortionate interest, but this of course is a power which is very cautiously exercised.

Not only has the Court power to apportion liability and marshal assets, as between different bondholders, but also as between the bondholders and other claimants, such as wages, salvage &c. As to the principles which the Court applies in the exercise of this important equitable jurisdiction, you may profitably consult the last chapter of Abbott on Shiping (on Maritime Lien), which has been added to the recent additions of that work.

The Court of Chancery has concurrent jurisdiction in cases of bottomry bonds, and will interfere by injunction to restrain proceedings in this court in case of fraud, or if it appears that the questions at issue can be better decided in the former court; but now that the powers of this Court have been enlarged, and its procedure improved, injunctions would, I should think, be very sparingly granted.

5. NECESSARIES.

In most of the countries governed by the civil law, repairs and necessaries form a lien upon the ship. Not so in this country. Here a shipwright has a lien for work done to the ship, but it is lost if he parts with possession. The shipwright, therefore, who has once parted with possession of a ship, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not, by the law of England, preferred to other creditors, nor have any particular claim or lien upon the ship itself for the recovery of their demands.

Until stopped by prohibitions, in and after the reign of Charles II., the Admiralty Court appears to have held that repairs and necessaries constituted a lien upon the ship; and even after prohibitions had been obtained on original suits instituted by what were called material men, it was still the constant practice of the Court to allow them to be paid out of the proceeds in the Registry; and this practice was upheld with a high hand by the Court of Admiralty, until condemned by the Judicial Committee of the Privy Council in 1835, on an appeal in the case of the *Neptune*, reported in 3 Knapp. p. 94, The marginal note in that case is as follows:—"Material men have no lien for supplies furnished in England on the proceeds remaining in the Registry of the Court of Admiralty, of a ship sold under a decree of that Court for the payment of seamen's wages. A mortgagee in possession of such ship, so sold, is entitled to the remainder of such proceeds after payment of seamen's wages and costs."

This case is worthy of an attentive perusal, not only as a leading case on Admiralty law, but also as an interesting case on the question of lien generally.

The law still remains the same, except as to necessaries supplied to foreign vessels. The provision in the statute of Victoria applicable to this has been already noticed. It only remains to observe, that the act does not expressly create any lien upon the ship: it merely gives to the Court power to enforce payment. This it exercises by its ordinary process—viz., arrest of the ship. Where, however, there has been great delay, and the ship has changed hands, the Court may refuse to enforce payment against the ship;* there being no express lien. This is an important distinction, and will at once suggest the expediency of enforcing this remedy without delay.

As to what amounts to necessaries within the meaning of the statute, see *The Alexander*, 6 Jur. 241; *The Sophie*, 1 W. Rob. 369; *The Ocean*, 2 W. Rob. 368.

6. SALVAGE AND TOWAGE.

Salvage is defined in Lord Tenterden's work as "the compensation that is to be made to other persons by whose assistance a ship or its lading may be saved from impending peril, or recovered after actual loss." "This compensation," he adds, "is known by the name of salvage, and at present is commonly made by payment in money; but in the infancy of commerce, was more frequently made by the delivery of some portion of the specific articles saved or recovered.

"All foreign codes of maritime law, both ancient and modern, contain provision and enactments on this head. In some of them the value to be paid is fixed at a certain portion of the articles saved, or of their value, according to their nature and quality, or the circumstances of the case. But it is obvious that positive and settled rules are little adapted to the administration of justice in varying and unsettled cases; and what can be more various and unsettled than the degree of labour experienced on the ocean, or the degree of peril to which persons who engage in the meritorious task of assisting the distressed on that element are at different times exposed? And, therefore, in the case of wreck, or derelict at sea, the law of England, like the law of some other countries, has fixed no positive rule or rate of salvage; but directs only, as a general principle, that a reasonable compensation shall be made."

It is further stated in the same work, that "a person who, by his own labour, preserves goods which the owner, or those entrusted with the care of them, have either abandoned in distress at sea, or are unable to protect and secure, is entitled, by the common law of England, to retain the possession of the goods saved, until the proper compensation is made to him for his trouble. The compensation, if the parties cannot agree upon it, may, by the same law, be ascertained by a jury in an action brought by the salvor against the proprietor of the goods, on his implied contract (if the circumstances justify an inference of it) to make compensation for the service rendered in respect of them; or the proprietor may tender to the salvor such sum of money as he thinks sufficient; and, upon refusal to deliver the goods, bring an action against the salvor; and, if the jury think the sum tendered sufficient, he will recover his goods or their value, and the costs of his suit. †

The Common Law courts have concurrent jurisdiction with the Admiralty Court in case of salvage; but in the case of valuable property and numerous proprietors and salvors, the jurisdiction and proceedings of the latter court are admirably adapted to the purposes of justice.

Indeed, in an ordinary salvage case, there are practical difficulties in the way of proceedings at common law; because where, as is usual, there are several salvors, it is not enough to assess the amount to be paid, but it is necessary to apportion the amount between the different salvors according to their respective deserts, and the common law courts have no machinery for doing this. Again, in the Admiralty Court, the judge is assisted, where necessary, by the nautical skill and experience of two of the elder brethern of the Trinity House. A tribunal so constituted is better able to decide a case of this kind than a judge and jury.

But although admirably adapted for the trial of important cases, yet the delay and expense, necessarily incident to the proceedings of a tribunal sitting at a distance from the subject in contest, will often be injurious to the parties. The Legislature has endeavoured, therefore, to introduce a more exped-

upon cargo to contribute.—*Held*, on the authority of the *Prince Regent*, holder of third bond must exhaust proceeds of ship and freight before he can apply to cargo, and, therefore, Court could not marshal assets as prayed, effect of which was first bond went unpaid. (*The Priscilla*, Dec. 2, 1859, reported the next or the following day, in the *Shipping Gazette*.)

† The following note is by the same gentleman as the notes at pages 52 and 53:—"It is correct to say that the court is one both of law and equity, when there is no such distinction in the Roman law? But perhaps no other means of expression could have been found to bring home to most of your hearers the fact that under a good system of law all just relief can be granted, without a distinction of courts or rules."

* The Alexander, 5 Jur. 1067. † Abbot on Shipping, 505.

itious and less expensive mode of adjustment. The result of the statutes on the subject is, that where the sum claimed for salvage does not exceed £200, it shall be referred to the arbitration of two justices of the peace, and, by consent, also if it exceed that amount; but with a right of appeal to the Court of Admiralty where the sum in dispute exceeds £50. Disputes with respect to salvage within the cinque ports are to be determined by commissioners specially appointed for the purpose by the Lord Warden, with an absolute right of appeal, without reference to amount.

Prior to the statute of Victoria, the jurisdiction of the Admiralty Court was confined to cases where the salvage was performed at sea, or between high or low water-mark. The Court had no jurisdiction whatever as to towage claims; they were only cognisable in the common law courts; but now, by the 6th section of that statute, the jurisdiction is, as we have already seen, given to the Court in all cases of salvage and claims in the nature of towage, whether the service were performed upon the high seas, or within the body of any country. See also, as to salvage, 17 & 18 Vic. c. 104, s. 476.

It seems to have been a notion formerly that it was necessary for salvors, in order to maintain their rights, to remain on board the vessel which has received their assistance. But Lord Stowell decided that this was not necessary. The Court of Admiralty is not bound by any technical common law notions as to losing a lien by giving up possession. Even if possession be given up by the salvors, the Court, by its ordinary process, and as the first step, arrests the ship, and so makes it available to answer the claim of the salvors.

The amount of salvage to be allowed, and the apportionment thereof among the persons engaged in the salvage service, must rest a good deal on the discretion of the judge, guided of course by the principles which precedent and experience have established, although the special circumstances of each case often give rise to questions of considerable difficulty.

"Salvage," said Sir John Nicholl, * "is not always a mere compensation for work and labour; various circumstances, upon public considerations—the interests of commerce, the benefit and security of navagation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are—first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their lives to save their fellow-creatures, and to rescue the property of their fellow-subjects; secondly, the degree of danger and distress from which the property is rescued, and whether it was in imminent peril, and almost certainly lost, if not at the time rescued and preserved; thirdly, the degree of labour and skill which the salvors incur and display, and the time occupied; lastly, the value. When all these circumstances concur, a large and liberal reward ought to be given: but where none, or scarcely any, take place, the compensation can hardly be denominated a salvage compensation: it is little more than a mere remuneration *pro opere et labore*."

The owners, in order to avoid the expenses, must make a sufficient tender to the claimant. This, if after the commencement of proceedings, should be done by what are called formal acts of Court, analogous to our summons to stay in a common law action. As to the rule of the Court with reference to costs, where a tender is made and refused, but afterwards held by the Court to be sufficient, see *The Williams*, 11 Jur. 174. It is not of course to give costs against the salvors who decline a tender.

7. DAMAGE.

This head includes damage to a ship by collision, and *injuries* to the person by assaults, &c., at sea. These are cases of *tort*, as distinguished from the preceding heads, which are cases of contract or quasi-contract.

* *The Clifton*, 3 Hagg. 117.

Assaults to the *person* at sea are still, I apprehend, cognisable in this court, although the remedy appears not to have been resorted to in modern times. The increased powers vested in magistrates for dealing with trivial cases of assault, and the fact that the Common Law Courts have concurrent jurisdiction in important cases, may account for the remedy in this court having become almost obsolete. In fact, there appears to be no special advantage in proceeding in this court rather than at law, except it be that the expense might be less. For obvious reasons the vessel cannot be arrested in a mere personal suit for tort. The judge may, no doubt, award damages as compensation, and formerly the Court had and exercised the power of arresting the defendant in personal actions (exactly as by its ordinary process it arrests the ship) as a first step, and compelling him to find bail; but there is no instance of the exercise of this power since the abolition of arrest on mesne process at common law, and, although not formally abolished, it would, no doubt, now be considered obsolete. The remedy, however, against the person according to the present procedure (that is, without the power of preliminary arrest) is, I doubt not, still open, and might, if desired, be resorted to, instead of proceeding at common law; but the remedy is limited to assaults, &c., committed at sea, as it is clear that the statute of Vic., extending the jurisdiction in damage cases, is confined to damage done to the ship.

With reference to the mode of estimating damage to the person, Lord Stowell has thus decribed a singular rule which formerly prevailed in the Admiralty Court.* "It is within my recollection," he says, "that in cases like these, which were formerly more frequent than they are at present in these courts, it was common for each maritime witness to assign what he thought a proper compensation for a punishment unjustly inflicted, by declaring that he would not take such a punishment for less than such a sum, and estimating the compensation by the value which each man put upon his own individual skin. Of course, that was an estimate that afforded little light to the judgment of the person who had to decide the question, and having been discontinued, it now affords him none."

Collision cases (no longer confined to cases happening at sea; sec. 3 and 4 Vic., ch. 95), now form the largest and most important class of cases which come before the Court.

The assistance which the Court is in the habit of obtaining from the Trinity Masters makes it generally a more desirable tribunal for the trial of collision causes than a judge and jury at Nisi Prius.

This Court, under the statute of Victoria, contains power to direct issues to be tried by a jury; but this power has, I believe, only been exercised in one case.† It has been urged as a reason why this power has not been more used, that the issues in a case of collision are rarely questions of mere fact, and that to throw them down before a jury, not conversant with nautical practice, may, however great the vigilance of the judge, involve a decision irreconcilable with the principles of admitted science. It has been thought, too, to approximate to an absurdity, to examine and cross-examine witnesses regarding laws and rules which are incontrovertible, and ought to be well known to the Court, oftentimes with no effect but to confound the understanding of twelve men wholly unused to such inquiries, to whom the language of seafarers is strange, and who, haply, have enough to do, in cases relating to matters with which they are familiar, to guard their minds against the undue influence of a popular address, and of the first and last word.‡

Recent experience in our common law courts has shown that trial by jury in civil cases has, as a recent writer has termed it, its "dark side." Only a few days ago, a patent case came on for trial before the Lord Chief Justice and a

* 1 Hagg. 288. † 1 W. Rob. 429. ‡ *Anne and Mary*, 2 W. Rob. 196.

special jury. I cut out the following from the newspaper report of the case:—

"The Lord Chief Justice said, these patent cases were nuisances. Laymen, perfectly unacquainted with the points which they were called upon to determine, were not in such an advantageous position at the end of several days as a scientific person would be in as many minutes.

A juryman said he could confirm his Lordship's view. He had served upon a jury in the Court of Exchequer in a very similar case, and he believed that half of the jury were so confused by the conflicting testimony they could scarcely arrive at any conclusion.

The Lord Chief Justice said, it was very difficult to decide between conflicting evidence in ordinary cases, but especially so when the subject matter was not within their cognisance.

A verdict was then taken for the plaintiff, with the damages in the declaration, subject to a reference.

What would be a proper tribunal for the trial of patent cases is not the question now before us. I take this extract merely as confirmatory of what I have already said as to a trial by judge and jury not being the best fitted for cases in which nautical skill and experience are requisite. How much better is the mode of trial adopted in the Admiralty than that which, as in this patent case, is too often the result of an attempted trial at *nisi prius!* A reference, however fitted for the settlement of matters of account, is not a proper tribunal for the decision of important questions of law and fact. Such a mode of trial would, indeed, be a poor exchange for that now in use in the Admiralty Court, where unlike a reference, the proceedings are conducted in public, and reasons are invariably given for the decisions, which reasons can be reviewed in a competent court of appeal.

The present learned judge of the Admiralty Court, in order as far as possible to provide against conflicting evidence, has wisely provided, by the rules of Court, that each party in a collision cause shall, by what are called "preliminary acts," *i.e.* as the first step in the cause, set down in writing all the leading particulars connected with the collision, according to the form given by the rule. These particulars are sealed up, and are not, except by special order, again opened until the hearing. This proceeding renders it impossible for either party so to frame his evidence, as to meet the case set up by his adversary.

"When it appears doubtful which vessel was to blame, or whether such a degree of blame may not be imputable to each as to render it difficult to decide who, if either, ought to make compensation, then it seems to be preferable to proceed in the Admiralty Court; because, if it should then appear that the navigators of both the ships were equally to blame, but that only one of the ships was materially damaged, the Court has a peculiar and singular jurisdiction, to decree that the owners of each vessel shall make good a moiety of the entire damage; although in a court of law, when the mischief done was the result of the combined neglect of both parties, both are in *statu quo*, and neither could recover any compensation from the other."* This suggests an important consideration for you in determining whether to proceed at law or in this court in a case of collision. "When the ship that has occasioned the damage is foreign, or the owner or person to be sued resides abroad, or is insolvent, so that a verdict at law for damages might not be enforced, it is certainly preferable to proceed in this court,"† where you can at once arrest the ship.

Although I do not profess to discuss the law administered by the Court, except so far as it may be necessary to mark out the metes and bounds of its jurisdiction, yet I can hardly omit while on this head, to draw your attention to two most important statutory provisions; whereby (1) the liability in collision cases is limited, in the case of British ships, to the value of the damage-doing vessel *immediately* prior to the collision, and of the freight, *i.e.* in fact, the whole interest of the owner. To the extent of such value the owner is personally responsible, but not beyond that amount, except as to the costs if he improperly contests his liability, and also according to the admiralty decision, to interest, but on this latter point there has, I believe, been a conflicting decision in Chancery.‡ (2) Rules are made for lights and fog signals, and also for meeting and passing, a kind of "rule of the sea;" and it is expressly provided, that if a collision ensues from a breach of these rules, the owner shall not be entitled to recover.§ As to (2), you should carefully study the provisions of the Act, and the decision thereunder, if consulted in any collision case, as they have an important bearing on almost every question in connection with it.

Having now drawn your attention to the principal heads of the jurisdiction of the Court as at present exercised, it is scarcely necessary for me to remark on the reasons which have excluded other maritime matters from the cognisance of the Admiralty. Charter-parties, marine insurance, and such like, being entered into or effected on land, come within the Restraining Statutes, according to the construction put upon them by the Common Law Courts, and these Courts, being able to afford relief in such cases, hesitated not to prohibit the Admiralty from entertaining them. Whether the Admiralty jurisdiction should now be extended to include such matters, will come more appropriately under consideration in a subsequent period of these lectures.

* 2 Chitty's General Practice, 515. † 2 Chitty's General Practice, 515.

‡ In Admiralty Court—
Interest held to be due plus value of ship; *The Dundee*, 2 Hagg. 142.
Sed contra in Chancery—
African Steam Ship Company v. *Swanzy*, 2 Kay & Johnson, 660; cited to, but dictum in Dundee upheld in Admiralty Court by, Dr. Lushington, in the *Hoang Ho*, May, 1859, not yet reported,

§ Merchant Shipping act, ss. 295 to 299, and the Admiralty Rules as to lights and fogs.

DIVISION COURTS.

OFFICERS AND SUITORS.

CORRESPONDENCE.

SELKIRK P. O., March 9th, 1860.

To the Editors of the Law Journal.

GENTLEMEN,—You will oblige me by answering the following questions, in your valuable *Journal*.

1st. What is the proper fee for a Division Court Clerk to charge for drawing an affidavit and administering an oath to Bailiff? I find there is a difference in practice since the Consolidated Statutes became law, some Clerks still charge 20cts., and some only 15cts.

2nd. Is a Clerk entitled to a receiving fee of 20cts., on a Foreign Summons, if that summons is returned to him by Bailiff (not served)?

3rd Is any Clerk (upon receiving a summons from a division in another County) bound to have the summons served, without the fees necessary to make such service being sent to him along with the summons, and if the fees are not sent, can he legally refuse to have the service made? My reason for asking this question is this, that many Clerks send summonses for service to other divisions, and the receiving Clerk gets them served, pays the Bailiff's fees and other expenses out of his own pocket, sends them back again to the Clerk from whom he received them, and often has to wait months before he gets his pay, and sometimes never gets it at all. What is the legal remedy?

4th. What is the proper mode of proceeding in the following case:—Plaintiff A. sues defendant B., who once lived in the same Division and County which A. now sues in, but who has since removed to another County. A. gets judgment, and the Clerk sends a transcript and certificate of judgment, to the Clerk of the other Division where B. resides. Upon the re-

ceipt of the transcript and certificate, the Clerk of the Division at once issues execution against the goods of B. In the meantime, and before the Bailiff can make any seizure, B. removes to the Division where the cause of action arose. A., the plaintiff, finds that B. is come back again, and immediately applies to the Clerk of said Division, to issue an execution. Is it legal for him to issue one, not having received any return of the transcript sent? and even if he had received a return, would he be justified in so doing after once issuing a transcript?

Yours truly,
Edward R. Kent, *Clerk,*
6th Division Court, Co. of Haldimand.

[1st. The proper fee is 15 cents.

2nd. The Clerk performs the service required of him, and whatever may be the Bailiff's return, we do not see that it can affect the Clerk's fees—at least as we understand the question, for it is somewhat ambiguously worded.

3rd. We think not. The Clerk of the home Court, ought to send the proper fee with the summons, or at least a sum on account of fees. The Clerk of the foreign Court would have a remedy by action against the Clerk of the home Court.

4th. It would not be "legal" for the Clerk of the Court to issue execution, not having received any return of the transcript sent. Under section 139 of the Act, the cause is in effect removed, and no action can, in our opinion, be taken in the original Court, until the cause is, so to speak, removed back again, which may be done by transcript certifying the proceedings had. There is much difference of opinion, however, as to the effect of the removal. We have stated ours. But when convenient, the Clerk would do well to procure the special order of the Judge, for the issue of the execution.

The Editors of the Law Journal.

Owen Sound, 12th March, 1860,

Gentlemen,—I intended the first word of the fifth line, and third paragraph in the first letter, on page six, of the January number for this year, to be *men*, not *means*. I do not like it believed that I have made an erroneous imputation. The words omitted in the letter just referred to, seem to me to be warranted by the article "Division Courts" commencing on page 108, of *Law Journal* for 1858, May number.

You are of opinion, and through a case now decided, I have reason to believe, that a bailiff may duly seize, advertise and sell goods that he had good reason to believe were properly liable to the process under which he so acted, and months after may be held accountable to the, then for the first time, claimant, for the value of the goods.

The writ commands the bailiff to levy on the goods of the party, but the bailiff seldom or never *knows positively* that the goods do belong to the party. This position may be illustrated by the following case:—

Since I wrote you last, I was waiting, concealed, whilst an execution debtor concluded a purchase that was followed by an immediate delivery. I seized the goods so bought and delivered within sixty seconds of the said delivery, and within ten minutes after the seizure the goods were so persistently claimed by a third party that I was obliged to interplead.

But a case might occur in a yet more embarrassing form, as thus: bailiff may be present and see a judgment debtor purchase and receive a span of Horses on Thursday, on the following Saturday, under execution, bailiff may seize, and in due time may sell them; months after, but for the first time, claimant may come along, and afterwards prove that he bought the Horses from defendant on the intervening Friday, and hold bailiff liable for the full value of the team.

Now considering that the legislature has provided indemnity for bailiff, when clerk is involved, that there is an appearance of protection for bailiff when acting under execution, that it is unreasonable to conclude that it was gravely intended to compel bailiff for the sake of the miserable pittance that the gets for his services, to incur such a weighty liability, and that he is required to seize, not to *discover* and *identify* the property, I would like you to say if you think it is compulsory upon bailiff to sell, or do anything that would incur risk of loss, when he does not know the property to belong to the party, or if the bailiff may fairly and lawfully require the beneficial party to point out the property, or if bailiff is to exercise his discrimination whether he may lawfully require beneficial party to assume the risk, by giving bailiff an indemnifying bond?

Yours truly,
Paul Dunn.

[We presume Mr. Dunn refers to Sec. 196 and 197 of the Division Court Act, which by no means aid his view. The effect of those provisions is merely, that if the clerk issue an irregular or defective warrant to the bailiff, he and not the bailiff is liable in respect to the defect or irregularity. Bailiffs like sheriffs are bound to use due diligence in discovering property, and must make true returns to executions at their peril. A bailiff cannot compel an indemnity, he must sue out an interpleader, or take it upon himself to sell on his own responsibility.—Eds. L. J.]

To the Editors of the Upper Canada Law Journal.

London, C. W., 20th March, 1860.

Gentlemen,—In your *Journal* for February I noticed your criticism on the MS. which I left at your office on the 31st of January last.

This I accept in proportion to the extent of your understanding of all the circumstances involved. I am unable, however, to perceive how it can be in any way just or impartial to dispense with three instances of recognised law principles in favor of Adam Hope, to my disadvantage, as by your shewing has been the case.

1st. Dispensing with and ignoring the law and custom affecting the holders of Promissory Notes. 2nd. The doctrine which disqualifies Assignees from sueing "*for choses in action.*" 3rd. Accepting the Assignor's absurd affidavit, being interested in the Estate Assigned, and therein referring to a document which did not then exist, (*vide* my truthful remarks on this document.)

But the truth is, no final judgment took place on the merits. On the first hearing of the case on the 28th April last, Judge Small, acting upon the obviously just law regulating Promissory Notes, in connection with Thos. Gordon's acknowledgment adduced, that the Note was good when he took it, and that he held it over a year, pronounced Judgment for the Defendant; but as the Plaintiff's agent demanded proof of Thos. Gordon's signature to said acknowledgment, a factitious move to evade an immediate affirmation of the Judgment and retain an avenue open for future policy and sharp practice, it appears that the perfection of the Judgment was suspended to await that proof.

On the occasion of the next Division Court, which took place on the 2nd June following, the Judge and Clerk were deputies, Judge Small and the usual Clerk being absent, I attended to ascertain whether or not the Plaintiff abandoned his frivolous case, being given to understand that he intended to do so; but after waiting a while I was surprised to hear the cause called *de novo*. Hence, thereupon, I represented the predicament of the case to the new Judge, and sought time to bring Thos. Gordon to Court, which he granted by ordering the acting Clerk to remove the case to the bottom of the list of cases for trial. That being done, as I supposed, I sought

for and obtained a Subpœna to bring Thos. Gordon into Court to affirm his signature to the aforesaid acknowledgment, and on leaving the Court I engaged a Law Student to attend upon the case.

By former conversation which I had with Mr. Gordon about the matter, he stated that Adam Hope endeavoured to make a tool of him, and that he would not attend any Court about the matter in question. This being the case, I anticipated trouble in finding Mr. Gordon,—which became realized,—and not finding him I made affidavit to that fact.

On returning to Court with this affidavit to plead an adjournment of the case thereon, I was astonished by being informed by my agent, that upon his looking over the list of cases to ascertain the position of the case by the progress of the Court in the disposal of the cases for trial, that he was greatly surprised to find that Judgment had already been entered against me and in favor of the Assignee mentioned, and that without any Plaintiff or Agent therefor being in Court.

From these truthful premises I leave you and the public to make legitimate inferences.

I remain, your's respectfully,
MARCUS GUNN.

[We have no further remark to make on the case submitted by Mr. Gunn, except this, that so far as we understand the facts adduced he has not had a fair trial,—in truth no trial. Had it been his good fortune to have been able to establish his case by legal evidence we believe the result would have been quite different. Here, as far as we are concerned, the matter must drop.—ED. L. J.]

[The three following letters, which we take from the *British Whig*, are fair specimens of the arguments *pro* and *con* about the 91st clause, which one usually sees in the lay press. Though evidently not intended for publication in our Journal, we deem it well to give our readers the benefit of them in connexion with our editorial remarks elsewhere.]

To the Editor of the Daily British Whig.

SIR,—As the matter is being fully discussed with a view to the abolishment of imprisonment for debt in the Division Courts, but all on one side of the question, through the medium of your valuable paper, both by an "Old Barrister" and a "Law Student," it would perhaps be advisable to present it in a different light, and on the other side, as well for the benefit and consideration of both creditor and debtor, as for the sake of argument.

It is contended that the 91st clause of the Division Courts Act should be repealed, thereby saving debtor from examination before the judge, as to his effects, debts, etc., even though he should have used some means of fraud to have the effect of causingthe bailiff to return his warrant "nulla bona;" no bones, as it was expressed not long since by a well known magistrate —and if that is so I will remove my case to the Superior Court by a suit of "seize her Rarey" (*certiorari*). I think Mr. Editor, it would be doing injustice to creditors and debtors both, to have repealed—as a few swindling debtors who seem to meet their own ends, view it—"that very formidable and threatening 91st clause." As for the creditor, he now depends upon it if other means fail, to cause a dishonest debtor to settle the debt; that clause is, as it were, "the indorser" for the debtor, the security and remedy for the creditor, and he will and justly too, avail himself of its benefit. If you have perused the late numbers of the *Law Journal*, you will there have seen the statements given by a great number of the Division Courts Clerks throughout Upper Canada (and who are a well informed and respectable set of men) by which it is clearly shown that very few debtors, indeed, are imprisoned, preferring rather, when it comes to the point, to satisfy the debt, than suffer the punishment which most of them so meritoriously deserve; and in very few instances is the debtor unjustly imprisoned. As to the imprisonment itself, that lies entirely in the discretion of the Judge; and who, better than he, is able to decide whether debtor has acted honestly or not? Also, by sections 21 and 23 of 22nd & 23rd Victoria, chapter 33, the enactment is to the following effect:—If on the examination of the judgment debtor before the Judge, it to said Judge appears that the party had not good cause for summoning the debtor, the Judge "shall" award the debtor a sum of money, by way of compensation, for his trouble and attendance, to be recovered against the creditor; and the debtor if after his examination, has been discharged, no further summons is allowed to issue out of the same Division Court at the suit of any creditor, without an affidavit satisfying the Judge that the debtor, on such examination, had not made a full disclosure of his estate, effects and debts; or that the debtor, since his examination, has acquired the means of satisfying the debt.

By the letters of your correspondents, I have before mentioned, it was argued "that debtors in Supreme and County Courts, cannot be disposed of as in the Division Courts." I would say in reply to that: Division Courts debtors cannot, if they are about to leave Canada, and owing a party up to the amount of £24 10s., be imprisoned and held to bail, under a writ of Capias; but if it were a Supreme or County Court debt "then as a matter of course," a Capias will issue, because if a debtor is about to clear off, any party being a creditor, or having a cause of action against the party, so departing, the party who has a cause of action to the amount of £25, and satisfies the Judge to that effect, in affidavit, and also that there is a good and probable cause for believing that the party, going away, is about to leave Canada with intent to defraud his creditors generally, or said party in particular; the Judge will allow a Capias to issue, together with an order by him made therein, stating for what amount debtor can be held to bail.

But Mr. Editor, a person owing £24 10s., can sell off his effects, etc., pocket the proceeds, laugh at his creditors, be sued and let judgment be entered, execution issued and returned *nulla bona*, be served with a judgment summons, then make tracks; and during all the time of the case pending, torments the creditor by continually telling him he will leave Canada, and prevent him from ever obtaining his debt; *these* are the fellows who wish to have that very disgraceful 91st clause, which is a *torment* and a *terror* to *them*, repealed.

Then if abolishment of the law of imprisonment for debt were to take place, persons, unless they were good responsible parties, would not be able to obtain credit for small amounts, which would be in most instances a great detriment and injury to a poor man, who not having just then the money, but, may, if he gets what is required, be able to pay his creditor in a short time. For instance, a poor man goes to B, and says, I have a chance of making a good speculation, if I can only get about £10 in cash, or certain articles to that amount I require: to which request B. answers, I can neither let you have the money nor the articles; supposing you should fail in the speculation, or want to defraud me, what security have I for the return of my money or goods? Echo of course, would answer "none," for the poor man's security is gone. The grasping and crushing ninety-one "claws," are almost certain to unfold with the ring of cash, not obtained by the wring of oppression, but by just means, from a swindling debtor, for an honest creditor; what is fair play for one is fair play for the other; if an act is passed to abolish imprisonment for debt, let it relate as well to the Courts of Record, as to the Division Courts. The greater part of the community are of opinion the laws of imprisonment are just; are not the editors of the *Upper Canada Law Journal* of the same opinion? are not a great many leading men of the Bar, and the very judges themselves of the same opinion also? and do not the Legislature hesitate to differ?

No Mr. Editor, I will tell you what Act we want passed before the Legislative Council and Assembly, and this very session if possible "An Act to prohibit the distilling, importation use, or sale of intoxicating liquors, within the Province;" if

that act were passed, it would save the necessity of passing one to abolish imprisonment. I will say nothing further concerning the injury done by the use of intoxicating liquors; ere this will be published, the able and manly speech of his Honour Judge McKenzie will appear in your paper, speaking at great length, and to the point.

Yours truly,
Another Law Student.

To the Editor of the British Whig.

Kingston, 18th March, 1860.

Sir,—An attempt is made in your issue of this date, to show that the 91st clause of the Division Courts Act—now advanced to the 160—because, no doubt, of the great good it has found to have done to the human race, is, if not a benevolent, at least a harmless law.

Either one of two things must be admitted, which is. that the 91st clause is not only not harmless, but most heathenish, if judged by its effects, or that those administering it in some localities in Canada, should long before now have been called to an account by the Government for misconstructing and misapplying it. I do not for a moment mean it to be understood here or elsewhere, that Kingston is one of those localities, for Judge McKenzie's humanity and enlarged views of honor and justice, forbid it; but the fact of oppression is incontrovertible. There is no justification for such Legislative obscurity as deprives a subject of his liberty by misinterpretation or mistake.

That persons have been incarcerated in numerous instances, not because of fraud or equivocation, but simply because they had not the wherewith to pay, is unquestionable; and if the 91st clause did not contemplate this, why let it remain from day to day, while Parliament is in session, without amendment leaving it with the Judge to continue to act upon it, according to its own words, "as he thinks fit!" Truly a law which leaves it with the Judge to put what construction he chooses upon it, without positive definition, must be held an unenviable monument to the memory of its framers!

Trusting for the credit of Canada, to see the 91st clause very soon expunged from its legal records,

I am, Sir, your most obedient servant,
An Old Barrister,

(*To the Editor of the Daily British Whig.*)

Kingston, 21st March, 1860.

Sir,—* * * * As to your correspondents "A Law Student" and "An Old Barrister"—by the latter it is contended the sentence in the 91st clause, "as he thinks fit," gives too much power to the judge, and there ought to be an amendment. He does not suggest the manner in which such amendment could or should be made; why does he not do so? Really if he knows of any substitution that would give greater satisfaction, let him state what it is; no doubt he is striving for the benefit of the public as well as myself. Your other correspondent, "A Law Student," misconstrues the meaning of a correspondent of yours of the 15th instant. A Law Student, states that correspondent, of 15th instant, says "imprisonment for debt is a fallacy," and then goes on to comment on it. But, Mr. Editor, that correspondent (of 15th inst.), after shewing good authority, says:—Thus is shewn the fallacy of the statement that a debtor may be imprisoned "simply" because he owes money, meaning that a debtor who has acted honestly and upright in every way, and has not the means of paying the debt, is not imprisoned. Give your correspondent of 15th instant his due, and do not let him be picked to pieces on a mere misconstruction The followiug I copy from a letter of your correspondent, A Law Student, dated 16th instant, and appeared in your issue of the 18th instant: It is scarcely worth mentioning that the debtor who owes £5, or trifles of that kind, is not disposed of in the way spoken of as "the judge sees fit." On the following day an erratum appeared to the effect that the £5 above mentioned was intended to have been £500. I would, as to that opinion with regard to a judgment debtor, beg to differ. A party owing £500 can be disposed of and imprisoned for any time not exceeding twelve months by order of a judge. If you will please look at 22nd Vic., chap. 96, s. 13 (now Consolidated Statutes of Upper Canada, chap. 24, s. 41), you will there find it enacted somewhat to the following effect;—"That any person who has obtained, or is entitled to enforce, a judgment on any Court in Upper Canada (meaning the Superior and County Courts), may apply to any judge of such court for an order that the judgment debtor shall be orally examined upon oath before the judge, or any other person named in such order, touching his estate and effects, as to the means he had of paying the debt when contracted, as to means acquired since, as to disposal of property, etc., etc.; and in case such debtor shall not attend, and shall not allege sufficient excuse for non-attendance, or attending shall refuse to make a sufficient disclosure, concerning his affairs, etc., or has acted in any way to defraud his creditors or any of them, such judge 'may' order debtor to be committed to the common gaol of the County in which he resides for any time not exceeding twelve months."

I would, with your leave, Mr. Editor, say something further as regards the abolishment of imprisonment. It is the wish of some of your correspondents to abolish imprisonment for debt in the Division Courts only. It is my opinion that if the law of imprisonment be abolished let it have effect in all the Courts. The Superior and County Courts have equal facilities and every advantage the Division Courts have, and indeed much greater, as you by this time fully understand. Then if it ought to be abolished why not abolish it as before suggested? Even if that were really done the debtors would not be satisfied; it has already be experimented on. An act was assented to and passed on the 9th of December, 1843, entitled, 'An act to abolish imprisonment for debt, and for other purposes therein mentioned.' What was the effect of that Act? Why, sir, the very individuals by whose prayers and for whose benefit it was passed, were the very first to cry out against it in order to have it repealed, and to again satisfy them it was repealed on the 29th March, 1845. So, Mr, Editor, it would have the very same effect were it tried again. It would either do that or establish the cash system and do away with credit altogether

Perhaps, Mr. Editor, I have wearied both yourself and subscribers by my long correspondence. If I have you must overlook it, as in doing so I had an eye to the interests and welfare of the public, and with a view they should fully understand the subject.

I am, Sir, your obedient servant,
Another Law Student.

U. C. REPORTS.

QUEEN'S BENCH.

Reported by C. Robinson, Esq., *Barrister-at-Law.*

Gunn v. McPherson et al.

Promissory note—Endorsee, being also payee, against endorser—Pleading.

Declaration by G. against M. & W, on a promissory note for $100, made by M payable to G. or order, by G. endorsed to W. and by W. to the plaintiff. *Plea*, by W., that G., the payee and endorsee and the plaintiff is the same person and as such payee endorsed to defendant W. *Replication*, that before making of said note the plaintiff agreed to lend to defendant M. $100. provided he would make and procure W. to endorse said note as surety for the payment thereof to the plaintiff; that in pursuance of such agreement M. made and W. for his accommodation endorsed, and M. delivered said note to the plaintiff so endorsed. and defendant lent M. the $100, which has not been paid.
Held, on demurrer, replication good.

Appeal from the county court of Middlesex. The plaintiff declared against McPherson and Wright on a promissory note for

for $100, made by defendant McPherson payable to Hugh Gunn, or order, endorsed by Gunn to the defendant Wright, and by Wright to the Plaintiff. McPherson did not appear. The defendant Hugh Wright pleaded, that Hugh Gunn, the payee and endorser of the promissory note in the declaration mentioned, and the plaintiff in this action is one and the same person, and that the said plaintiff as such payee endorsed the said note to the defendant Hugh Wright, as in the declaration mentioned, and that he, the said defendant Hugh Wright, is an endorser subsequent to the plaintiff on said note, and so the defendant Hugh Wright says that the plaintiff had no right to maintain this action against him, as the said defendant Hugh Wright would be entitled to sue the plaintiff as endorser of the said note to him, the said defendant.

The plaintiff replied that before and at the time of the making of the said note he agreed to lend and advance the sum of $100 to to the defendant Donald McPherson, provided the said Donald McPherson would make the said promissory note in the declaration mentioned, and procure the defendant Hugh Wright to endorse the same as surety for the payment of said note to the plaintiff; and the plaintiff further saith, that in pursuance of said agreement, to wit, on the day and year in the declaration mentioned, he, the defendant Donald McPherson, made the said promissory note in the declaration mentioned, and the defendant Hugh Wright, for the accommodation of the said Donald McPherson, then endorsed the same to the plaintiff, with intent thereby of becoming surety and endorser to the plaintiff of the said note; and the said defendant Donald McPherson, after the said endorsement by the defendant, to wit, on the day and year aforesaid, in further performance of the agreement delivered to the plaintiff the said note so endorsed by the defendant Hugh Wright, and the plaintiff gave to the defendant Donald McPherson the said $100 and time for the payment thereof until the said note became due; and the plaintiff further said, that no part of the said money had been paid to the plaintiff.

The defendant demurred to this replication; and judgment having been given against him in the court below, appealed.

R. A. Harrison, for the appellant. *Read*, Q. C., contra.

Wilders v. *Stevens*, 15 M. & W. 208; *Williams* v. *Clarke*, 16 M. & W. 836; *Morris* v. *Walker*, 15 Q. B, 594; *Peck* v. *Phippen*, 8 U. C. R. 73 *Foster, et al* v. *Farewell*, 13 U. C. R. 449; *Moffat* v. *Rees*, 15 U. C. R. 527; *McMurray* v. *Talbot*, 5. U.C.C. P. 157, were referred to.

Robinson, C. J., delivered the judgment of the court

This replication is good, under the authority of the case of *Wilders* v. *Stevens* (15 M. & W. 208), and the other cases cited in the in the judgment in this court in *Foster* v. *Farewell* (13 U. C. P. 449).

Appeal dismissed.

O'Brien v. Fight

Promissory note—Fraud and failure of consideration pleaded together—Proof of the latter only, and not covering the whole demand—Pleading.

To an action on two promissory notes defendant pleaded that they were given for the assignment to him of the plaintiff's right to two lots of Crown Land, of which the plaintiff falsely and fraudently represented that he was locatee; that the plaintiff had no claim to said land, and the notes were obtained from defendant by fraud.

Held, that on shewing the plaintiff's title to on of the lots to have been bad, without proving fraud, the defendant was entitled to succeed as to that part of the claim for which the consideration had failed.

Such a defence, however, should properly be pleaded only to that part of the demand covered by it.

Appeal from the county court of the County of Brant. This was an action upon two promissory notes, for £25 and $119 respectively, made by defendant, payable to the plaintiff.

Plea.—That before and at the time of the making of the two several promissory notes in the declaration mentioned, the plaintiff fraudently and falsely represented and pretended to the defendant that he had a good and legal claim to certain lands, namely, lots number eleven in concession C., and thirty-four in concession A., in the township Howick, in the County of Huron, the same being Crown Lands, by virtue of his having located the same, and paid thereon the first instalment, and thereby securing to himself and his assigns the right to complete the payment of the residue of the purchase money thereof, and sue out a patent therefor, and thereby, and by means of such fraudulent and false representations, induced the defendant to purchase from the plaintiff his said pretended right to and right of purchase of the said lands; and the defendant did then purchase and take an assignment from the plaintiff of the said lands, at and for the sum of £75, and to secure the payment thereof, did make and deliver to the plaintiff his, the defendants three several promissory notes, each for the sum of £25, to fall due and become payable respectively at six months, one year, and two years after date, with interest; and the defendant further saith, that the said promissory notes, as in the declaration mentioned, are parcel of the same identical notes so made and delivered as aforesaid, and in this plea secondly and lastly mentioned; and the defendant further saith, that at the time of the said purchase, and the making and delivery of the said notes, of which the said notes in the declaration mentioned are parcel, the plaintiff had not secured a legal claim to the said two two lots, nor had he or his assigns a right to complete the purchase thereof, and sue out a patent therefor, of all which said several premises the plaintiff had notice; and the defendant in fact says that the said promissory notes in the declaration mentioned were obtained and procured by the plaintiff and others in collusion with him, by fraud, covin, and misrepresentation.

On this plea the plaintiff took issue.

At the trial the plaintiff was proved to have sold to the defendants two rights to separate parcels of Crown land, which he represented himself to have acquired by purchase. Each was valued in the transaction between them at $150, and three notes were given for the money. One of these for $100 had been paid, but after that it came to the defendant's knowledge that the plaintiff's right to one of the lots would not and could not be recognised by the government, because that lot had been sold to another party by the government, before the agent for the Commissioner of Crown Lands issued the ticket under which the plaintiff claimed, and there was some evidence to shew that the plaintiff knew that to be so before he sold to the defendant. Of that lot the first purchaser alluded to had been many years in possession. The defendant had neither had possession nor received any benefit whatever from his purchase of that lot.

The learned judge charged the jury that if they thought the fraud was not proved, of which the evidence was but slight, it was still competent for them to enquire into the question as to the partial failure of consideration, and if it existed, to deduct that amount from the plaintiff's claim.

The jury reckoning the $100 already paid, gave their verdict for the balance between that sum and the purchase money of the one lot to which the plaintiff appeared to have a right, which he had assigned to the defendant, which, including interest, amounted to £14 15s., and rejected the plaintiff's claim for so much of the two notes sued upon as represented the price paid or to be paid for the other parcel of land.

The charge was objected to, and a rule *nisi* having been obtained for a new trial, on the ground of misdirection, was discharged; whereupon the plaintiff appealed.

M. C. Cameron, for the appeal, cited *Coulter* v. *Lee*, 5, U. C. C. P. 201; *Haigh* v. *Brooks*, 10 A. & E. 320; *Lundy* v. *Carr*, 7, U. C. C. P. 371.

E. B. Wood, contra, cited *Foreman* v. *Wright*, 11 C. B. 481; Chitty on Bills, 10th Ed. 47, 49, 384.

Robinson, C. J., delivered the judgment of the court.

The verdict that was given appears from the evidence to be in every respect just, but legal objections have been taken by the plaintiff to the learned judge's ruling, and if we saw that they were well founded we should have to give way to them, though they are not reasonable objections. We think however, that the judge took a sound view of the law. The case of *Forman* v. *Wright* (11 C. B. 481) fully supports the principle that, although a defence of this nature may be set forth in a plea which charges fraud as well as want of consideration, the allegation of fraud is not necessary to be established if want of consideration is clearly made out; it will be enough if the defendant proves so much of his plea as establishes a legal defence, and what need not have been inserted may be rejected.

Here there was not a total want of consideration as to the whole amount of the notes, but a total want of consideration for a certain part of the amount covered by the notes: that is, for the price of

of one of the lots valued at $150, and when the objection goes to a precise part of the consideration, as in this case, so much of the demand may be met by such a plea. The plea would have been better pleaded, we think, to so much of the demand only as the defence applied to, but the learned judge considered that it would be idle to grant a new trial on that ground, as in furtherance of justice the defendant would be allowed to amend his plea.

We think the appeal should be dismissed with costs.

Appeal dismissed.

COMMON LAW CHAMBERS.

CHISHOLM v. GOODMAN.

Seduction—Death of Plaintiff—Right of Personal Representative to continue Action.

Where the plaintiff, a widow, brought an action for the alleged seduction of her daughter, and recovered a verdict for $2,000, but upon the application of defendant that verdict was set aside upon payment of costs, and plaintiff subsequently died before the costs were paid, a summons was made absolute to enter a suggestion of the death of the plaintiff, and to proceed with the action in the name of the personal representative.

(March 5, 1860.)

This was an action brought by a mother for the alleged seduction of her daughter. It was commenced on the 22d day of January, 1859. The plaintiff declared on the 14th day of February following.

Issue was found on 22d of same month. The action was tried at the last Spring Assizes held at Niagara, when the plaintiff recovered a verdict for £500.

The defendant applied for a new trial, and the Rule was made absolute in Trinity Term last upon payment of costs. The plaintiff died on the 24th day of October last. She died intestate, and in February letters of administration of her goods and chattels were granted to William Wilson Ball by the Surrogate Court of the County of Halton, and he thereby became the legal representative of the plaintiff.

At the time of the alleged seduction the plaintiff, the mother of the girl seduced was alive, but the daughter then lived with her uncle at the Town of St. Catherines.

The administrator obtained a summons calling upon the defendant to show cause why he should not be allowed to enter a suggestion of the death of the plaintiff, and that he was the legal representative of the plaintiff deceased, and why the action should not thereupon proceed in the name of the said administrator.

It was said in the course of the argument, that at the time of the death of the plaintiff the costs of obtaining the Rule absolute for a new trial had not been paid.

Anderson showed cause. He contended that the cause of action did not survive, and that upon the death of the plaintiff the action abated. He referred to Consol. Stat. U. C. cap. 22, s. 183 and 189, p. 212, 218, and to Broom's Legal Maxims, *Actio personalis moritur cum persona*, p. 702.

Harrison contra argued. 1. That this action is not an action for libel, slander, assault, or other injury to a man's person, feelings, or reputation, but an action for seduction, the gist of which is loss of services including cost of medical attendance, &c., resulting in a loss to the personal estate of deceased, which was thereby diminished. 2. That before plaintiff's death there having been a verdict for £500 in her favor, if that verdict had not been moved against the proceeds would have gone to increase the personal estate. 3. That the verdict having been set aside conditionally, that is, upon payment of costs, which costs were not paid at the time of the plaintiff's death, the verdict was then as if it had not been moved against. 5. That the mother, though now dead, having been resident in Upper Canada at the time of the birth of the child, the uncle or other person who by reason of the relation of master would at common Law have been entitled to maintain the action, could not by the express language of Consol. Stat. U. C., cap. 77, s. 3, p. 804, do so. 5. That unless leave were given to enter the suggestion there would not be any remedy for a gross wrong. He referred to Com. Dig. Administrator B. 13.

MCLEAN, J.—Having taken time to consider the application and having consulted some of his brother Judges, including the Chief Justice of Upper Canada, on a subsequent day made the summons absolute.

UPTHEGROVE v. WINTERS.

Insolvent debtor—Weekly allowance—Seduction—Consol. Stat. U. C. c. 26, ss. 2 & 11.

A prisoner in execution for seduction is not entitled to weekly allowance, or at all events not entitled to be discharged from custody for non-payment of it.

(Chambers, January, 1860.)

This was a summons for defendant's discharge, and granted upon the ordinary application, for non-payment of the weekly allowance; but on hearing the parties, it was admitted that defendant was in custody in execution, on a judgment recovered for seduction, and that this fact was to be taken into account.

It was also agreed that the judge should treat the case as if a summons were before him served by plaintiff for defendant's recommittal to custody, under the 11th section of the Consolidated Statutes, cap. 26, "The Insolvent Debtors Act."

Carrol for plaintiff.

John McNab for defendant.

DRAPER, C. J.—I presume this act must now be construed as one general declaratory enactment of the statute law respecting the relief of insolvent debtors, though it consolidates the provisions previously existing in entirely independent statutes. It is one act, to be expounded altogether.

The question seems to be, is the fact that the judgment was for seduction, sufficient cause against the defendant's discharge? (*vide* ss. 2 & 11, and caps. 18 & 30) or, in other words, is a prisoner in execution for any of the causes mentioned in sec. 11, entitled to the weekly allowance? If he is, then can such a construction be placed on the eleventh and second sections together, as to authorize, on a proper application, the suspension of a weekly allowance for a period not exceeding twelve calendar months? The enactments are apparently somewhat conflicting. The law puts the application for weekly allowance, and for discharge from custody, in some respects on the same footing.

As to not being worth £5 (though there are exceptions in the latter case not existing in the former), and as to answering interrogatories, the principle seems the same. Inability to pay the debt, and an absence of all resources excepting a trifling amount, in short, indigence or insolvency, seem the foundation of either relief. One entitles the creditor to detain his debtor in custody by paying the weekly allowance; the other entitles the debtor to his discharge, subject to the power of the court or a judge to order the applicant to be "recommitted," under certain circumstances. The term *re*-committed is not, perhaps, the most precise, when the debtor is already in close custody; it may, I apprehend, be construed "further" committed, *i. e.*, not on *ca. sa.* merely, but on a rule of court or judge's order for a fixed time, at the end of which the debtor will be as of right discharged.

I feel it difficult to hold that a debtor in execution, committed by such a rule or order, which could only be made where, in the opinion of the Legislature, imprisonment should be inflicted by way of punishment, can be entitled to call on the plaintiff to maintain him. It appears repugnant to the spirit of sec. 11, to treat such a debtor as within the benevolent contemplation of the enactment which provides a weekly allowance for an unfortunate debtor. On the other hand, it may be urged that it could not be intended that a *quasi* criminal should be starved, and that a debtor coming within the plain meaning of the eleventh section, who perhaps could not legally claim the gaol allowance of food, as a person committed for crime, should be left to the humanity of the gaoler or of the charitable for his subsistence.

Between these difficulties, I think that I shall be acting more in the spirit of the act in holding that the gaoler would extend to him the same allowance as is afforded to criminals, than to say that he shall escape the consequences of fraud or vice, or to inflict a further loss on the plaintiff, whom he has defrauded or even more deeply injured.

In the present case, the defendant has friends, who are able to assist him to some extent, sufficient to keep him from suffering, and I do not fear any danger of his being left to starve. I shall venture to act upon the opinion which I have formed of the act, and to hold that the fact that the defendant is in execution in an action for seduction, is sufficient cause for his not being discharged for non-payment of the weekly allowance; and, acting on the consent of the parties, as if a cross-application for his recommittal

were before me, I will make an order that he be recommitted to close custody for six calendar months, to be computed from the day on which he was first committed on the *ca. sa.*, either party to be at liberty to apply to the full court.

THE QUEEN, ON THE RELATION OF COUPLAND *v.* WEBSTER—DAY, RETURNING OFFICER.

Municipal Election—Equality of Votes—Casting vote of Returning Officer—When to be given—Costs.

It is the duty of the Returning Officer, at the close of the election, to declare publicly the Candidate standing highest on the roll, to be duly elected.

If there be an equality of votes, the Returning Officer ought there and then to give his casting vote.

Where a Returning Officer, in ignorance of his duty on the second day of the election closed of the poll, and on a subsequent day, gave his casting vote in favor of one of the Candidates, the election was held to be void; but as the Returning Officer appeared to have acted in good faith, and without any evil intent, costs were not given against him.

As to the person against whose election complaint was made, he having duly disclaimed, and not in any manner taken his seat, costs were not imposed upon him.

(February, 1860.)

The election for Ward No. 1, of the Township of Nottawasaga, was held on Monday and Tuesday, 2nd and 3rd January, 1860.

Coupland and Webster were candidates. On the second day one Kelly, a freeholder of the Ward, and duly entered on the roll, but a non-resident tendered his vote for Coupland: Webster objected to him as non-resident. It was replied that on the preceding day one Wilson had voted for Webster, although admitted by all to be a non-resident. After some discussion, it was agreed by all parties that the Returning Officer should strike out the name of Wilson, and also reject Kelly. This was accordingly done.

At the close of the poll on Tuesday, the Returning Officer added up the votes, and announced that there were 60 votes for Webster, and 61 for Coupland, but he reserved his decision to enable him to get legal advice as to the vote of one Taylor, who voted for Coupland—Wilson's vote was not counted.

It appeared that on the Thursday following, the Returning Officer proceeded to Collingwood, and took advice, and being informed that he had wrongfully struck out Wilson's name, thereupon restored it, and thereby made the votes even, gave his own casting vote for Webster, and returned him as elected, and sent the Poll Book and Return to the Township Clerk.

Next morning he called together some electors at the polling place, and informed them that he had made a mistake, and of his having corrected it and voted for Webster, and that the latter was duly elected.

Coupland applied for the seat. Webster, on being served with the *Quo Warranto* summons, disclaimed in proper form.

On the argument no question was raised against the right of non-resident freeholders to vote.

McCarthy for relator: *McMichael* for Returning Officer.

HAGARTY, J.—In my opinion, the Statute clearly requires the Returning Officer, at the close of the poll, to declare publicly the candidate standing highest on the Roll to be duly elected, and if there then be an equality of votes, to give a casting vote. Consol. Stats., U. C., page 546.

All this, I think, should be done publicly at the close of the poll.

Such a course as the Returning Officer has thought proper to adopt in the present case, might lead to the very gravest abuses, destroy all confidence in the fairness and purity of elections, and cannot, in my judgment, be supported.

I had some doubts whether Coupland should have the seat, or a new election be ordered. Had both Wilson and Kelly's votes been counted, (nothing turned on Taylor's,) Coupland would have had a majority of one. As the Returning Officer chose to add up the votes on the second day, omitting the erased vote of Wilson, Coupland also had a majority. I do not see how it can be permitted that Coupland should be placed in the position of having Kelly's vote rejected on account of a compromise, allowing him, as it were, "to pair off" with Wilson, and after all was over, then an apparent equality should be created by reinstating Wilson on the poll, and still leaving Kelly rejected.

Webster disclaims, and therefore his interest is at an end.

It is clear that Kelly tendered his vote distinctly for Coupland, and that he was open to no objection except that urged against Wilson, viz., non-resident.

I think, therefore, that I can only do substantial justice by awarding the seat to Coupland, as the choice of the majority. The law, I consider, permits me to add Kelly's name in such a case as this, and the evidence of his vote being tendered for Coupland, is unequivocal.

As for costs, I cannot see any reason for awarding them against Webster. He appears to be free from any imputation of blame, and the mere fact of his being a candidate, (as he clearly was,) and disclaiming as soon as he heard of the legal objection to his return, and without taking his seat, ought not, I think, to subject him to costs.

As to the Returning Officer I have had much doubt. I think his conduct was clearly illegal, but that it was done all in good faith, and without any evil intent.

It appears that he was not the regular Returning Officer: that he was chosen by the electors, and after much objection acted, as he says, under the belief that by refusing he would incur a penalty.

I have come to the conclusion that his error arose altogether from ignorance of the duties of such a position, and that his having to pay his own costs of defence here, will be a sufficient punishment.

BROWN AND BROWN *v.* STEVENS.

Ca. Sa.—Bail—Render—Alias Ca. Sa.—Setting aside.

If a plaintiff issue a *Ca. Sa.* upon which a defendant is arrested and gives bail to the court, plaintiff cannot in the same suit issue an alias *Ca. Sa.* and cause defendant to be arrested a second time on the same judgment.

But where defendant had endeavoured after the arrest under the *Ca. Sa.* by a contrivance to effect an escape so as to relieve his bail of the debt, and charge the sheriff therewith, the court refused to set aside his arrest under an alias *Ca. Sa.*

Semble: before the issue of an alias under such circumstances, the original writ should be returned and filed.

(11th November, 1859.)

This was a summons calling upon the plaintiff to shew cause why the alias *Ca. Sa.* issued in this cause and the arrest made under it, and all subsequent proceedings thereon, should not be set aside for irregularity with costs.

1. Because defendant was arrested on the original writ of *Ca. Sa.* and gave bail to the Sheriff of Hastings for the limits.

2. That he had duly observed the conditions of the recognizance and was still entitled to be on the limits by virtue of the first arrest and his recognizance.

3. That the arrest under the alias writ was a second arrest of defendant for the same cause of action under the same judgment, while the first arrest was in full force and effect.

4. That when the alias *Ca. Sa.* issued the first writ had not been filed or returned to the Deputy Clerk of the Crown, from whose office both writs were issued.

5. That the Sheriff having arrested defendant under the first writ and returned thereon, that he had so arrested him the plaintiffs could not legally issue an alias *Ca. Sa*, and have defendant arrested thereon.

6. That the second arrest was made without the approbation or knowledge of plaintiff.

The Judgment roll was produced, and it contained an award of the first *Ca. Sa.*, and the Sheriff's return, that he had taken the defendant thereon, and admitted him to the limits.

The first *Ca. Sa.* issued 25th April, 1855, indorsed for £223 16s. 2d., with interest, &c., on which the Sheriff returned, that he had arrested the defendant, and admitted him to the limits. Ira Shibly and John Reynolds, being his bail. The arrest was made 1st May, 1855.

On 16th October, 1857, an alias *Ca. Sa.* issued, on which the Sheriff on the 24th October, arrested the defendant, and had him in close custody at the time of the application.

The original *Ca. Sa.* was not filed when the alias was issued—nor was it at the time of this application, filed in the office.

The defendant swore he had never left the limits, nor in any way committed a breach of the recognizance.

In February, 1857, Reynolds, one of his bail, died, leaving a will and a large estate above his debts. But Shibly the other bail, on 15th June, 1857, in company with the plaintiff, James Brown, who survived the other plaintiff, met the Sheriff and his Deputy, while in a public street of Belleville within the goal limits,

and took steps to surrender defendant to the Deputy Sheriff, and did say to him or the Sheriff, that he surrendered him to their custody. That immediately afterwards, he withdrew the attempted surrender of him, and gave to the Sheriff a writing, stating that he withdrew it and would still hold himself liable for bail; whereupon the Sheriff and his Deputy at once voluntarily allowed defendant to go out of their custody, and have the benefit of the gaol limits as before, until he was arrested under the alias writ.

Since the said in part surrender by Shibly, the plaintiff voluntarily allowed defendant to be at large on the limits, until the last arrest, but he has never since his first arrest been off the limits.

Shibly, his bail, was said to be worth £5,000, and perfectly responsible.

On the plaintiff's side affidavits were filed by James Brown, the surviving plaintiff, that after the defendant was admitted to the limits on the first arrest, he was informed and believed that Shibly, one of the bail, surrendered the defendant to the Sheriff, who thereupon voluntarily or negligently permitted him to go at large, without plaintiff's consent. That on several occasions before, defendant was committed to gaol after his second arrest, and after he was surrendered by Shibly, he told deponent repeatedly that he had been surrendered by his bail, and that he had taken legal advice, and was told that in law he was not in custody in this cause; but the Sheriff had allowed him to go at large voluntarily, after he had been surrendered by his bail, and that he would swear to this.

Brown also swore that he believed defendant had the means of satisfying the plaintiff.

Ira Shibly, one of the bail, swore that in July, 1857, after Reynold's death, being desirous to be released from his bail bond, he rendered defendant to the Sheriff, and demanded to be released, and that immediately on doing so, he was informed that he was discharged from his liability. That two or three hours afterwards, at defendant's request, he again expressed his willingness to the defendant himself, to renew his bail, as defendant engaged to put in new bail within three months. But that the Sheriff, after the render of defendant, and during deponent's negotiation with defendant, permitted him to be at large at the solicitation of the defendant, and at his (Shibly's) request. That on several occasions after such render, the defendant told him that the sheriff had no right to give him license to be at large. That the Sheriff must pay the debt, and that he (Shibly) was free of liability, that as the Sheriff had not put him in gaol when he was rendered, he was a free man. That the deponent told the defendant that if the Sheriff had done wrong, it was done innocently and at their united request, and that it was wrong that the sheriff should be made to pay the debt.

The deputy sheriff swore that after the death of Reynolds, viz., on the 24th October last, he notified the defendant that he had reason to believe that Shibly had become insufficient to pay the amount sworn to, stating his grounds for that belief, and also for apprehending that Shibly was about to leave the country, and offered to take some other responsible person. That the defendant at once said he would get no more bail; that he was advised he was free from the debt, and he intended to remain so; that Shibly had rendered him to the sheriff, and he had been allowed to go at large, which released him and his bail. That the deputy therefore arrested the defendant (having, it is supposed, the alias writ then with him), and brought him to the court house; and while there, and before he was put in gaol, the deponent repeatedly offered to send for any person whom he would receive as bail, but he insisted on being locked up. That on the 24th October last, when he spoke to the defendant, as stated above, Shibly, being present at the door of the court-house, gave deponent distinct notice that he surrendered the defendant to him, and that he would insist that he was discharged, and demanded his bond back.

William R. Ponton swore that the defendant had repeatedly stated to him, within the month of October, that the surrender made by Shibly in June (or July) last, and the act of the sheriff in allowing him afterwards to go at large, had freed him from the debt, and that he would do nothing to alter his position. That he distinctly said he had been surrendered to the sheriff, and would swear to it; and that the sheriff had voluntarily allowed him to go at large after his surrender.

The objection was taken, that the alias *fi. fa.* could not legally issue, as it did, from the deputy's office in Hastings, because all papers had been before transmitted to the principal office, and was abandoned on the argument, the plaintiff being allowed by statute to take out executions from the deputy's office under such circumstances.

The other objection—that the alias writ of *ca. sa.* was taken out without the consent or knowledge of the surviving plaintiff—was denied on oath by the plaintiff, and of course failed.

The omission to file the first writ before taking out the second, was also relied upon.

ROBINSON, C. J.—According to the affidavits of Mr. Shibly, the bail, and of the deputy sheriff, and Mr. Ponton, in addition to the affidavits made by James Brown the plaintiff, there is every reason to believe that the defendant had been contriving and endeavoring by management to throw the debt upon the sheriff, by contending that an indulgence at one time shown himself by the sheriff, had the effect of releasing him and his bail, and leaving the sheriff liable; and when he finds that the plaintiff, adopting his representation of the matter, has exercised his right of taking further process against the defendant's person, notwithstanding the alleged voluntary escape, to which it is not shown by the defendant and denied by the judgment plaintiff that he was in any measure a party, when the defendant departed from his former statement that he had been surrendered by the sheriff, and of being allowed by him to escape, and rests his right to discharge on the grounds that he was all the time in legal custody on the limits under the first writ, and so could not be arrested a second time in execution in the same suit.

The case of *Baker* v. *Ridgway*, 2 Bing. 41, is very much in point, to show that the Court will not interfere summarily to release a debtor who has been so acting, upon the principle that no man shall be allowed to take advantage of his own wrong.

The defendant swears now that he never in fact was surrendered. According to his first account, there was an intention on the part of his bail to surrender him; but the intention was abandoned, and he was in fact taken to gaol in the manner spoken of, in June last; and if his account of what passed is correct, no doubt he continued on the limits under the first writ as before, in which case a second arrest in execution in the same suit under a new writ could not properly take place, because a plaintiff is not allowed to act vexatiously in arresting his debtor twice for the same cause. But we cannot look upon the plaintiff in the cause as having acted vexatiously, since, according to the defendant's repeated declarations, he insisted that his custody under the first writ was at an end, in consequence of the sheriff having voluntarily allowed him to escape; and if that were so, the plaintiff was entitled to a new writ against his person. If, on the other hand, the facts were as he now represents them to be, then there was no occasion for a new *ca. sa.*, and he has been all the time in legal custody under the first writ, and in that view of the case I would not summarily discharge him from custody.

If the taking out a second writ has had the effect of destroying the binding authority of the first, which it would not have unless it is itself intended to be treated as a valid process, then the party is legally in custody under the second writ. If otherwise, then I should hold that the defendant has failed in the contrivance by which he has endeavored to relieve himself from the effect of the first arrest; for the second arrest would have entitled the plaintiff to hold him in custody. There was no surrender here, according to the terms of the 306th section of the Common Law Procedure Act 1856, by anything that is stated to have taken place in June or July. There could be no color for contending that the defendant might be treated as surrendered by his bail, by what the deputy sheriff swears took place at the court-house on the 24th October.

On the circumstances as they appear, I will not discharge the defendant upon this application, but follow the course taken in *Baker* v. *Ridgeway*—leave him to take any remedy by which he may be advised that he can establish his right in strictness to be discharged.

In the meantime it is for the plaintiff and the sheriff to be advised whether it is essential for them to take any proceedings

that may give a more definite form to the defendant's custody as under the one writ or the other, or as having been surrendered by his bail, or whether they will retain the defendant in the position in which he is, claiming a right to avail themselves, under the peculiar circumstances of the case, of any authority for his detention which the facts as they existed can be held to furnish.

If it be seen that the defendant has led the plaintiff into the taking out a second writ, by contending that he had been surrendered, and afterwards allowed to escape, which state of things he now repudiates, the court would be unwilling to release the defendant, if there be any means of keeping him in custody which it may be in the power of the plaintiff or sheriff to advance. Moreover, I need not anticipate what the court may think proper to do, if the defendant is not content to abide by my decision.

If on other grounds I had not felt that I ought not to discharge the defendant, and thought it necessary to decide on the point of practice, that the first writ should have been filed with or without such return upon it as would show the right to a second writ, I would allow the plaintiff to file the original *ca. sa. nunc pro tunc;* but, for the reasons I have already stated, and acting in accordance with the case of *Baker* v. *Ridgway*, I refuse to discharge the defendant, and simply discharge this summons. And I will add the expression of my present opinion, that if the facts were as the defendant himself represents them to have been, and if the plaintiff was misled into the course he has taken by the defendant having before the second arrest maintained that he had been surrendered to close custody and escaped, and so was relieved from the first arrest, he would not be suffered to set up anything done towards a second arrest under such circumstances as having destroyed the authority of the first arrest. And it is further to be considered, that according to the express words of 8 & 9 Wm. III. cap. 29, sec. 7, if it is true, as the defendant now asserts, that he was suffered to escape after he was committed to close custody, the plaintiff might legally take out new process against his body or goods, as if he had never been taken in execution; and this seems to remove any difficulty about the not filing the return of the first writ.

Summons discharged.

In Re Harrison v. A. and B., Attorneys.

Attorney.—Money collected.—Order to pay over.

Quære,—Does the loaning to an attorney of money in his hands for his client disentitle the client after the expiration of the term of the loan, to the usual order against his attorney to pay over the same, and if so, will not a subsequent agreement by the attorney to hold the said monies as monies collected by him, restore the parties to their original positions and rights.

Where the fact as to whether money collected by an attorney, was afterwards loaned to him by his client is disputed, an undertaking signed by the attorney to hold the money as money collected for his client, and if not paid by a certain day, consenting to an order against himself to pay over the same, will be enforced against him, and the usual order will be made.

This was a summons, calling on Messrs A. and B., attorneys, &c., to show cause why they should not pay over to Mr. Harrison the sum of 253*l*, and interest, from the 26th of September, 1857, as having been collected by them for him, as his attorney.

The applicant filed the following undertaking:—

"B——, 16th May, 1859."

"We hereby admit that there is due to Duncan B. Harrison at this date, for money belonging to him, collected by us, as his attornies, after charging him with all costs we have against him, the sum of 253*l*. And we hereby undertake, that unless we pay over the amount of the same with interest, on or before the 18th July next, he shall be at liberty to make application to either of the Superior Courts against us in a summary way for payment of the said amount and interest.

"(Signed) A. & B."

Also, the following notes of hand:—

"B——, 26th May, 1859."

"£55."

"On demand we promise to pay to Duncan B. Harrison, or order, the sum of fifty-five pounds, being the amount received by us on George Geddy's mortgage of House in Bowmanville."

"(Signed) A. and B."

"B——, September 29th, 1857."

"£150."

"On demand, we promise to pay D. B. Harrison, Esq., or order, one hundred and fifty pounds, Ha. Cy., being the amount of his claim, collected by us from the Grand Trunk Railway Company."

"(Signed) A. & B."

The applicant swore that A. and B. were attornies of the court, and until recent were practising law in partnership in Bowmanville. That during 1857—58, when they were in partnership, employed them in various matters, as his attornies, in collecting monies for him by suit, from mortgages left by him for collection. That he repeatedly applied to them for a settlement, but they refused, that at length he obtained the above undertaking.

It was objected to the application, that as the money was converted into a loan, and securities to run for the same, the undertaking could not give the Court jurisdiction in a matter in which it had not jurisdiction before.

To this it was replied, that the money was never converted into a loan, and that the applicant did not rely upon the undertaking for power to make this application, that he had a right to do so independently of any such undertaking.

Richards, J.—As at present advised, I think an order should go directing the said attornies to pay to Duncan Harrison, 253*l*, with interest from the 16th May, 1859, on or before the 25th day of August, instant, together with the costs of this application.

It is admitted on all hands that the moneys referred to were collected by Messrs. A. and B., as attornies.

It is contended on their behalf that by Mr. Harrison's consent, these moneys were loaned to Mr. A., and if I understand the affidavit correctly as to the larger part of the sum claimed, viz.: the demand against the Grand Trunk Railway Company, this arrangement was made before the money was collected.

The note given by A. and B., dated 29th September, 1859, in Mr. B's handwriting, shows that both co-partners promised to pay the 150*l* on demand, "being the amount of his claim, collected by us from the Grand Trunk Railway Company." There is no promise to pay interest.

The affidavits are conflicting as to whether this money was really loaned to Mr. A, or A. and B, the note referred to repels the presumption of it being loaned to A. alone.

The memorandum is signed by both of the attorneys, and dated 16th May, 1859, by it they respectively admit 253*l* to be due Mr. Harrison, for moneys belonging to him, collected by them, as his attornies, and undertake that unless the same were paid with interest on or before the 16th July, Mr. Harrison should be at liberty to apply to the Court in a summary way for payment of amount and interest.

It is not pretended that anything has occurred since the 16th May to change the effect of this acknowledgment and undertaking, and I see no reason why they should not be bound by it.

The proposition is, that admitting the money to be collected by Messrs. A. and B., as attornies, yet, if by agreement it was to remain a loan, the subsequent agreement that it should be in their hands as moneys collected by them as attornies, will not bind them, and, therefore, the application must fail.

If it were necessary to decide the question on this point, alone, I should hesitate much before adopting that view. If the agreement between the parties is good for one purpose, I do not well see why it should not be equally binding for another, or in other words, if the agreement between the parties could convert money collected into a loan, why could not an agreement between the same parties restore the same money to its original character.

However, the fact as to the conversion of the money into a loan is not admitted, the affidavits on that point being conflicting.

I think the ends of justice will be best subserved, by holding these gentlemen to their agreement and undertaking. They have had all the benefit of the delay which was to be given to them under it, and they ought in justice to be bound by it. They are both professional men, and they know very well the effect of signing an undertaking like the one produced. It is not as if such a document were given by an unprofessional person who may have been deceived. To let professional gentlemen avoid such agree-

ments, they must shew facts clear and precise to warrant that course. I think they have failed to do this, and the order must go. I have directed the amount to be paid during the Term, so that the attornies if they wish to set aside my order may apply for that purpose during the Term, and the applicant take steps to enforce the order this Term if he shall be so advised. I would feel disposed in relation to any process to enforce the payment of the amount, to order it to lie in the office for some little time, unless it could be shown that the delay would prejudice the collection of the demand.

Order accordingly.

LUNDY v. DICKSON.

C. L. P. Act.—Attachment.—Debt.—Verdict.—Foreign Corporation.

Held that a debt due by a foreign corporation to a resident of Upper Canada, cannot be attached by service of the order to attach upon the agent of the corporation of this Province.

March 14th, 1860.

In this case an order had been granted on the application of the plaintiff, (the judgment creditor,) by Mr. Justice Burns, under the 288th sec. of the Common Law Procedure Act, (Consolidated Statutes of U. C., p. 247,) to attach a verdict recovered by the defendant, (the judgment debtor), against the Equitable Fire Insurance Company of London, (England,) which verdict had been moved against by them, and the rule *nisi* for a new trial discharged, but no judgment had been entered on the verdict.

The affidavit on which the order to attach had been granted, stated that the verdict had been recovered, and the rule for a new trial discharged by the Court, and that therefore the verdict had become absolute.

It was also stated that the action was brought on a Policy of Insurance, and was for a total destruction by fire of the property insured.

A summons was issued calling on the Company to shew cause why they should not pay over to the plaintiff the amount of the said verdict, or so much as might be sufficient to satisfy the judgment in this cause.

Helliwell, for the plaintiff.

M. C. Cameron, for the defendant.

Two objections were raised against the plaintiff's application.

1st. That as the judgment had not been entered in the suit of the defendant against the company, the verdict rendered, although absolute, was not a debt within the meaning of the 288th Sec. of the C. L. P. A. (Con. Stat. of U. C. p. 247.)

2nd. That the company being a foreign corporation, a debt due by them to a party in Upper Canada, could not be attached at all, because the 17th sec. of the C. L. P. A. (Con. Stat. of U. C., p. 188), provides only for the service of a summons on their Agent here for the purpose of a suit against themselves, and makes no provision for the service on them by an order to attach a debt due by them to a resident of Upper Canada.

ROBINSON, C. J.—Held that the service on the Agent of the company in Upper Canada of the garnishee order and summons, did not bind them, inasmuch as the 17th section of the C. L. P. Act, speaks of the service on such Agent only of a writ of summons issued against such corporation.

Summons discharged without costs.

PRACTICE COURT.

IN THE MATTER OF THE ARBITRATION OF JOHN MCCLUNY AND JAMES MOTLEY.

Arbitration—Three Arbitrators—Award by two—Misconduct of Arbitrators—Setting aside Award.

1. Where parties submit matters in difference to arbitrators to be decided by three or any two of them, all the arbitrators must be notified of their appointment, and of the time of sitting.
2. If any one of three arbitrators refuses to act the remaining two, on being satisfied of that fact, may proceed without him, and this they may do at any stage either before or after they have entered upon their duties.
3. If two of the arbitrators take upon themselves, by consent of the litigant parties, in the absence of the third arbitrator, to decide upon all the matters referred, it does not afterwards rest with either of the litigants to object to that which has taken place, and would not have taken place but with his concurrence
4. Where, however, the award was made in a hasty manner on the day of the submission, the third arbitrator not being informed of the sitting, and there being a misapprehension on the part of one of the litigants as to what was referred, the award was set aside.

(Practice Court, Mich. T. 1860.)

The parties on the 29th September submitted to the award of William Clemens, John Somers and William Brent, or any two of them, by an agreement under seal, all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever then pending, existing or held by and between them, and they covenanted with each other that the award to be made by the said arbitrators, or any two of them, should in all things by them and each of them be well and faithfully kept and observed; provided the said award was made in writing under the hands of the said William Clemens, John Somers and William Brent, or any two of them, and ready to be delivered to the said parties within the time limited.

On the same day an award was made under the hands and seals of William Clemens and George Sumers, but it was not executed by William Brent, though in the commencement of it it professed to be made by the three arbitrators to whom were submitted the matters in controversy existing between John McCluny and James Motley, as by their submission in writing more fully appeared.

The two arbitrators then alleging "that they have heard the evidence and allegations of the parties, and examined the matters in controversy to them submitted, awarded that James Motley shall pay to John McCluny the sum of three hundred and forty dollars in full satisfaction of all the costs, charges and expenses incurred by or in consequence of the said arbitration. And they further awarded and adjudged, that James Motley "shall *give up possession* of the farm immediately, with the exception of the house and part of the stable which he can have for his own use *for one month*, and the potato ground for one week."

And the arbitrators declared that it was not their intention in rendering their award to deprive John McCluny of his privilege as landlord to distrain the goods and chattels of James Motley for the amount of the award which they allow him as rent for his farm.

During the last term a rule was obtained by the tenant Motley calling upon McCluny to show cause why the award should not be set aside on the following grounds:

1. That the submission was to three arbitrators, William Clemens, John Somers, and William Brent, or any two of them, and that Somers and Clemens proceeded with the arbitration and made the award without Brent having received any intimation or notice that he had been appointed an arbitrator, or of the sitting of the arbitrators—or their intention to proceed with the arbitration—or of the making or intention to make the award, and that the said William Brent had no opportunity of attending the sitting of the said arbitrators, or of being present when the award was made and proceeded with, and was not present when it was made.

2. That the said William Clemens and John Somers proceeded with the arbitration, and made and executed their award without giving to the said James Motley an opportunity of being heard or of producing before them any evidence on his behalf, and without due notice being given to him of the sitting of the arbitrators or of their proceeding with their arbitration.

3. That the award was not final in this, that it awarded that the said James Motley shall pay to the said John McCluny the sum of three hundred and forty dollars in full satisfaction of all the costs, charges and expenses incurred by or in consequence of the said arbitration, and in a subsequent part of the said award the said sum was said to be allowed to the said McCluny as rent for his farm and does not say that it is to be in full of all matters in difference, and does not award mutual releases but leaves the real matters in difference between the parties untouched and undecided, and is therefore abortive.

4. That the award is uncertain and inconsistent in this, that the sum awarded to be paid by Motley to McCluny is first awarded in full satisfaction of the costs, charges and expenses incurred by or in consequence of the arbitration, and in a subsequent part of the award the said sum is said to be allowed to John McCluny as rent for his farm, without stating what farm, and thereby leaving it uncertain what that amount is to be paid for; and also that the said award directs that Motley shall give up possession of the

farm immediately, with the exception of the house and part of the stable, which the award says he can have for his own use for one month and the potatoe ground for one week; but the award does not state of what farm possession was to be given up, or to whom or what house or what stable, or what part of the stable, Motley was to have for his own use for a month, or what potatoe ground he was to have for a week.

5. That the arbitrators exceeded their authority in this, that they ordered Moltey should give up possession of the farm *immediately* with the exceptions therein mentioned, which they had no authority to do, the question of possession of any farm never having been submitted to them; and the said Motley holds possession of the farm presumed to be referred to in the award by a lease, which has not yet expired, and will not expire for some years. And that no question as to the possession of the said farm under the said lease, or the duration of the lease, was ever referred to the said arbitrators; and that the possession of the said lease or the farm mentioned therein, or the duration of said lease, was never a matter in difference between the said Motley and McCluny.

McLean, J.—It appears by the affidavits on both sides, and by the submission, that the differences, whatever they were, existing between these parties were referred to three arbitrators, whose award was to be made on the same day the submission was entered into, and the award of the three or of any two so made was to be final.

No notice of his appointment or of the arbitration was ever given to William Brent, one of the number, but the other two immediately after the submission was executed proceeded without hearing the parties or examining witnesses to make the award in question.

Now there is nothing more clearly established than that when parties submit matters to be decided by three or any two of them, all the arbitrators must be notified of their appointments and of the time of sitting, so that all may have an opportunity of attending, and the parties may have the benefit of the consultations and advice of all whom they have constituted the judges of the matters submitted. If any one of the three refuses to act the other two, on being satisfied of that fact, may proceed without him, and this they may do at any stage, either before or after they have entered upon their duties. And if two take upon themselves *by consent of all parties* to decide upon all the matters referred in the absence of the third arbitrator, it does not afterwards rest with either of the litigants to object to that which has taken place, and would not have taken place but with his concurrence.

In this case it is stated by Motley, in one of his affidavits, that when he executed the submission he thought and understood that all the arbitrators would have held the arbitration, and that the decision of any two of them in that case would be binding, —that he understood that the three arbitrators would appoint a time for the holding of the arbitration, and that he would have had an opportunity of producing certain evidence with respect to the differences between McCluny and himself with respect to the rent and the deduction to be made therefrom. That he *never intended* to submit and *did not submit* his differences with McCluny to the award of Clemens and Somers only. And that he never intended to submit and did not submit to arbitration his lease from McCluny, or the cancelling thereof, or the shortening of the term for which he was to hold the same. That the only matters which were submitted were the yearly value of the farm which he Motley held from McCluny, and such accounts and matters of dealing besides the farm arising out of other transactions, such as work done for McCluny, and matters of account which he held against him, and which he intended to set off against the amount of rent due.

That the two arbitrators *immediately* after the execution of the submission proceeded to make their award without hearing him (Motley) or his testimony in relation to the matters in difference, and *without giving him an opportunity of putting in his account*, which he then held and still holds against McCluny.

He swears too that *he did not consent* or *agree to the arbitration* being held or the *award being made* without William Brent, the third arbitrator, being present at the arbitration and taking a part therein, and that he intended to submit his account to the arbitrators if an opportunity had been afforded him of so doing, but that he had no opportunity of being heard, or of producing his account, or any evidence.

The circumstances stated in that affidavit are such as if uncontradicted would indicate a very precipitous and harsh proceeding on the part of the arbitrators towards Motley,—but it is relieved in a great measure from bearing that character by the affidavits of McCluny and the two arbitrators.

McCluny states that Motley rented a farm from him, for which he undertook to pay £100 a year rent, for four years, commencing on the 1st October, 1858. That in the course of the spring following, he had great difficulty in procuring seed to sow, and complained of being harassed by creditors whom he could not pay, and asked to have the farm taken off his hands, and to be paid for the work he had done on it. That when that proposition was acceded to and a time appointed to receive the premises from Motley, he declined giving them up, alleging that he had made up his mind to hold till the end of the year, as he could not see where he could go to. That in September last, near the close of the year, Motley again proposed to give up the farm and to *arbitrate upon the value thereof for the past rent.* That in consequence of such proposition, the arbitrators, John Somers and William Clemens, were chosen, and that both Motley and himself were present attending the arbitrators. That the *only set off* or claim which Motley can have against him *is* for pasturing two colts and two heifers for some months, and for drawing a few loads of furniture when he (McCluny) was moving, but that *Motley was indebted to him, at the time of the arbitration, over* $100 *over and above any claim which he may have.*

Then the arbitrators swear that they were severally chosen by the parties to decide certain matters in difference between them, both parties stating that James Motley *had been* a tenant of McCluny, and had agreed to leave the place rented by him, having found that the rent was more than he could pay; that the arbitration was held, *amongst other th ngs*, to decide what rent should be paid for the time then past; that it was agreed, by consent of all parties, that if Somers and Clemens should disagree, *they* should call in William Brent as a third arbitrator, but not otherwise; that the only matter for them to award upon was the deduction to be made in the rent for the time passed, and the time that Motley should continue to occupy the house, part of the stable, and the potato ground, as his potatoes had not then been all dug; and that these matters were to be decided by the arbitrators looking over the premises and exercising their own judgments, which was done. That both parties were present, assenting and agreeing to what was going on; and that after the award was made and read over to them, Motley stated that he was perfectly satisfied with it, and mentioned that he could pay on it to McCluny one hundred and fifty dollars in money, and with wheat and potatoes could make it up to two hundred dollars. That if Motley had objected to the two arbitrators carrying on the arbitration, or had desired that Brent might be present, or expressed any dissatisfaction at any of the proceedings, the arbitrators would not have signed the award; but that on the contrary Motley expressed himself satisfied with what was being done, and, after the award was made, with what had been done.

It is difficult to reconcile these affidavits. On the one side it is shown that a most imperfect and hasty award was made by two instead of three arbitrators, embracing matters not referred nor intended to be referred, without affording any opportunity to Motley to make any defence whatever; and on the other side it is shown that the sitting of the two instead of three arbitrators was with the entire concurrence of all parties, and that all they did was perfectly satisfactory. However that may be, it is abundantly evident from the affidavit of Motley that at least one of the parties has become very much dissatisfied with the award, and that he thinks himself greatly agrieved by the arbitrators taking upon themselves to decide upon matters which were not referred to them.

By the preamble or recital of the submission, it is stated that differences had for the past six or eight months been existing and pending between the parties in relation to divers subjects of controversy and dispute, and the reference is "of and concerning all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever then pending, existing

or held by and between them." Of the divers subjects of controversy mentioned in the recital, and all that may be embraced within the terms of the reference, the arbitrators seem to have come to their decision only as to the deduction to be made in the rent for the time past and the time that Motley should continue to hold the house and part of the stable and potato ground. Now it is manifest that the decision as to these matters has not made a conclusive settlement of the "divers subjects of controversy and dispute" between them.

Motley asserts that he has an account against McCluny, which he has had no opportunity of bringing forward as a set-off against the claim for rent. The amount of such account, it is alleged by McCluny, is but small, and it may be so, but it is quite evident that there is an account, and that, though it might have been settled by the reference, it still remains a subject of controversy between the parties. Besides this objection, there seems to be a misapprehension or misunderstanding as to what was actually referred. On the part of Motley, he alleges that the farm contains a less quantity of cleared land than was represented by McCluny, and that he claimed a deduction from the rent on that account, but never had any intention to have his term abridged or his lease in other respects made the subject of a reference; while on the part of McCluny it is stated that the whole arbitration was with a view to settle all matters so that the lease and the farm might be surrendered.

From the fact that when Motley was asked by one of the arbitrators, when the award was made, to give up his lease, he refused to do so, a strong presumption arises that he could not then have supposed that he was to give up the premises; and yet, if he expressed satisfaction with the award, as the arbitrators swear he did, and at the same time understood by it that he was required to give up the farm immediately, and the house, &c., within a month, it is difficult to imagine why he should decline to give up the lease.

There are various objections urged against the award, but it is not necessary to notice them all. It appears to be so imperfect and inconclusive, and the proceedings so irregular and unsatisfactory, that, though perhaps it would be better for all parties to let matters stand as they are, I do not see that I can do otherwise than to set aside the award.

Rule absolute to set aside award.

CHANCERY.

MOFFAT V. HYDE.

Practice—Amending Decree—Motion or petition—Orders of 1828.

Where a necessary direction is omitted in a decree, the Court will amend it, although the decree has been passed and entered.

In such a case, the proper mode of proceeding is by a petition.

This case had been heard upon further directions, and a decree of foreclosure had been drawn up and entered, when it was found that no provision was made for foreclosing the owner of the equity of redemption. A motion was made *ex parte* before the Chancellor, under the English orders of 1828, and cases decided thereunder; but the Chancellor declined making any order, and directed the matter to be brought on by petition. Accordingly a petition was presented, and

SPRAGGE, V. C., after looking into the authorities, made the order as asked for.

SEXTON V. SHELL.

Vendor and Purchaser.—Parol Evidence.—Specific Performance.

Where a vendor files his bill for specific performance against a purchaser on a contract partly performed, the evidence of the contract must be clear and unmistakeable, and the acts done must be such as cannot be referred to any other than the contract as alleged, nor done with any other intention than in part performance of such contract.

This was a bill filed by the vendor against the defendant, alleging a contract for the sale of land partly performed. The facts of the case are stated in the judgment.

A. Crooks, for the plaintiff.

Strong, for the defendant.

THE CHANCELLOR.—This is a bill for specific performance for the sale of a lot a land in Scugog. It states that the plaintiff being owner in fee, agreed to sell the lot to the defendant for £500, with interest, to be paid in five years,—the amount to be paid in logs and square timber cut off the land. The bill alleges a parol contract partly performed, that the defendant was let into possession and cut a large quantity of logs under such parol contract, and then it prays specific performance. The defendant contends that the facts of the case are insufficient to bind either vendor or purchaser, or to enable the Court to enforce specific performance, the argument being that it is possible to refer this part performance to a contract for cutting timber as to an acceptance of title; and that it being capable of being referred to another contract, the plaintiff cannot succeed. There are cases which seem to indicate this, as *Frame* v. *Dawson*, (14 Ves. 386), and the principle on which those cases proceed, is I think, settled:—that those who make representations on which others act, cannot afterwards deny those representations. The statute of frauds lays down a rule of evidence for the protection of either party; and it has declared that a contract for the sale of land, must be signed by the party to be charged; but it has sometimes arisen, that owing to a partial performance, the case has been held to be taken out of the statute, and I have no doubt but such acts as those of Shell, are acts of part performance,—being let into possession, and cutting timber,—and that they are sufficient to exclude the statute, and that the defendant would be bound by the contract. But is this a contract? The evidence in support of it is very unsatisfactory. The contract is proved by admissions said to have been made by the defendant in casual observations to laborers, and their evidence is full of discrepancy. One swears that the defendant was to have any time for the completion of the contract,—another swears that he was to have had five years. But it is alleged that the land without the timber was sold, and if so, a witness who was asked, says, that £500 would be an extravagant price. But then, again, there is no evidence that the timber was to have been reserved for the plaintiff, and Mr. Crooks asks me to infer such was the case. The only fact I have by which to find out such a contract, is that after the sale, the plaintiff cut timber on the lot—but what timber? Did he mean to retain an absolute control, or did he mean that the defendant was to be at liberty to cut timber so as to pay for the land? If so, it appears to me that according to the contract set up in the bill, the plaintiff might reserve a right over the timber for ever. It appears to me to have been a contract for work and labor, and if so, I think the bill should be dismissed with costs.

MCAVOY V. SIMPSON.

Vendor and Purchaser.—Specific Performance.—Election of Remedy—Waiver.

A Vendor sued upon the covenants of a Bond and obtained judgment, he then filed a bill setting out the agreement and praying foreclosure.

Held that his bill was improperly framed, but that he might amend on payment of costs.

Quere:—Was his action at law a waiver of his remedy by specific performance.

The bill set out, that the plaintiff, and one Simpson, deceased, entered into a bond for the sale and purchase of a certain lot of land in Garafraxa, for a certain sum, that default had been in the payment of said sum, and prayed that said sum might be paid, or in default foreclosure. The bond had been lost but evidence taken in a court of law was put in. To this the principal defendants set out that the plaintiff had sued on his bond and obtained judgment, and under it had sold all the real and personal estate of said Simpson, and that consequently having elected his remedy at law, he was barred from relief in equity. The cause was then brought on by way of motion for a decree.

A. Crooks, for plaintiff, contended that although the bill was framed as if for foreclosure, yet that the court would look to the facts of the bill, and under the prayer for general relief, decree the plaintiff entitled to specific performance. The action at law was not a bar, for the action was only for instalments due, and did not put an end to the contract.

Strong, for the infants, argued, that the bill was demurrable in its present shape, and that plaintiff was barred by his action at law.

Hodgins for defendants, Simpson and Marshall. The action at law must be held to have put an end to the contract. The plaintiff after bringing parties before the court to answer his specific prayer, could not turn round and say that he asked a different

relief. Marshall had no interest in the place, and the bill must be dismissed as against him.

The cases cited were, *Sainter* v. *Ferguson*, (1, M. & G. 286, s. c. 14 Jur. 255), *Barker* v. *Smark* (3 Beav 64), *Orme* v. *Broughton*, (10 Bing 538), Dart, V. & P. Fry on Sp. Perf, 25.

ESTEN, V. C.,—I think the agreement is proved, but it would be satisfactory, though not necessary, to see the bond given by the plaintiff, which must be in the defendant's custody. The bill ought not to be entertained in its present shape, but the plaintiff may have leave to amend. I think the plaintiff should pay the the costs up to the present time, and that the bill should be dismissed as to Marshall with costs. The cause to stand over with these directions.

This is subject to the question of waiver by the plaintiff bringing his action at law. My impression is against the waiver and in favor of the plaintiff. The case of *Orme* v. *Broughton*, is the case of the administrator of a purchaser suing for damages, and it was there held it would bar other actions or suits, but *quære*, could he here sue for specific performance? Mr. Fry also states, that when a plaintiff has proceeded at law and recovered damages for the breach of the contract, he cannot afterwards sue in equity for specific performance. *Sainter* v. *Ferguson*, is the case of a surgeon agreeing not to practice in a certain place under a penalty of £500 The plaintiff brought his action and recovered £500 as liquidated damages and signed judgment, and it was there held that after the verdict giving liquidated damages for the breach of the agreement, the contract was at an end, and that equity could not interfere. In *Barker* v. *Smark*, the plaintiff was compelled to elect; but per M. R. "The plaintiff will not be prejudiced for if he fail in one remedy, he may resort to the other. I think the objection should not prevail.

GENERAL CORRESPONDENCE.

TO THE EDITORS OF THE LAW JOURNAL.

Consolidated Statutes—Municipal Law.

Township of Rainham, March 9, 1860.

GENTLEMEN,—The following questions being of general interest, answers to the same in the next issue of your valuable journal, are respectfully requested by the subscriber.

1st. Are the Consolidated Statutes issued to the different municipalities, intended by the Government to be in possession and for the sole use of the Reeve of such municipality to whom they are directed; or are they, on the other hand, intended to be kept in the office of the Clerk, for the use of the municipality?

In my opinion the words pasted in each volume ("The property and for the use of the office,") would indicate that the latter is the proper place for them, but our Reeve takes a different view, on the ground that they are directed to him, and I am aware that such is the view taken in some other municipalities. What is your opinion?

2nd. Can a candidate (at a municipal election) be proposed and seconded, after one hour has elapsed from the time of opening the poll, and would the election of such a candidate be valid?

I am, gentlemen, yours truly,

TOWNSHIP CLERK, *Rainham*.

[1. The Reeve of a Township has no more right to the Consolidated Statutes issued for the use of the Township, than he has to the chairs and tables in the Clerk's office.

2. The Statute is, we think, directory, not imperative. The Returning Officer *may* (not shall) close the election in one hour after commencing the same, if within that time no more candidates are proposed, &c. If, notwithstanding the expiration of the hour, he keep the poll open, and shortly afterwards receive a second candidate, which candidate is elected, we apprehend his election, if not impeached on other grounds would be valid.—EDS. L. J.]

Judgment—Execution—Registry—Priority.

TO THE EDITORS OF THE UPPER CANADA LAW JOURNAL.

GENTLEMEN,—I beg leave to submit the following question for your consideration, trusting, that you may be pleased to give your opinion in the next issue of the Journal.

A. and B. are two judgment creditors, and D. is a mortgagee. A. registers in the Registry Office a certificate of judgment, on 4th January, 1859. D. registers in the same office, his mortgage, on the 5th January, 1859, and B. places a writ of *fi. fa.* against lands in the Sheriff's hands, of the same county, on the 7th January of the same year. A. afterwards follows with a *fi fa*, lands also, and hands it to the same Sheriff, on the 15th of January, 1859. On the 20th of January, 1860, the Sheriff offers for sale the property mentioned in D.'s mortgage, under B.'s execution, being the first in his hands. B. thinking to secure himself, purchases at a sum which pays the two executions, and the Sheriff returns them satisfied. Query, Does the mortgage hold good, and what of A.'s certificate?

27th March, 1850. W.

[We can not do more than refer our correspondent to the article on the Law of Registered Judgments, in the number of the *Law Journal* for last September. Correspondents must understand that we do not intend to give specific answers to questions on general law, unless our answers will be useful to our readers generally. So far as the case put by our correspondent, W. is concerned, few beyond himself we think would feel much interested in the result of his inquiry.—EDS. L. J.]

TO THE EDITORS OF THE LAW JOURNAL.

Municipal Law—Assessment—Mortgagee—Licenses—Disqualification.

Beamsville, March 9th, 1860.

A question has arisen in our Municipality as to the legality of the assessment of certain Mortgages, and I am desired by our Council to enquire of you,—Is a Mortgage given by A. to B. to secure the payment of money borrowed assessable: or, in other words, if A. borrows money of B. and gives B. a Mortgage, can B be assessed for the amount the Mortgage calls for.

And further, are persons holding a Shop License for the sale of Spiritous Liquors by the gallon or quart, having obtained that License under the By-laws of the Municipality, disqualified from holding a seat in the Council.

Your's truly,

ROWLY KILBORN.

1. It is expressly provided by the Assessment Act that "So much of the personal property of any person as is secured by

a mortgage upon land, or is due to him on account of the sale of land, the fee or freehold of which is vested in him," shall be exempt from taxation (Consol. Stat. U. C., p. 651, s. 9 sub. s. 15). The reason is obvious. The land is rated at its full value, and the mortgagor pays taxes upon it as if not at all mortgaged. If the mortgagee also were obliged to pay taxes the land, as regards the amount of the mortgage, would be doubly rated, and this is not intended by the Legislature.

2. There is no decision on this point. Our impression is, that a person holding such a license would be disqualified to hold a seat in the Council from which or under which he holds his license. He would, we imagine, come fully within the mischief intended to be prevented by the Act (Con. Stat. U. C., p. 546, s. 73).

REVIEW.

The Lower Canada Reports: Editors, Monsieurs LeLievre and Angers; Printer, Augustin Cote, Quebec.

Number two of these Reports is received. It contains the reports of six decided cases in the courts of Lower Canada, all of which are important. One (*The Queen* v. *St. Louis et al*) is important in Upper Canada. It determines that a shareholder in an incorporated company, under the circumstances mentioned, cannot commit larceny from the company nor be guilty of obtaining its money under false pretences.

The Atlantic Monthly. Boston; Ticknor and Fields.

April number received. Since this young but rising Magazine has been placed under the control of Ticknor & Fields, the well known Boston publishers, it has continued gradually to gain in public favor. We look upon it as one of the best Magazines of the age, and without question the most able Magazine published on this continent. Unusual ability is displayed in its every department. And the reader is lead from grave to gay in a manner as agreeable as instructive. The number now before us opens with an article on the Laws of Beauty, which, though not elaborate, is learned, and characterized by a display of much thought, and is evidently the result of deep reflection. The lovers of philosophy will not fail to make this article the subject of study.

The London Quarterly. New York; Leonard Scott & Co.

The quarterly number for January contains the following articles: 1. The Three Colonies of Australia; 2. Cotton Spinning Machines and their inventors; 3. China and the War; 4. The Roman Wall; 5. Religious Revivals; 6. Life and Works of Cowper; 7. Reform Schemes. An essay in a quarterly is become a most formidable document. It is no longer the expression of some evanescent thoughts but an elaborate and exhausting disquisition on the subject in hand. That above mentioned on cotton spinning machines is a history of cotton spinning machines and their inventors. That on the religious revivals is an attempt to deal with a difficult and extraordinary subject and one concerning which there is much diversity of opinion. The conclusion of the writer is, that the revivals are productive of good and much to be encouraged.

The North British Review. New York: Leonard, Scott & Co.

The quarterly number of this able but erratic review, as usual, abounds with much to interest—much to gainsay—much to doubt—and much to think about. In it there is a very singular contribution headed the Silence of Scripture, wherein the writer comments with much emphasis about the silence of Scripture on many points of interest but not of vital importance to the Christian, such as the personal appearance of Christ, history of the Virgin Mary, &c. The writer argues that from the silence of Scripture on these and similar points all must feel that the Christian Churches have a larger charter of freedom than in our local and ecclesiastical differences we imagine, and promises at no very distant day to return to his subject. An article on "Form and Colour" we recommend both to the philosopher and the artist. The followers of Wesley will find in "Wesleyan Methodism" much useful information.

The Eclectic Magazine, April, 1860. New York: W. H. Bidwell.

Whenever we receive a number of this welcome magazine, we at once turn to the embellishments. In the number for April we have a good likeness of the late Lord Macaulay, and a most striking likeness of Longfellow the poet. The embellishments are a most attractive feature. For works of art they cannot be surpassed, and the Editor usually manages to make most acceptable selections. The letter press is, as usual, varied and interesting.

Godey's Lady's Book, April, 1860. Louis A. Godey, Philadelphia.

The engravings in "Godey" have not only the merit of being beautiful, but instructive. The "Lady's Book" is a universal favourite with ladies, and so well it may be. For thirty years its Editors have labored to make it worthy of their patronage, and in this they have succeeded in a marked degree. And notwithstanding its great success, no exertion is spared to secure a continuance of that public support which has been so honestly acquired. Terms, for one copy, $3 per annum.

The United States Insurance Gazette. Edited and published by G. E. Currie.

The number for March is received, and is the first received for several months. We are always glad to see the Insurance Gazette. It is a most industrious compilation of facts and statistics bearing on a topic about which not only underwriters but law reformers and legislators are much concerned.

APPOINTMENTS TO OFFICE, &c.

RECORDER.

WILLIAM HORTON, of the City of London, Esquire, Barrister-at-law, to be Recorder of the City of London.—(Gazetted 17th March, 1860.)

CORONERS.

HENRY GOODMAN, to be an Associate Coroner for the County Lincoln—(Gazetted 3rd March, 1860.)

ALFRED WYATT, to be an Associate Coroner for the County of Ontario.—(Gazetted 3rd March, 1860.)

NOTARIES PUBLIC.

JAMES HANVEY, of St. Thomas, Barrister-at-law, to be a Notary Public for Upper Canada.—(Gazetted 3rd March, 1860.)

ALEXANDER SHAW, of Kincardine, Attorney-at-law, to be a Notary Public for Upper Canada.—(Gazetted 17th March, 1860.)

GEORGE DOUGLAS FERGUSSON, of Fergus, to be a Notary Public for Upper Canada.—Gazetted 24th March, 1860.)

TO CORRESPONDENTS.

A Division Court Clerk—Another Law Student—An Old Barrister—Paul Dunn—Marcus Gunn—Another Law Student—Under "Division Courts."

Township Clerk of Raineham.—W.—Rowly Kilsorn—Under "General Correspondence."

The communication of our correspondent "Subscriber" is not such a communication as we are usually disposed to answer. It is not of sufficient general importance, and is besides too long for insertion, and looks too much as if addressed to us to save a fee to counsel. For the satisfaction of our correspondent we may however state that, so far as we have formed any opinion on the case stated, it is against C's right to relief in Equity. He could not go into Equity with clean hands. What was assigned was not an endorsed note but a joint judgment.—Ed. L. J.

DIARY FOR MAY.

1. Tuesday..... Last d. for not. to Counties of apport. of Gram School moneys.
5. Saturday..... Articles, &c., to be left with Sec. Law Soc. Chancery Hearing [Term ends.
6. SUNDAY..... *4th Sunday after Easter.*
13. SUNDAY..... *5th Sunday after Easter. Rogation Sunday.*
16. Wednesday ... Last day for service of Writ in County Court.
17. Thursday ..... *Ascension Day.*
20. SUNDAY..... *Sunday after Ascension Day.*
21. Monday..... EASTER TERM begins.
25. Friday ..... Paper Day, Q. B.
26. Saturday..... Paper Day, C. P. Last day for declar. County Court.
27. SUNDAY..... *Whit-Sunday.*
28. Monday..... Paper Day, Q. B.
29. Tuesday ..... Paper Day, C. P.
30. Wednesday ... Paper Day, Q. B.
31. Thursday..... { Paper Day, C. P. Last day for Court of Revision finally to revise Ass't Rolls, and for Co. Councils to revise T'p Rolls.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

MAY, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60" *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The "60" has reference to the year, and not to the amount represented as due.*

TAXATION OF ATTORNEYS BILLS.

It is at present the policy of the law to regulate as far as possible the remuneration to be allowed Attorneys and Solicitors for work done by them as such.

This policy, though having many advocates, is not without some opponents. Many there are who contend that neither the Court nor any other power should dictate to an Attorney what he is to charge for his services more than to the tradesman what he is to charge for his wares, or to the laborer for his labor.

Without discussing the wisdom of the existing policy, we propose to examine in what manner and to what extent it is carried intopractice.

An Attorney or Solicitor is an officer of the Court, and as such amenable to the Court for everything which he does in the practice of his profession, whether it be the receipt of money or the issue of a writ, a charge made or a suit conducted.

From this it is argued that the Courts have independently of any statute power to refer an Attorney's bill for taxation (*Sayers* v. *Walond*, 1 Sim. & St. 97; *Williams* v. *Odell*, 4 Price 279, *Wilson* v. *Gutteridge*, 4 D. & R., 736.

This position is sustained to some extent, though not conclusively, by the case of *Watson* v. *Poston*, 1 Dowl. P. C. 556, but in the case of *Dagley* v. *Kentish*, 2 B. & Ad. 411, Lord Tenterden doubted its correctness. And in *Weymouth* v. *Knight*, 3 Scott, 764, Chief Justice Tindal referring to *Dagley* v. *Kentish*, said, "The result of the conference of the Judges on that case was that they almost unanimously concluded that the Courts had no authority independently of the Statute to direct the taxation of Attorneys bills unless under special circumstances, as when an Attorney has been guilty of fraud."

The authority of more recent cases, and the practice of the Courts is certainly in favor of the doctrine advanced by Chief Justice Tindal (*Slater* v. *Brookes*, 9 Dowl. P. C. 349. *See ex parte Cardross*, 5 M. & W. 545).

It is not now usual for the Courts to refer a bill to taxation, otherwise than under some one or other of the Statutory provisions giving express authority so to do. In each case where the right is disputed the contest is whether the services charged for are such as can be referred under the Statute, not whether the Court has power independently of the Statute to make the particular reference.

Until recently the Statute under which references were made was 2 Geo. II. cap. 23, s. 23, passed in 1729, which provided as follows :—

"1. That no Attorney or Solicitor should commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at Law or in Equity until the expiration of one month or more after such Attorney or Solicitor should have delivered unto the party or parties to be charged therewith, or left for him, her or them at his, her or their dwelling-house or last place of abode, a bill of such fees, charges and disbursements, written in a common legible hand and in the English tongue, (except law terms and names of writs,) and in words at length (except times and sums), which should be subscribed with the proper hand-writing of such Attorney and Solicitor.

"2. That upon the application of the party or parties chargeable by such bill, or of any other person in that

behalf authorized, unto the Lord High Chancellor, &c., or unto any of the Courts, &c., or unto a Judge of any of the Courts, &c., in which the business contained in such bill, or the greatest part thereof in amount or value was transacted, and upon the submission of the said party or parties, &c., to pay the whole sum that upon taxation of the said bill should appear to be due to the said Attorney or Solicitor respectively, it should be lawful for the said Lord High Chancellor, Court, Judge, &c., to refer the bill and the Attorney or Solicitor's demand thereupon (although no action or suit should be depending in such Court touching the same) to be taxed and settled by the proper officer of such Court without any money being brought into the Court for that purpose.

"3. That if the Attorney or Solicitor, or party or parties chargeable by such bill having due notice, should refuse or neglect to attend the taxation the officer might proceed to tax the bill *ex parte*, pending which reference and taxation no action should be commenced or prosecuted touching the demand.

"4. That upon the taxation and settlement of such bill and demand the party or parties should forthwith pay to the Attorney or Solicitor, &c., the whole sum that should be found to be or remain due thereon, which payment should be a full discharge of the said bill and demand, and in default thereof should be liable to an attachment or process of contempt or other proceeding at the election of the Attorney or Solicitor.

"5. That if upon the taxation and settlement it should be found that the Attorney or Solicitor was overpaid, then the Attorney or Solicitor should forthwith refund all such monies as the taxing officer should certify to have been overpaid, and in default that the Attorney or Solicitor should in like manner be liable to an attachment or process of contempt.

"6. That the costs of such taxations should be awarded according to the event of the taxation of the bill, that is to say, if the bill taxed be less by a sixth part than the bill delivered, then the Attorney or Solicitor should pay the costs of the taxation, and if not less the Court in its discretion should charge the Attorney or client in regard to the reasonableness and unreasonableness of such bills."

Without discussing the various provisions of this Statute we may remark, that as compared with subsequent Statutes the following appear to be some of its distinguishing characteristics. The power to tax was after delivery of bill. The time for the application was according to the intention of the Act, within a month after delivery. The applicant was required to be the party chargeable. It applied only to business transacted in some one or other of the Courts. The application was required to be made to the Court in which the business contained in such bill, or the greatest part thereof in amount or value was transacted.

In Upper Canada the power to refer a bill to taxation until the passing of the Stat. 16 Vic., cap. 175, appears to have been derived entirely from the Eng. Stat. 2 Geo. II. cap. 23, s. 23. (*In re* Jones 3 U. C. L. J. 167.)

The 16 Vic., cap. 175, was in some respects an extension of the provisions of the old Act.

It expressly allowed an application after the expiration of one month from delivery with such directions and subject to such conditions as the Court or Judge making such reference should decide proper, but provided that no such reference should be made after a verdict obtained or writ of enquiry executed in any action for the recovery of the the demand or after the expiration of twelve months from the delivery of the bill, except under special circumstances to be proved to the satisfaction of the Court or Judge.

The reference was permitted to the proper officer of the Court in which any of the business charged was done. It empowered the officer to whom the reference was made to request the proper officer of any other Court to assist in taxing and settling any part of the bill. If more than a sixth were disallowed the Attorney was required to pay the costs of taxation. If less, the party chargeable. In the former Act on this latter point the Court had a discretion.

The Courts also were empowered in cases when authorized to refer a bill when delivered, if no bill were delivered to order the delivery of the same, and to make an order for the delivery up of deeds, documents, and papers in the possession, custody, or power of the Attorney (s. 20), provided for a reference upon the application of a party liable to pay though not the party chargeable (s. 21), and also for the delivery of a bill to a party liable though not chargeable (s. 22).

It also in express terms declared that the payment of any such bill should in no case preclude the Court or Judge from referring the bill, if the special circumstances of the case in the opinion of the Court or Judge appeared to require the same; upon such terms and conditions, and subject to such directions as to such Court or Judge should seem right, provided the application were made within twelve months after payment (s. 23).

Such was the law until the passing of the Consolidated Act of Upper Canada, cap. 35. The whole law on the subject is now contained in eighteen sections of that Act, numbering from s. 27 to s. 44 inclusive. They are substantially a re-enactment of the old Statute of 2 Geo. II. c. 23, s. 23, and 16 Vic. c. 175, s. 20, 21 and 22.

Our 16 Vic. cap. 175 appears to have been based upon the Eng. Stat. 6 & 7 Vic. c. 73, s. 37, 38 and 39, which repealed and re-enacted the Eng. Stat. 2 Geo. II. cap. 23

s. 23, and so our present Act and the Eng. Stat. 6 & 7 Vic. cap. 73 are substantially the same.

It is enacted by our present Statute as follows:

"1. That no suit at Law or Equity shall be brought for the recovery of *fees, charges* or *disbursements* for business done by any Attorney or Solicitor *as such* until one month after delivery of bill, &c. (as before), (s. 27).

"2. That upon the application of the party *chargeable* by such bill within such month any of the Superior Courts of Law or Equity, or any Judge thereof, &c., without any money being brought into Court, may refer the bill, &c., to be taxed by the proper officer of any of the Courts in which any of the business charged for in such bill was done (s. 28).

"3. That in case no application be made *within* the month, then the Court or Judge, upon the application of either party, may order a reference with such directions and conditions as he may deem proper, and may upon such terms as may be thought just restrain any suit for such demand pending the reference (s. 29).

"4. That no such reference shall be directed, &c, after a verdict obtained or writ of enquiry executed, *or* after twelve months from the time such bill was delivered, &c., *except under special circumstances* to be proved to the satisfaction of the Court or Judge to whom the application for the reference is made (s. 30).

"5. That in case either party having due notice refuses or neglects to attend the taxation, the officer, &c., may tax the bill *ex parte* (s. 31).

"6. That in case the reference is made upon the application of either party, and the party chargeable with the bill attends the taxation, the costs of the reference shall be paid according to the event of the taxation, except that if a sixth part be taxed off the costs *shall* be paid by the party by whom or on whose behalf such bill was delivered, and if *less* than a sixth part be taxed off thereby the party chargeable with such bill, *if he applied for or attended the taxation* (s. 31).

"7. That every order of reference shall direct the officer, &c., to tax the costs of the reference and to certify what upon the reference he finds to be due to or from either party, &c. (s. 32.)

"8. That such officer may certify specially any circumstances relating to such bill or taxation, and the Court or Judge may thereupon make such order as may be deemed right respecting the payment of the costs of the taxation (s. 33).

"9. That in case such reference be made when the same not authorized, except under special circumstances as hereinbefore provided, the Court or Judge in making the same may give any special directions relative to the costs of the reference (s. 34.)

"10. That where no bill has been delivered, &c., and where such bill if delivered, &c., might have been referred as aforesaid, any such Court or Judge may order the delivery of a bill and may also order the delivery up of deeds or papers, &c. (s. 35).

"11. That in proving a compliance with this Act it shall not be necessary in the first instance to prove the contents of the bill delivered, &c. (s. 36).

"12. That any Judge, &c., on proof to his satisfaction that there is probable cause for believing that the party chargeable, &c., is about to quit Upper Canada, may authorize an Attorney, &c., to commence an action for the recovery of his fees, &c., although one month has not expired since the delivery of his bill, &c. (s. 37).

"13. That when any person not being chargeable as the principal party is liable to pay or as paid any bill, &c., the party so paying, &c., may make the like application for a reference, &c., as the party chargeable therewith might himself have made, &c. (s. 38).

"14. That in case such an application is made when under the provisions hereinafter contained, a reference is not authorized except under special circumstances the Court, &c., may take into consideration any additional special circumstances applicable to the person making it, &c. (s. 39).

"15. That for the purpose of any such reference, &c. such Court or Judge, &c., may order the Attorney, &c., to deliver to the party making the application a copy of the bill *upon payment of the costs of the copy* (s. 40).

"16. That no bill previously taxed shall be again referred, unless under special circumstances the Court or Judge, &c., thinks fit to direct a retaxation (s. 41).

"17. That payment of any such bill shall in no case preclude the Court or Judge, &c., from referring such bill for taxation if the application be made within twelve months after payment, and if the special circumstances of the case in the opinion of such Court or Judge appear to require the same, upon the terms and subject to the directions which to the Court or Judge seem meet (s. 42).

"18. That in all cases in which a bill is referred, &c., the officer, &c., may request the proper officer of any other Court to assist him in taxing any part of such bill, &c. (s. 43).

"19. That all applications made to refer any bill, &c., or for the delivery of a bill, &c., shall be made 'In the matter of such Attorney or Solicitor,' &c." (s. 44).

If space permitted we might make many observations in explanation of the above statutory provisions, but at present must briefly confine our remarks to two points. 1. Cases within the Act. 2. Effect of the Act upon special agreements.

First. In the old Act 2 Geo. II. c. 23, s. 23, the expression was, "Fees, Charges or Disbursements *at Law or in Equity*," and was construed as extending only to fees, &c., connected with proceedings in Courts either at Law or Equity (*Hillier* v. *James Barnes*, 41, *Burton* v. *Chatterton*, 3 B. & Ald. 486, *Williams* v. *Odell*, 4 Price 279, *ex parte Dann*, 9 Ves. 547). But if the bill delivered contained *any* taxable item the *whole* became taxable (*Winter* v. *Payne*, 6 T. R. 645, *Smith* v. *Taylor*, 7 Bing. 259).

The present Act extends not only to "Fees, Charges or Disbursements," but to "*business done by any Attorney or Solicitor as such*," and therefore the Act is not now limited to business transacted in Court, but extends to any other business connected with the profession of an Attorney or Solicitor, which as an Attorney or Solicitor he is employed to do (*Smith* v. *Dimes*, 4 Ex. 32). When the bill is for conveyancing and business not done in Court the Taxing Officer must ascertain the remuneration as well as he can according to the contract between the parties express or implied (*In re Eccles et al*, 5 U. C. L. J. 279, *Ib.* 6 U. C. L. J. 59).

Second. The jurisdiction as to taxation extends only to the ascertainment by the ordinary rules of practice of the *quantum* payable by the one party to the other. It does not authorize the Court or Judge to determine whether a special agreement exists, or to interfere with a special agreement superseding the discretion of the Court (*In re Smith*, 4 Beav. 309, *Alexander* v. *Anderden*, 6 Beav. 405, *In re Byrch*, 8 Beav. 124. *In re Rhodes*, *Ib.* 224. *In re Thompson*, *Ib.* 237. *In re Eyre*, 10 Beav. 569). The validity of such an agreement can in Equity only be determined in a suit and not by petition (*In re Whitcombe*, 8 Beav. 145). And where the amount of a bill of costs was included in a settled account between a Solicitor and client, and retained by the Solicitor out of money in his his hands, it was held that the Court had not jurisdiction upon petition to open the account and enter taxation, and that it could only be done by bill (*In re Catlin*, 8 Beav. 121. *See* also *ex parte* Buss. 2 Phillips, 562). But the Courts of Common Law will not in general give full effect to agreements between Attorney and client for payment at a specified rate for business done (*Drax* v. *Scroope*, 2 B. & Ad. 581. *Evans* v. *Taylor*, 2 Dowl. P. C. 349. *Tanner* v. *Lea*, 4 M. & G. 617), though there is nothing to prevent an Attorney bargaining with his client for less than the established rate of fees (per Bullock, C. B., in *Smith* v. *Dimes*, ubi. sup.).

ATTORNEY'S BILL.

The case of *Read, Leith & Read* v. *Cotton & Manning*, reported in this number, will be read with interest in connexion with the foregoing.

MUNICIPAL LAW.

Our thanks are due to W. Duck, Esq., of the city of Ottawa, for the report of the case of *Regina ex rel. Horne and Sparks*, reported in other columns.

The judgment will be read with much interest by those who may be concerned in contesting a municipal election. The point decided is a new one, and the judgment is the more valuable upon this account.

It is provided by the Municipal Act (Consol. Stats. U.C. p. 551), that a relator with a view to question a municipal election shall make application "within six weeks after the election, *or* one month after the acceptance of office by the person elected." The doubt arises on the latter branch of the provision. What is an "acceptance of office," such as intended? Taking the declaration of office is undoubtedly an acceptance. Then what *other* act will constitute an acceptance?

It seems, according to the ruling of Judge Armstrong, that a speech by the elected to the electors, immediately after the termination of the election, announcing an acceptance of office, to bind a relator, must be clearly proved, and possibly made in his presence or with his knowledge.

The proper construction of this clause of the statute becomes a matter of much concern, when we mention that if the time allowed for moving be allowed to expire without a motion, the right of the elected to hold his seat cannot be tried by information in the nature of a *quo warranto*, or in any other direct manner. (*Reg. ex rel. White and Roach*, 18 U.C., Q.B. 226.)

DEATH OF BARON WATSON.

This eminent Judge, like the late Mr. Justice Talfourd, expired while holding a Court of Assize. On 13th March last, while holding the Assizes for the County of Montgomery he was seized with an apoplectic fit, and in less than an hour from the first attack breathed his last, aged 63. The names of Mr. Wilde, Q. C., Mr. Montague Chambers, and Mr. Lush, are mentioned in connexion with the vacant seat.

LAW AND EQUITY.

The Lord Chancellor, who for so many years presided over the Court of Queen's Bench, and who, owing to his large experience and extensive learning, is, perhaps, of all living men the best fitted to bring about a fusion of the systems of Law and Equity, has introduced a bill, which, if it become law, will in a great measure attain that end.

During the recent Durham Assizes in England, a Roman Catholic Clergyman (Rev Father Kelly) refused to reveal a statement made to him by a prisoner in confession. Mr. Justice Hill, the presiding Judge, committed the priest to custody for contempt.

THIRD REPORT OF THE ENGLISH COMMON LAW COMMISSIONERS.

The following is the third and concluding report of this Commission :—

We, your Majesty's Commissioners, appointed to inquire into the Process, Practice, and System of Pleading in the Superior Courts of Law at Westminster, the manner of conducting suits and other proceedings in such Courts, and on the circuits, and the costs, charges, and expenses incidental thereto, the practice at the judge's chambers, and the duties of the several officers, clerks, and other persons of and connected with such Courts, circuits, and judge's chambers, humbly certify to your Majesty that we have further proceeded to consider the matters thus committed to our investigation, and we submit to your Majesty this our Third and Final Report.

In the year 1850, your Majesty was pleased to direct us and our late lamented colleague Sir John Jervis, to inquire into and report upon the Process, Practice and System of Pleading in the Superior Courts of Common Law at Westminster. At that time much dissatisfaction prevailed amongst the practitioners and suitors. It was complained, and with justice, that the proceedings in actions, though undefended, of which the great majority of cases consists, were unnecessarily tedious and costly. It was also a subject of deep and just dissatisfaction, that the time of the Courts was frequently occupied, and expense and delay occasioned, by frivolous arguments and discussions upon points merely of a technical form, altogether irrelevant to the merits. Justice was frequently defeated in trials at Nisi Prius, in consequence of variances between the Pleadings and the Evidence; or of objections to the stamps upon documents; or from want of authority to adjourn the trial when an unforseen difficulty arose; or from other circumstances which occasionally, after very great trouble and expense had been incurred, rendered the trial wholly fruitless, and left the real question in controversy between the parties undecided. To these and other causes or complaint we have referred in our former Reports.

Our first Report was presented in the year 1851. We discussed therein all the ordinary proceedings in an action, and made suggestions for their improvement by abolishing all unnecessary steps, by removing the possibility of a defeat of justice by mere technical objections, and by putting an end to the fictions which, as in outlawry and ejectment, had incumbered the law. We further recommended the payment of the officers of the Superior Courts by salaries instead of fees, and the abolition, or at least revision, of the various charges upon the suitors in respect of the proceedings in those Courts.

In consequence of that Report, the Common Law Procedure Act of 1852, and the Nisi Prius Officers Act (15 & 16 Vic. ch. 73,) were enacted, and these Acts were followed by two sets of Rules made by the Judges in Hilary Term, 1853.

In our Second Report (1853), we proceeded to deal with the following important subjects:—Trial by Jury, the instances in which it might be dispensed with, and the mode in which the constitution of Juries might be improved; the trial at Nisi Prius and its incidents, and the improvements necessary in that part of our Procedure for perfecting the administration of justice; the law of evidence, and the further alterations required to complete the course of improvement which modern legislation has introduced into this branch of the law; the expediency of an appellate jurisdiction in cases of New Trial, and of special cases stated by consent of parties. These, together with several other subjects of minor importance, fully considered and discussed in our Report, related to the existing Procedure of the Common Law Courts in actions at Law.

In the second branch of our Second Report we considered the necessity of enlarging and expanding the Procedure of these Courts, so as not only to invest them with powers previously exercised by Courts of Equity alone, by way of assistance to the Courts of Common Law in the progress of an action called auxiliary Equity, but also to enable them to exercise the powers of Courts of Equity, for the protection of legal, as distinguished from equitable rights, and for the enforcing of legal obligations.

We strongly urged that these powers should be conferred on the Courts of Common Law, on the ground that every Court ought to possess within itself the means of administering complete justice within the scope of its jurisdiction; and that the Courts of Common Law, to be able satisfactorily to administer justice, ought to possess in all matters within their jurisdiction the power to give all the redress necessary to protect and vindicate common law rights, and to prevent wrongs, whether existing or likely to happen unless prevented.

This Report was followed by the Common Law Procedure Act of 1854. By this Act the legislature gave effect, in substance, to all our recommendations contained in that Report relating to the existing Procedure in an action at law, with the exception of our recommendation as to the constitution of juries; this subject being reserved, as it was understood, for consideration at a future period when the law relating to this matter was to be generally revised. Effect also was given to our recommendations as to conferring on the Courts of Common Law the powers previously exercised by the Courts of Equity alone, as auxiliary to the Courts of law. But the Legislature abstained from enlarging the powers of the latter Courts, so as to enable them to protect common law rights from threatened invasion, or to enforce the specific performance of common law obligations.

The experience of the several years which have elapsed since the new system of Procedure, with such great and varied improvements, has been in operation, enables us to express a confident opinion as to its working. We have delayed making this Report in order to have the advantage of this experience, before we submitted to your Majesty our final views on the important subjects upon which your Majesty was pleased to command our services.

As regards the amendments and alterations in the Procedure in actions at law, we are happy to be able to report, that they have rendered the Procedure simple, economical, and speedy, and have had the effect of limiting the costs to the expenses of the necessary and essential steps in a cause.

The extent of the reform effected will be exemplified by the fact that in nine months of the years 1852-3 (the first, during which the new system was partially introduced), as compared with the same period in the preceding year, by the abolition of proceedings of a formal character, all involving considerable expense, reported by us to be unnecessary, and thereupon abrogated, the Rules granted by the three Courts, were during that time reduced in number from 38,000 to 3,081, and this notwithstanding an increase in the number of Writs issued.

The technicalities which brought so much discredit on our jurisprudence have now disappeared; and the Courts, owing to the improved system of Pleading and Procedure, and the large additional power of amendment, are occupied in adjucating upon the substantial merits of the cases in litigation, while from the operation of the same causes, it very rarely oc-

curs in trials at Nisi Prius that the real question in controversy is not decided by the jury.

Nevertheless, there are still a few suggestions which we think it necessary to make as to this branch of the subject, partly as to matters omitted in our former Reports, and partly as to improvements which the practical working of the existing system has shown to be desirable.

First, as to the joinder of parties to actions. It not unfrequently happens that the right to sue arises in such a manner that it is doubtful in whom it is vested. In such cases, great hardship and difficulty are imposed upon the suitor by the rule, which requires that an action shall be brought in the name only of the person in whom the right is legally vested. The effect of that rule is, that a mistake as to the proper person to sue involves an expensive defeat, by a judgment whereby the right is pronounced to exist, but to be vested in a person not a party to the action, but who may in fact be a trustee for or otherwise in the same interest with the Plaintiff, and who would have consented, had the law allowed it, to be joined as a party.

The existing rule, however, theoretically correct, is unnecessary in practice, as is proved by the exception in the case of ejectment; whilst in the other cases to which we have referred it has a mischievous effect. It is not likely that parties will be joined as Plaintiffs who have no interest in the matter; and we think that Plaintiffs may safely be intrusted with the right to bring their actions in the name of the persons in whom the legal right may be supposed to exist, leaving it to the Court to give judgment in favour of the persons or person who may be found to be entitled. With a discretion as to costs, and the provision as to set-off recommended in our First Report, this suggestion can work nothing but good, and we recommend its adoption.

The action of Replevin was one of the subjects left for our consideration; but we have been in part anticipated by the provision of the 19 & 20 Vic. ch. 108, ss. 63 to 68, upon which we have no improvements to suggest.

A doubt has been suggested whether that statute is not confined to replevin of goods distrained for rent or damage feasant. To prevent any question, it ought, by enactment, to be extended to all cases of replevin.

Besides this, there is an alteration in the Procedure of Replevin which would be especially beneficial in the case of distress for damage feasant. At present a tender, after impounding, of the rent or damage, is too late; and it is said that the distrainee's only course is to replevy, to let the jury find the rent or damage, and then to pay it. This is obviously most objectionable, as it involves the expense of trial at the cost of the distrainee, if the distrainor is obstinate or malicious, to ascertain a sum, the amount of which may not be doubtful, or which and much more the distrainee would pay rather than be at the expense of a trial. The remedy for this is to permit a plaintiff, in answer to an avowry, to pay money into court in satisfaction of the matter avowed for, and we recommend that this should be allowed. It would be necessary to alter the bonds of each party accordingly. If the distrainee paid in enough, and the action went on, then his case should be like that of a defendant now in ordinary actions, and the case of the defendant like that of the plaintiff in such an action, with similar results *mutatis mutandis*, if too little was paid in.

The Actions of Dower, Writ of right of Dower and Quare impedit are at present commenced by writ issued out of Chancery. This causes delay and expense, besides giving rise to needless questions of form. They are the only actions so commenced, and there is no reason why the proceedings therein should differ in respect from those in other actions. We think they ought to be commenced by writ issuing out of the Court of Common Pleas, that being the Court which at present has alone jurisdiction in this action between subject and subject, in the same manner as a writ of summons in an ordinary action; that all process therein should be tested either in or out of term, and returnable after execution; and that the proceedings therein should be assimilated, as nearly as may be, to those in personal actions.

In Actions on Bonds the Defendant ought, in our opinion, to be allowed to pay money into court; and also in Detinue by leave of the Court or Judge.

An amendment has been suggested by our experience of the working of our Common Law Procedure Act 1854, in relation to the Attachment of Debts. It is, that the Judge should have a discretion to refuse to interfere in cases where the costs of the Proceedings will, in his opinion, bear so large a proportion to the amount to be recovered as to make the remedy practically worthless or vexatious.

There is a further provision which it is desirable to add to this part of the law. It occasionally happens that the garnishee appears, admits the debt, is willing to pay it, but has a *bona fide* doubt whether the execution debtor is really entitled to it, and whether some other person is not. Now it is obvious that garnishees ought not to be compelled to pay without being protected against that other person, and that the latter ought not to have his rights decided on without an opportunity of being heard on them. To prevent these inconveniences, the proper remedy is that the garnishee, on being served with the order, should be at liberty to take out a summons, in the nature of an interpleader summons, calling on any person to whom he suggests the debt is really due to appear. Proceedings might then take place as on interpleader summonses, and the creditor or person called on be barred according to the result.

Doubts also exist as to whether a Judge can exercise a discretionary power in cases where the garnishee appears and admits the debt in point of law, and where the judgment debtor has in strictness a legal right to maintain an action against the garnishee, but under the circumstances, it would in the opinion of the Judge, be inequitable for him to do so. For instance, where the garnishee has a cross claim against the judgment debtor for an amount exceeding the judgment debtor's claim, but which is not yet due. In such case it may well be that the judgment debtor himself would not think of enforcing payment of the debt due to him from the garnishee, whilst his assignees in bankruptcy or insolvency could not do so. To meet such cases the Judge should have power to make such orders as shall, in his opinion, effect complete justice between all the parties.

With respect to the subject of Costs, it appears to us that the two objects to be attained are, that the right to costs should be clearly defined, and that the amount to be awarded should be uniform in all the Courts.

The statutes which give to the parties a right to costs are in a very confused and unsatisfactory state. Not only have the separate enactments of the older statutes given rise to a variety of decisions, but subsequent statutes have in some instances modified, and in others partially repealed, former enactments, so that it is extremely difficult to ascertain what the real state of the law is on this subject.

We are of opinion that these statutes should be revised and consolidated. All that we think it necessary to say upon this branch of the subject is, that the leading principles which now regulate the right to costs should be retained. The party succeeding in the suit should have the general costs of the cause, the party succeeding on issues, either of law or fact, although he be not entitled to the general costs of the cause, should have the costs of those issues, or of those parts of the cause on which he succeeds; and the restraints now imposed on frivolous actions, by depriving the party of costs, should be preserved, and better defined than they are at present.

Under this head we think that it ought to be enacted, that whenever a Plaintiff in any action recovers less than £5

damages, it should be in the discretion of the Judge to allow or disallow his Costs.

The amount to be awarded for costs is now settled by the Masters of the Courts on Taxation, subject to revision by the Court, or a Judge. The allowance is regulated by the usage and practice of the Courts, excepting where the scale of costs has been fixed by rule of Court or Statute. These scales have recently been revised by the Judges, and there is no arrear in the Masters' Offices, where we believe the business is satisfactorily conducted.

We think it right to avail ourselves of this opportunity to invite renewed attention to our former observations respecting the constitution of juries; More especially we would urge the consideration of that part of our recommendations which relates to securing the attendance on common juries of the class of persons who now serve exclusively on special juries, with a view to the improvement of the former by the admixture of persons of higher education and intelligence. We are strongly persuaded that a very great improvement would by this means be effected in the constitution of juries; and as we do not propose to do away with the right of parties to resort to a special jury, or to deprive special jurors, when serving as such, of the additional remuneration which they are in the habit of receiving, we can see no ground why the liability of such persons to serve on common juries, which already exists in law, though it is not required in practice, should not be enforced.

We proceed to the second part of the subject, namely, the powers hitherto exercised by Courts of Equity alone, which we have proposed should be conferred upon Courts of Common Law. The experience of the five years which have elapsed since the passing of the Act of 1854, has strongly confirmed the views which we sought to enforce in our last Report; and we cannot but regret the partial manner in which our recommendations were carried into effect by the Legislature. Upon this subject, in addition to what we formerly urged, we beg to submit for consideration the following observations:—

Besides the exclusive jurisdiction which the Court of Chancery has from time to time acquired over subjects which either never were within the scope of the Common Law, or have ceased to be so from desuetude or express enactment, that Court has also exercised in various instances powers over subjects within the jurisdiction of the Common Law Courts, either in aid of these Courts, as by discovery, or by way of prevention of a threatened injury, as by injunction against a wrong or against an apprehended unjust litigation, or by way of specific performance, or by way of restraint of the proceedings of the Common Law Courts, where the prosecution of actions, and even the execution of judgments, have been stayed by injunction, upon the ground that there was something in the proceedings contrary to the law as administered in the Court of Chancery, technically called Equity. We desire to call attention to the points in which the two jurisdictions at present thus interefere, and are dependant one upon the other.

With that part of the Chancery jurisdiction which deals with subjects not within the cognisance of the Common Law Courts, it is no part of our duty to deal, because it does not interfere with the jurisdiction or procedure of the Common Law Courts as at present constituted. It is with that part of the Chancery jurisdiction which undertakes to aid the proceedings of Common Law Courts, or to furnish a better remedy or to control and restrain their proceedings, that we are concerned, because, in our opinion, the relation of the Courts to one another is, in respect of such jurisdiction, anomalous and absurd.

The auxiliary power of the Court of Chancery to compel discovery in aid of an action or defence in a Common Law Court has already by the Common Law Procedure Act of 1854, been conferred upon the Courts of Common Law. No practical difficulty has been experienced in the exercise of this jurisdiction. In cases where discovery must previously have been sought in the Court of Chancery, it has since the Act of 1854, been speedily obtained at Judges Chambers at a comparatively trifling expense.

That part of the jurisdiction of the Court of Chancery which relates to protection against threatened and impending injury deals, to a great extent, with subjects which are within the general jurisdiction of the Courts of Common Law. It is founded upon the principle of giving a more complete remedy by restraining the commission of injuries, in respect of which the Courts of Common Law can only award damages. We proceed to consider this subject, with reference to the various remedies in their order.

First, as to the power of restraining, by injunction, threatened and impeding injuries. Upon this subject we have already, in our Second Report, stated at large the opinion of the former Common Law Commissioners and our own. Suffice it now to say, that, for the reasons there stated, Courts of Common Law ought equally to have power to protect legal rights from violation, and to give damages for actual injury. It often happens that both compensation in damages and protection are required in order to afford justice; and, in such cases, where immediate protection is necessary, no complete remedy can at present be obtained, except by resorting to the Court of Chancery. This arises from the circumstance that there is no provision for issuing an injunction from a Common Law Court in case of threatened injury. It is necessary, as the law at present stands, to wait until a wrongful act has actually been commenced, so that an action for damages may be maintained, before application can be made for an injunction to a Court of Common Law, whereas the danger of such an injury is enough to found the jurisdiction of the Court of Chancery. This seems unreasonable, when it is considered that the right threatened to be violated exists at the Common Law, and that, in case of actual injury, redress is given in a Common Law Court and not in the Court of Chancery (unless it be incidently under the Act 21 & 22 Vict. c. 27), and that after the wrong has actually commenced an injunction may be obtained in a Common Law Court against its repetition or continuance, or the committal of an injury of a like kind; and yet that, in case of threatened and impending injury to a similar right, is is necessary to resort to the Court of Chancery. This defect in the jurisdiction of the Common Law Courts, which is the more striking when it is considered that the Court of Chancery often declines to interfere until after the right has been established at Law, ought, we think, at once to be remedied. The reasons for doing so are shortly as follows:—The rights, in respect of which the remedy proposed is to be given, are recognised in Courts of Common Law, which are instituted for the purpose of protecting and vindicating them: The complete enjoyment of such rights can only be obtained through the means of injunction, by which the violation of them is prohibited and prevented: Damages in many cases afford but imperfect redress; In practice, the resort for protection by injunction to a court different from that in which the right, if in dispute, is and ordinary must be tried and established, necessitates two suits instead of one: Lastly, to give the power to the Common Law Courts in all cases of Common Law rights will be to restore an ancient jurisdiction in an improved and more efficient form.

The procedure for this purpose may be at once simple and effective, namely, by application to the Court or a Judge for an injunction. If the case be such that the recovery of damages would be an inadequate or inconvenient remedy, the injunction may be ordered to issue forthwith *ex parte*, subject of course to an application to the opposite party to dissolve it. It should be in the discretion of the Court or Judge, whether the injunction should issue in the first instance, or whether only a rule or summons to shew cause should be granted.

Upon mention to quash the injunction, or on the hearing of

the rule or summons to issue it, the Court or Judge ought to have power either to decide the matter summarily, or to direct direct an action, or issue, or a special case, and to impose such terms as to keeping an account or otherwise, and to make such order as to the costs of the proceedings, as may be just.

This power ought to be conferred in all cases of Common Law rights in which an injunction might be obtained in the Court of Chancery.

In an action involving the question of injunction, brought or continued under the direction of the Court or Judge, it should not be necessary to claim an injunction in the Declaration, unless directed by the Judge; and in such an action not so brought, the party injured ought to be at liberty, as at present, to claim an injunction, if he think proper. The provisions of the 82nd section of the Common Law Procedure Act of 1854 ought to be modified, so as to be applicable to the new writ.

The power of issuing injunctions by the Common Law Courts is at present confined to actions in which some breach of contract or duty is complained of, and cannot be exercised for the protection of property the right to which is in litigation. It cannot, for instance, be exercised in the action of ejectment, even to prevent irreparable waste; nor in case of detinue, to prevent the defendant from making away with the goods, which may be specifically recovered. This defect in the jurisdiction should be supplied by extending the power of issuing injunctions so as to prevent injury to or the making away with property, in actions in which the title thereto is in dispute.

Another measure of protection at present afforded by the Court of Chancery consists in ordering the delivering up of documents, which, upon the face of them, appear sufficient to give the holder a right of action at Common Law, but which by reason of circumstances which might be set up as a defence if an action were brought, ought not to be made available. In such a case, the danger that by lapse of time evidence of the defence may be lost, and so the instrument may be unjustly enforced, is considered as constituting a right in the party apparently charged by the instrument, unless disabled by some act of his own, to have it given up and cancelled, and so to have the claim set at rest. This power may well be given to the Courts of Common Law in respect of Common Law claims and defences. And in cases in which only a part of the amount appearing to be due on the instrument is in fact due, an offer to pay such part, and a payment of the amount into court to abide such order as the Court may make, ought to be considered equivalent to actual payment, before proceedings. This may be done either by action or by summary application to the Court, as may be thought most advisable.

Under the same head of protection against anticipated injury may be classed the proceedings in Interpleader, which we now proceed to consider.

The principle of interpleader is this: That a person having, without any fault on his part, the possession of property in which he claims no interest, and which is claimed by two or more adverse parties whose alleged titles have a common origin is entitled to be protected from the necessity of litigating the question of property in which he has no concern, upon giving up the subject matter in dispute to be dealt with under the direction of the Court, which then determines the question in a proceeding between the adverse claimants. Before the Statute 1 & 2 Wil. 4, c. 58, the remedy existed in the Common Law Courts in one form of proceeding only, namely, the action of detinue. One of the last instances, if not the last, in which it was resorted to was in the case of *Land* v. *Lord North*, 4 Douglass, 226. The statute referred to, however, gave jurisdiction to Common Law Courts, in cases of action brought by one of the claimants against the holder of the property. It also gave a new power to relieve sheriffs against the necessity of litigating adverse claims made to goods taken under execution. In this latter case the Court of Chancery before the statute declined to exercise jurisdiction, for the alleged reason, that if the sheriff had made a wrongful seizure he ought not to be relieved; while if he had made a rightful one, there was no occasion for interfering. And it may be doubted whether that Court will assume jurisdiction since the statute (see *Tufton* v. *Harding*, 21 Dec. 1859, before Vice-Chancellor Kindersley). The jurisdiction conferred upon the Common Law Courts in such cases has proved highly beneficial. In some particulars, however, it requires extension and amendment.

With respect to both kinds of interpleader proceedings, difficulties have arisen where the claim is at present capable of being enforced in the Court of Chancery only, and is called equitable. In respect to such claims, Courts of Common Law have at present no jurisdiction, and the consequence has been that great inconvenience has arisen in the execution of the Interpleader Act. To enable the Courts to do complete justice in such cases, their jurisdiction ought to be extended to all claims, whether legal or equitable, where an action has been brought in respect of a Common Law claim within the former branch of the statute, or there has been a seizure in execution within the latter. In case of Interpleader for relief of sheriffs, jurisdiction ought to be given to the Common Law Courts, even though the claim or claims be all equitable. The proceedings upon such claim may be in the same form as those in the case of a conditional defence upon equitable grounds, which will be mentioned in a subsequent part of this Report.

In interpleader after action brought by one of the claimants, an amendment is also advisable. The course of decision upon the construction of this branch of the statute has usually followed that of the decisions in Chancery, which amongst other exceptions to this jurisdiction, appear to have established that relief will not be given when the titles of the claimants have not a common origin, but are adverse to and independent of one another. This exception of which the alleged reason is not very obvious, has no place in interpleader proceedings for the relief of sheriffs; and we see no good reason for its existence in any case of interpleader in the Common Law Courts. To take the common case of a wharfinger or warehouseman seeking relief against adverse claimants, the applicant has, generally speaking, no information as to the nature of their alleged titles; and yet it is clearly just, that, whatever may be, he ought not to be at the expense and risk of determining who is in the right, in a contest in which he has no interest whatsoever, except it be to hand over the property in dispute to the rightful owner. We recommend that interpleader should be allowed to all persons not falling within the class at present estopped from interpleading, whether the adverse claims have a common origin or not.

Interpleader for the relief of sheriffs admits of further improvement. It often happens that where a sheriff has seized goods in execution, a claim is made to them under a bill of sale to secure an amount much less than the value of the goods, and the goods, if sold, would be sufficient to satisfy both the execution and the bill of sale creditor. In such cases great difficulty arises. The property of the goods is entirely out of the debtor and in the bill of sale creditor. The former has a right to the goods upon paying off the bill of sale, and that right ought to be available to the execution creditor. The bill of sale creditor has a right to the possession of the goods for the purpose only of satisfying his debt, and he ought not, provided his own debt is first satisfied, to be allowed to stand in the way of the execution creditor by objecting to a sale by the sheriff. There are other similar cases in which the claimant is entitled to the goods only to secure a debt. The judge ought to have power in all cases where the right of the claimant is only by way of security for a debt, to direct a sale, and the application of the proceeds, in case of a surplus, to satisfy the execution, upon such terms as to payment of the secured debt or not, and otherwise, as the judge may think fit.

The jurisdiction in interpleader cases ought also to be extended in the following particular. It occasionally happens that the execution creditor and the claimant agree to leave the matter to the decision of the judge before whom the summons is heard, without requiring an issue. When points of law only are involved, this course saves expense and delay. Even where questions of fact are involved, now that the parties and their witnesses can be summoned and examined before the judge it not unfrequently happens that the judge, by consent, disposes of the case. Sometimes, however, even in cases of small amount, one of the parties insists upon the trial of an issue at a greater expense to both parties than the amount in dispute. In cases of this kind, it is obviously for the advantage of all that the judge should have the power of deciding summarily and so preventing needless expense. We think this power should be given to the judge, to be exercised if he thinks proper.

We would further recommend that in all cases where the question is one of law, the facts not being disputed, the judge should be at liberty to decide the question without an issue, and, if necessary, to direct a special case for the opinion of the Court.

We pass on to the remedy of specific performance for enforcing the actual fulfilment of contracts, the breach of which cannot be compensated by mere damages. On this subject we have already, in our Second Report, expressed our opinion that it ought to be added to the powers of the Common Law Courts, at least in all cases in which a breach of the contract can now be redressed in those Courts by an action for damages; and we pointed out the form of proceeding in which such remedy could be administered. We will not repeat what we then stated to be our opinion upon this subject, but we think it right to say that that opinion remains unaltered.

We next proceed to consider the interference of the Court of Chancery, upon equitable grounds, with the proceedings in Common Law Courts, as a subject to which particular attention ought to be directed. Notwithstanding recent legislation, the law is still imperfect in not admitting, by way of defence to a Common Law action, matter which is now ground only for application to the Court of Chancery to restrain the proceedings by injunction.

In all actions at Common Law whatever is ground for a perpetual injunction ought to be and is received as a defence, where the relief in Chancery would be unconditional; and in cases where such relief in the Court of Chancery would be conditional, the Courts of Common Law ought to have power to give, in a summary way, the same relief against actions pending therein. The first part of this recommendation has obtained the force of law by the 83rd and following sections of the Common Law Procedure Act of 1854, but subject to a condition, namely, "provided that such a plea shall begin with the words, *for defence on equitable grounds;* or words to the like effect." Considerable difference of opinion exists amongst us as to the propriety of requiring that a plea should be thus headed, but as we are not agreed upon this matter, we do not think it expedient to enter further upon it.

The second part of the recommendation now under consideration has not been acted upon, and the consequence has been, that in many cases pleas founded upon matter which would, in the Court of Chancery, be ground for conditional relief, have necessarily been rejected by the Common Law Courts, although they involved no difficulty which could not have been readily overcome by their ordinary procedure. The consequence is, that in such cases the defendant must either resort to the Court of Chancery, or submit to the judgment of the Court of Law, though he is ready and willing to perform the conditions upon which, according to the rule of the Court of Chancery, he ought to be relieved from the effect of such judgment.

Difficulties have been apprehended in raising such defences, because of the rigidity of the existing forms of pleading and judgment in the Courts of Common Law, and from its having been supposed that no appeal could be made to lie against a decision founded upon a summary application. In truth, however, no such difficulty exists. An instance of a conditional equitable defence given effect to by the proceedings in a Common Law Court, is presented by the proceedings in an action upon a mortgage to stay the action, and for a reconveyance upon payment of the debt and costs. The power of giving relief upon summary application by rule or summons may be coupled with a right to the unsuccessful party to appeal, by leave of the Court, within a limited time upon giving security. The appeal might be in the form of a special case stating the facts necessary to raise the question, as in appeals upon new trial motions, under the Common Law Procedure Act of 1854. This power of appeal, coupled with a discretionary power to direct issues or enquiries, and as to costs of the action and application, will enable the Common Law Courts in the great majority of cases to dispose of such defences finally; whilst in cases in which any unforseen difficulty may arise, though we do not anticipate any, a provision similar to the 86th section of the Common Law Procedure Act of 1854 will enable the court or judge to reject the defence, "in case it cannot be dealt with by a court of law so as to do justice between the parties, upon such terms as to costs and otherwise as to such court or judge may seem reasonable."

In these cases, the summons or rule would be in the nature of a bill for relief; if a form of procedure analogous to a plea is preferred, there is no reason why it should not be adopted. In that case the judgment must be altered, and be made the same as the combined effect of a Common Law Judgment and a decree on a bill for relief from it. On such a Judgment Error or Appeal may lie as on other Judgments.

The Action of Ejectment is not included in our recommendations under this head, because the course of legislation on the subject of land has tended to maintain and strengthen the distinction between legal and equitable estates, and we cannot hope, under the form of an improvement in procedure to change the system thus sanctioned.

There is, however, in addition to the case mentioned in our Second Report of an outstanding trust term, a class of cases in which we think the Courts of Common Law might, with advantage, be authorised to receive defences, at present available only by proceedings in Chancery; we mean cases of relief against forfeitures.

It often happens that contracts provide for a pecuniary penalty of large amount, in case of non-payment of a smaller sum, or non-performance of one or more stipulated acts, the omission of which occasions damage of less amount than the penalty. In such cases, at the Common Law, it was formerly competent for the stipulating party, in case of breach of the contract to demand and recover the whole amount of the penalty, without regard to the actual amount of damage sustained. In the Court of Chancery, however, unless it appeared that the amount represented the agreed damages for a breach of contract, technically called "liquidated damages," the sum stipulated to be paid was considered merely a security for the actual damages sustained, and where these admitted of calculation, that Court relieved against the penalty upon compensation being made for such damage. This jurisdiction has been given to Courts of Common Law, and the conflict between the two Courts put an end to by the Statutes 4 Ann, c. 16, s. 11, and 8 & 9 Wil. 3, c 11, s. 8. No more than the actual damage sustained can now be recovered, and the interference of the Court of Chancery is no longer necessary.

Upon the same footing stands the jurisdiction of the Court of Chancery to relieve against forfeiture of leases for non-payment of rent, and, in certain cases since the statute of 22 & 23 Vic. c. 35, against breaches of covenants to insure,

This jurisdiction has in case of non-payment of rent been partially conferred upon Courts of Common Law by statutes 4 Geo. 2, c. 28, ss. 2, 3, 4, and the Common Law Procedure Act, 1852, ss 210, 211, 212. We think that the jurisdiction of the Courts of Common Law should be extended in this direction, and that in every case of ejectment brought for a forfeiture, these Courts should have, upon rule or summons, power to relieve in all cases in which relief can now be obtained by Bill in Chancery.

The legislation upon this subject will thus be rendered consistent.

Another enactment is, however, necessary to give full effect to the reception of such defences by Courts of Common Law. It is that a defendant shall not be permitted to proceed in the Court of Chancery for relief which he may obtain by plea or otherwise in the Court in which the action is pending; unless after such defence has been rejected by the Court of Common Law expressly upon the ground that "it cannot be dealt with there so as to do justice between the parties." The course of decision upon this subject may be traced in the cases of *Prothero* v. *Phelps*, before the Lords Justices, 22nd December, 1855; *Wild* v. *Hillas*, before Vice-Chancellor Kindersley, 3rd December, 1858; *Kingsford* v *Swinford*, before the same judge, 31st January, 1859; and *Gompertz* v *Pooley*, before the same judge, 9th February 1859. These cases seem to establish that in the present state of the Law, it is competent for a defendant, after allowing the action to proceed to its termination without availing himself of such a defence, to file a bill in Chancery founded upon the same matter, and after a second investigation of the case, to nullify the judgment. This may be prevented without introducing any novelty in principle, simply by requiring the defendant, upon the first opportunity, to put forward all he intends to rely upon in answer to the action.

The alleged jurisdiction in the Court of Chancery to entertain bills, technically called Bills for a New Trial, to restrain execution upon a verdict and judgment, after the time for moving for a new trial in the Common Law Courts has elapsed, ought also to be abolished, as tending to revive and continue a litigation already brought to a close in a court of competent jurisdiction. Courts of law have abundant authority to deal with cases of fraud upon the Court and abuse of their proceedings. In other cases it is considered that the time allowed to prepare for trial, and to move for a new trial, gives the defeated litigant as much opportunity to bring forward the matter upon which he relies, as is consistent with a speedy and efficient administration of justice. The protraction of litigation to a length bearing a large proportion to the ordinary period of life is all but equivalent to a denial of redress, and it operates with almost equal disadvantage to both the litigants. The cases in which such a jurisdiction may be applicable were always rare, and they have become more unlikely than ever to occur, since the parties to a suit may be examined for or against themselves. Bills for a new trial have, for the reasons stated, fallen into disrepute and desuetude; but as the jurisdiction is stated to exist, and is an anomally in our jurisprudence, we think it ought to be abolished by express enactment.

We have thus recommended that many powers exercised by the Court of Chancery should be given to the Common Law Courts, and in doing so we have selected those only which seemed to us likely to be exercised there with advantage. It has not been our object to extend, for the mere sake of extending, the field in which the Courts have Common jurisdiction, by giving to the Common Law Courts powers which may be exercised with equal benefit in the Court of Chancery, but simply to prevent the necessity for a resort by either party to both Courts for the purpose of obtaining complete justice where the Court of Chancery at present, in the case of Common Law rights, gives, on the one hand, aid by way of discovery, or a more complete remedy, as by injunction and specific performance, or, on the other hand, restrains the proceedings in Common Law Courts because of the existence of an equitable defence. Indeed it is obvious, that our recommendations, instead of having a tendency to extend the common field of jurisdiction, suggest a contrary and more effectual mode of putting an end to the contest between Courts of Common Law and Chancery by so distributing their jurisdiction as to render their interference with one another impossible. It is our intention and wish, that the result of what is proposed should be ingrafted upon and become part of the Common Law, and the distinction between Common Law and Chancery Law should be so far abolished. If, in addition to this, the Court of Chancery is prohibited from interfering in cases where Common Law rights are thus rendered capable of complete vindication in the Courts of Common Law, and in which, therefore, its interference will have become useless, the greater part, if not the whole, of the field of conflict will be done away with by confining the operation of the Courts respectively to subject-matters peculiar to each. Thoroughly to effect this it it is necessary to confer upon Common Law Courts power to give, in respect of rights there recognized, all the protection and redress which at present can be obtained in any jurisdiction; and it is upon this principle that we have acted in our suggestions. If they be carried into effect, there will no longer be the spectacle of jurisdiction imperfect in themselves and clashing with one another, but each Court will be armed in itself with exclusive jurisdiction over the subject matter within its cognizance with full power to give all the protection and redress which the law at present affords by means of a plurality of suits. The conflict of jurisdiction will be done away with, because the occasion for it will no longer exist.

We have only to add, that we have given our best attention to the question whether it is necessary to adopt the Procedure of the Court of Chancery in cases where it is proposed to borrow from its remedies; and we have arrived at the conclusion, strengthened by an experience of the working of the Common Law Procedure Act of 1854, that the desired object can be attained as effectually, and with less expense, by means of the ordinary proceedings of the Common Law Courts.

We have thus finished our task; and we submit this, our Final Report, to your Majesty's Royal consideration.

A. E. COCKBURN. (L.S)
SAMUEL MARTIN. (L.S)
JAS. S. WILLES. (L.S)
G. BRAMWELL. (L.S)
W. H. WALTON (L.S)

LECTURES

ON THE JURISDICTION AND PRACTICE OF THE HIGH COURT OF ADMIRALTY OF ENGLAND.

BY JOHN MORRIS, ESQ.

(*Continued from our last.*)

SECOND LECTURE.

Our next subject is the practice of the Instance Court. In connection with this I might be allowed just to refer to the *locality* of the Court and its offices. The Court has for many years past held its sittings in Doctors' Commons; and its offices (*i. e.* the Registrar's and Marshal's offices) are in the immediate neighbourhood. The Court appears, however, to have had notice to quit the hall in which it holds its sittings. Although an Act of last session empowered Government to purchase the site of the College property in Doctors' Commons, terms have not yet been come to with the Doctors, who are, I suppose, and naturally enough, looking out for the best bidder.

I am tempted, here, just to refer to a sitting of the Court about two centuries ago, before its migration to the Commons,

as appearing by an entry in "Pepys' Diary"‡ (Pepys himself was Secretary to the Admiralty in the reigns of Charles II. and James II.); the entry is as follows:—"To St. Margaret's Hill, in Southwark,§ where the judge of the Admiralty came and the rest of the doctors of the civil law, and some other commissioners, whose commission of oyer and terminer was read, and then the charge given by Dr. Exton, which methought was somewhat dull, though he would seem to intend it to be very rhetorical, saying that justice had two wings, one of which spread itself over the land, and the other over the water, which was this Admiralty Court. That being done, and the jury called, they broke up, and to dinner to a tavern hard by, where a great dinner, and I with them; but I perceive that this Court is yet in its infancy; as to its rising again, their design and consultation was—I could overhear them—how to proceed with the most solemnity and spend time, there being only two businesses to do, which of themselves could not spend much time. In the afternoon to the court again, where," &c.

All of you who are familiar with the Courts in Doctors' Commons, especially the Ecclesiastical Courts, will remember the quiet, and, if I might so term it, "cosy" mode in which the proceedings were conducted. The proctors were each known to the judge, and were addressed by him, from time to time, by name. No chance for an interloper! Your humble servant happened, some few years since, to be attending the Perogative Court on the hearing of an important will cause. and, having been engaged in getting up the case, he ventured from time to time to convey to the advocates such suggestions as occurred to him, little imagining that he was thereby committing an offence. The old judge bore with the intrusion patiently for a time; but at length he stopped the arguments of counsel, and informed the intruder that it was not allowable, in that court, to make communications to the advocates, except through the proctor. How all this has been rudely shocked by recent legislation is familiar to us all. The Admiralty was the last of our closed courts. I will not ask you to rejoice with me at its having been thrown open; but I do ask you to join with me in the expression of hope, that we shall do our best to prove ourselves worthy of our new privileges.

Pardon this digression from the subject immediately before us—viz. the practice of the Instance Court.

When I first designed these lectures the practice of the Court was my greatest difficulty. Excepting an old book written in Latin, "Clarke's Praxis," there was no treatise on the subject. In America, where, with its large mercantile marine, the Admiralty jurisdiction has received great attention, there are several treatises on the practice, and I am happy to find that we shall not long remain without proper guides in the practice of our own court, two treatises having been already announced, one by Mr. Pritchard, of Doctors' Commons (already favourably known to the profession by his "Admiralty Digest"), aided by his brother Dr. Pritchard; and the other by Mr. Coote, of Doctors' Commons.

With such aid as I could command, I had sketched out some remarks on the practice of the Court, accompanied by suggestions for its improvement, but I gladly cancelled what I had written on receiving, through the courtesy of the registrar, Mr. Rothery (who, I am happy to say, has honoured us with his attendance at both the lectures), an early copy of the new rules, which have only just been issued, and come into operation on the 1st of January next. These rules effect a complete revolution in the procedure of the Court; I commend them to your attentive consideration. They appear to me simple, concise, and practical. For all ordinary purposes, you will, I think, find them a sufficient guide; although it is true the 3rd rule provides that the old practice, previously in operation, shall continue in force, save in so far as it may be inconsistent with the new rules. Those only who have some acquaintance with the old procedure will be able to appreciate fully the great improvements which have been effected in the court by the present judge, of which these new rules are the crowning act.

The principal officers of the court, besides the judge, are the registrar and the marshal. The registrar combines the duties of a registrar and master in Chancery, and something beyond. He attends the court on the hearing of all Admiralty causes—he also attends the Court of Appeal on the hearing of all Admiralty appeal causes—and to him, either alone, or assisted by one or two merchants, all references are made. The registry is open all the year round; and all warrants of arrest are issued by the registrar upon his being satisfied of the sufficiency of the affidavit. Other duties of a special character devolve upon him, but which, as they do not affect the ordinary procedure of the Court, I pass over. The marshal executes the process of the court, and his office is altogether somewhat analogous to that of sheriff at common law. He attends the sittings of the Court, and carries before the judge a silver oar, as the emblem of the maritime jurisdiction of the Court.

There are two modes of procedure—1. *In rem*: 2 *In personam*. The former is the most usual, and we will consider it first.

The first step in a suit *in rem*, after the formal entry of the action, is to arrest the ship, "her tackle, apparel, and furniture"—words which include the whole extent of her owner's interest. The arrest may extend to the freight, if the value of the ship, &c. (allowing for prior claims), is not sufficient to satisfy the plaintiff's demand. In some cases, as in bottomry, where the cargo is liable (which it is not in ordinary cases), the arrest may extend to that also.

The affidavit to ground the warrant need not be made by the plaintiff himself. It is sufficient if it be made by some one on his behalf, and in the latter case the facts may be deposed to on information and belief. The affidavit may be sworn before a commissioner for administering oaths in Chancery.

As the warrant issues on the registrar being satisfied of the sufficiency of the affidavit, the whole proceeding may be accomplished in a few hours.

The warrant is executed by affixing it temporarily to the main mast (and in case it extends to the freight, then also on one of the principal bales of the cargo), and leaving thereon affixed a true copy; and a party is, of course, left in possession. Any one disturbing the party in possession will be liable to an attachment. Dr. Lushington said, pointedly, in a case in which the party in possession was forcibly ejected, that he would not only attach the party who did it, but he added, "If I can bring within reach of the law any persons, who have assisted in executing the dispossession, or have advised it or aided it in any way, I will attach them all."*

When the ship has been arrested, the course of proceeding differs according to whether any party interested appears or not.

If not, the cause formerly proceeded, as it was termed, *in pœnam*, whereby a decree could only be obtained after a certain number of court days, at each of which a formal default had to be entered if there was no appearance. Then, after the right number of defaults, the cause was heard as an undefended one; and the plaintiff, if he made out his case, obtained the first decree, analogous to the *primum decretum* of the civil law, but no sale could take place under the decree, except on what was called an allegation of perishable condition, and for that another order had to be obtained. The plaintiff had no absolute title to the ship, or its proceeds if sold, until the expiration of a year and a day from the date of the first decree, within which time any claimants might come in.

This procedure, founded on the model of the civil law, and well enough suited to a time when there were not any such public means of intelligence as we now possess through the

‡ Vol. i. p. 398, 6th edit. § At the Old Marshalsea.

* *The Bure* 10 Jur., 1123.

medium of newspapers, has been wisely abolished by the new rules, which provide that after the expiration of twelve days from the filing of a warrant, if no appearance has been entered a notice of sale may be advertised in two or more public journals, and if no claimant then appears, the plaintiff may move for an order for sale, and if the judge is satisfied that the claim is well founded, he may order the property to be appraised and sold, and the proceeds to be paid into the registry. Within six days from the time when the proceeds have been paid into the registry, the plaintiff is to file his proofs in the registry, and have the cause placed on the list for hearing, and it will be heard as an undefended one. The proceedings necessarily differ in causes of possession, in which a sale is not sought, indeed cannot, as we have already seen, be had. See rules 24, 25, & 26. A claimant may come in at any time before the decree; but the 38th rule properly provides, that "a party who shall not enter an appearance, until after the expiration of six days from the service of the warrant or citation, shall pay all costs that may have been occasioned by his default."

Under the old practice, the plaintiff could in no case obtain payment of money out of the registry, which had been paid in under a decree *in pœnam*, until the expiration of the year and a day, before referred to, except on bail. This was a very proper precaution in some cases, but it was wholly unnecessary in the great majority of cases; and accordingly, by rule 129, it is now provided that in future "bail for latent demands shall not, unless the judge shall otherwise order, be required on the payment of money out of the registry." In *The Saracen*, 10 Jur. 396; s. c. on appeal, 11 Jur. 253; the nature of the bail-bond, under the old practice, was fully discussed. Whether the bail for latent demands under the new rules will follow the form of bail bond under the old practice I do not know. I should think not, as the precise effect of the old bail-bond seems to have been a matter of doubt; but if the old form should be adhered to, then the case of *The Saracen* is well worth your perusal. See also *The Tecumseh*, 13 Jur. 68.

Instead, however, of alloting the decree to pass by default, any of the persons interested in the ship, as the master, owner, &c., may appear and defend. There are two modes of appearance—viz, under protest, or absolutely. If under protest, the sufficiency of the protest has first to be decided: the cause is heard thereon, and if the protest be overruled, the defendant must then appear absolutely. An appearance under protest is only resorted to when it is intended to dispute the jurisdiction of the Court on the subject matter, and this is done because an absolute appearance is held to amount to a waiver of any defect as to jurisdiction.

After appearance, bail may be given—*i. e.* the bond of the defendant and two sureties, and if sufficient, the ship is released, and suffered to proceed to sea; the security thus substituted for the ship is enforceable by attachment. It is not in the option of the suitor to refuse or accept bail upon the ground of insufficiency. "If it were," says Lord Tenterden, "the shipowner might be deprived of the profit of his ship's employment; the merchant of a market for his goods; both ship and goods might be deteriorated by detention, or overwhelmed with an accumulation of fees of possession, dock-dues, and warehouse charges."*

The cause then, by the old practice, proceeded by libel, allegation, and responsive allegation, and the examination of witnesses. This was the ancient mode of proceeding, called by "plea and proof," as distinguished from what was called "act on petition." The latter has been described by Lord Stowell "as a summary mode of proceeding, in which the parties state their respective cases briefly, and support their statements by affidavits, a form convenient enough in matters of slight interest, and not of very delicate investigation;" but now the new rule provides as follows:—

* Abbott, 10th ed., 540.

65. "The mode of pleading hitherto used, as well in causes by act on petition as by plea and proof, are hereby abolished."

66. "There shall be but one mode of pleading in the court. The first pleading shall be called the petition; the second, the answer; the third, the reply; and the fourth, the rejoinder; and the subsequent pleadings, if any, shall be called as they have heretofore been called in causes by act on petition."

67. "Every pleading shall be divided into short paragraphs, numbered consecutively, which shall be called the articles of the pleadings, and shall contain brief statements of the facts material to the issue."

Then as to proofs, the new rules provides as follows:—

78. "Causes may be proved by affidavits, by written depositions, or by the oral examination of witnesses in open court; or partly by one mode, and partly by another."

79. "The proctors in the case may consent to the mode or modes in which the proofs shall be taken; or either proctor may apply to the judge to direct the mode or modes in which the proofs shall be taken."

The present judge, in 1854 and 1855 I think, made rules providing for the printing of the whole of the pleadings and proofs in contested causes, and this is continued by the new rules.

I have already referred to the "preliminary acts" required in collision cases. This provision is continued by the new rules. They are still as heretofore to be sealed up, and not to be opened, save by order of the judge, until the proofs are filed. But the 64th rule contains an excellent provision which will, I should think, in many cases be adopted in practice, and so effect a great saving of expense. It is as follows:—If both proctors consent, the judge may, if he think fit, order the preliminary acts to be opened, and the evidence to be taken thereon, without its being necessary to file any pleadings."

In suits *in personam*, the first step, instead of arresting the ship, was formerly to arrest the person, and the defendant could only be released on giving bail; but now, as I have already observed, the power of arrest to compel appearance has fallen into disuse;* and, in fact, until a recent act, 17 & 18 Vic. c. 78, had confirmed it, the jurisdiction to proceed in *personam* was doubted. The first step under the recent rules is a citation against the person. A decree may be obtained by default if no appearance; or if an appearance be entered, the cause then proceeds much the same as in an action *in rem*.

According to Mr. Justice Story,† "the admiralty jurisdiction primarily (originally) acted *in personam*, and now acts *in rem* only as auxiliary to its general authority."

Under the old practice, the judge did not sit in chambers; but the proctors were heard in court on common motions—called assignations which were usually made on court days, after the ordinary business was disposed of. A bell was rung in the Commons to give the proctors notice that the assignations were called on. This would, of course, have been wholly unfitted when the practice was no longer confined to practitioners residing in one locality; and the new rules have, therefore, properly provided for motions and summonses in chambers, on which proctors may be heard, but they can no longer be heard in court—the 141st rule providing that "no motion shall be made to the judge in court save by counsel, or by a party conducting his cause in person."

As I read the new rules, proctors only (and by proctors the new rules mean "any proctor, attorney or solicitor"), and not their clerks, are entitled to appear before the judge at chambers; but at the same time, I hope that that construction will not be put upon the rules, as the effect of it would be to exclude solicitors in large practice, from practising in this court.‡ Solicitors will attend as of course on important summonses;

* *See The Stephen Wright*. 12 Jur. 732.
† *The Boston, Sumner*, 341.
‡ The Registrar stated to me, after the lecture, that it was not intended, in framing the new rules, to prevent solicitors from being represented at chambers by competent clerks.

but to require them personally to attend on all cases will, I submit, answer no proper purpose. The necessary effect would be, that the practice of this Court would continue in the hands of a class—call them proctors, or what you like. The same facilities ought, I submit, to be given to the ordinary practitioner in this court as he has in the other courts—including, I might remark, the Probate and Divorce Court, which most nearly assimilates to the Admiralty Court.

It was a rule of the old practice, that any act or agreement in a cause, to be binding, should be evidenced by what were called "acts of court;" i.e. should be entered with the minutes in the cause; if not so done, the Court took no notice of it, however distinctly it might be proved† as a fact. This applied particularly to all tenders of money. I assume that the same rule of practice will still prevail, and that the analogous step to acts of court will now be an order at chambers, or an agreement in writing between the proctors, dated and signed in accordance with the provisions of the 155th of the new rules.

I have now drawn your attention to what are, I believe the leading features in the new rules. I have not attempted to go through them seriatim. I have merely selected such portions as appeared to require comment; and if in connection with my remarks you attentively peruse the new rules themselves, you will, I think, obtain a pretty good notion of the proceedure of the Court.

† *The Saracen*. 10 Jur. 396; see also *The Mellona*, 12 Jur. 274, where Dr. Lushington declined to enter into the question of an alleged compromise, and adhered to the opinion he had expressed in *The Saracen*.

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "The Editors of the Law Journal, Toronto."

We see nothing doing this Session for the Division Courts, and yet the bills last year were numerous enough.

We presume honorable gentlemen find other subjects more interesting, yet the business of the Courts so largely employed by the great bulk of the people is not unworthy of attention.

But if members are indifferent, clerks are supine, and if those who best know what reforms are necessary remain indifferent what can be expected of others?

The fact is nothing effectual will be done without some concerted action, some periodical convention such as we proposed, where well-informed clerks, delegates from each county, could discuss the matters affecting the Courts they are connected with. We have given our mind on this subject, but our advice has met with comparatively little response. We tell officers now that strong interests are at work to *destroy* the courts, and little has been done by those specially interested—nothing as a body—to resist the impending evil.

We shall look anxiously for the returns moved for by the Hon. Mr. Patton, as to the number of increased hearing fees. We have had sad complaints from one county where the increased hearing was charged almost in every case. If true, it was a very great abuse, and most unjust towards suitors.

The fee in such cases should be regulated on the same principle as an arbitrator's fee, according to the nature of the particular case, or the time occupied in hearing it. We would feel obliged to the honorable mover for a copy of the returns.

There is an anxiety to know "what prospect there is of a new set of rules in improved form and suited to the Consolidated Division Court Act."

We are unable to answer the question, but suppose the Board of Judges will not lose sight of the necessity for an early revision. There are now only three on the board, one Judge having resigned, and another, the lamented Judge Campbell, being dead.

The numerous questions that have arisen upon the act since the rules were issued ought to be settled by the Board of Judges, and a further effort be made to secure uniformity in procedure in all the Courts in Upper Canada.

If we might be allowed to suggest, we would recommend that every County Judge should furnish the Board with any points of difficulty that arose in his practice and upon which a rule would be desirable; and also any amendments or improvements that might be desirable in the existing rules.

There are a class of cases termed in England "County Court Curiosities" These are published in a journal like to our own. The English County Courts are similar to our Division Courts, and it has been suggested to us by an old correspondent, that we might give a selection from these cases in our pages. We would be very willing to do so if we thought the proposition would meet with general approval, but as the cases involve quite as much of what is amusing as what is instructive, we prefer asking the opinion of officers. Will they be good enough to give us their views?

We subjoin a case taken at random from the publication before us to let our readers see the description of cases to which we refer:

MALLETT V. THOMPSON.

This was an action brought by the plaintiff, an elderly bed-ridden lady, at East Bergholt, against the defendant, a laborer living at Dedham, to recover £5.

Sarah Mallett, a young woman, proved that the defendant was paying his addresses to her, and they went in company to see the old lady, who thought she was dying. She then expressed her desire to give the defendant £5, to be divided between her grand children after death to purchase mourning, and at a subsequent interview her grandmother told her, in the presence of the defendant, that he had received the money, and he had promised that it should be appropriated in accordance with her wishes. She however got better, and then employed her grand-daughter to try and get the money back, and he said the old lady should have it if she lived and wanted it.

Cross-examined.—She had broken off the acquaintance with defendant twelve months ago next Thursday week, and did not wish to know anything more about him. She had not indulged in writing poetry to the defendant, nor had she ever received articles of dress from defendant exceeding in value the £1 which would have been her share upon the old lady's death. The poetry produced was not her writing, nor had she seen it before. It was as follows:

TO ALL YOUNG MAIDENS BEWARE.

When first I went to service a cook's place I took,
There was the nurse-maid and me, we both had pleasant looks;
A young man came a courting me, and sure it was no joke,
He got from me a five pound note and bought a flash great coat.
Therefore all young maidens,
That have followers after you,
Be sure you do not stuff them out too much,
Or the day you will have to rue.

The defendant was called and said the young woman's statement was correct in the main, but asserted that the money was given him by the old lady in consideration of little acts of kindness which he had performed in taking her cakes and spirits and other articles.

This was confirmed by defendant's father, who said the old lady had told him about giving the money to his son whilst the acquaintance between his son and the grand-daughter was being carried on.

Philbrick regretted that he could not produce the testimony of the old woman who was bed-ridden, for he was instructed that the story told by defendant and his father was a fabrication, and he argued that it was hardly probable she would have presented the money to defendant when she was at the time receiving parish relief.

Considerable contradiction and cross-swearing took place as to a boy named Silly having been sent by the authority of the father to offer £3 of the money, which he positively denied, and the case was adjourned for the production of other witnesses.

OFFICERS AND SUITORS.

CORRESPONDENCE.

To the Editors of the Law Journal.

Norfolk County, April 9th, 1860.

GENTLEMEN,—I sent a transcript and certificate of judgment, stamped with the seal of my court, to a Division Court clerk of another county, who returned said transcript as being illegal, requesting me to attach a seal: that the stamp of the court was not sufficient.

Now I am under the impression that the stamp of the court to any and every process answers every purpose, and meets the requirements of the law, *vide* 22 Vic. cap. 19, sec. 4. Revised Statute says, "Every court shall have a seal, with which every process of the court shall be sealed *or stamped.*" It would appear from the act that a stamp is sufficient. If not, it is a very important matter to know. What is your opinion?

Is a bailiff entitled to two and a half per cent. upon property levied on but not sold by him? I know that some bailiffs take the per centage without selling. All that is said in the act on the subject is in the schedule of bailiff's fees, which says, "That there be allowed to the bailiff, *upon the sale* of property under any execution, the sum of two and a half per cent. upon the sum realized." I do not see how they can take the per centage except they sell. What is your opinion?

Yours truly,
DIVISION COURT CLERK.

[We agree with our correspondent on both points.

The objection to stamping is very absurd. The plan is that in use in nearly all the large courts in Upper Canada, and it is a clearer and more economical method of impressing the seal than in the old way, besides being more difficult to counterfeit.—EDS. L J.]

To the Editors of the Law Journal.

April 9th, 1860.

GENTLEMEN,—An award made by three fence-viewers has been placed in my hands as Clerk of Division Court. See Con. Stats., cap. 57, sec. 16, sub-secs. 10 and 11.

The award commences with style of cause, as if suit commenced. The three arbitrators have signed award, and affixed their seals in the presence of a subscribing witness, and the execution of the instrument is proven by the oath of the witness.

The plaintiff is awarded ten dollars, to be paid in forty days by defendant, and six dollars and eighty-six cents as costs, to be paid in ten days. I have entered it as a suit in court, in the ordinary way, and will send each party a copy. It appears by the last quoted sub-section, that I may issue an execution at the end of forty days.

I do not find that the *Law Journal* has at any time commented upon this branch of division court clerks' duties, and there are no existing forms—at least, that I am aware of. You will confer a favor on the writer, and possibly on other clerks, by giving full information of the law on the matter, as relates to our duties, and suggesting the various forms to be used—especially the execution.

Respectfully yours,
A DIVISION COURT CLERK.

[Our valued correspondent suggests an important point for consideration, and we shall at an early day review the enactment in question. The provisions are by no means as clear as they ought to be, and it is not easy to say what the practice under them ought to be.

Here is a subject on which the Board of Judges would do well to establish a practice, and provide suitable authoritative forms.

The course taken—sending a copy to defendant—seems proper; but what occasion to give the plaintiff one, for we do not see that the clerk should act, unless set in motion by the plaintiff.

In the case mentioned, costs appear to be included in the award; but this seems wrong, for the 18th section provides that the costs disbursed under the act shall, upon the plaintiff making affidavit of their payment, be *added* by the division court clerk *to the execution.* The costs referred to in sub-section eleven of section sixteen, as we understand it, refers to the costs in the division court.

Without the copy of award before us, we cannot venture to give a form of execution; but would suggest, that under a recital of the necessary facts, the "determination" or award should be set out *verbatim.*

We would feel obliged by information from any clerk who has had occasion to act under the clause, and with copies of the forms used; and in treating the subject, we shall of course credit any materials supplied to their proper source, unless directed not to do so.

It would also be of material service, and probably assist to uniformity if some outline of proceedings, *anterior* to the determination, was given in this Journal. Our correspondent has a very thorough acquaintance with municipal matters—will he or others assist in the object proposed?

It is by contributing items in this way, that the *Law Journal* may be made more extensively useful, and our labors rendered more effectual. If those interested would contribute from their experience, the aggregate would form a valuable fund for the information of all.—EDS. L. J.]

To the Editors of the Law Journal.

London, C. W., April 20, 1860.

GENTLEMEN,—My attention has been directed to the April number of your journal, where a Mr. Marcus Gunn details certain grievances supposed by him to have been suffered in the Division Court of which I am Clerk. I would not have noticed a charge emanating from such a source, but as you have expressed an opinion on an untruthful statement, and when charges are made against public officials connected with the Court, I feel it my duty to address you.

Mr. Gunn charges that he was summoned to appear at the Division Court; that the Judge, on hearing his defence, dismissed the case; yet, that it was brought forward at the next court; was then taken out of its turn, and disposed of in his absence; that no person appeared for the plaintiff; and then he states the merits of his defence.

In answer, I say it is untrue that the case was dismissed at first;—on the contrary, it was postponed to the next court for the accommodation of Mr. Gunn, to procure the evidence of Mr. Thomas Gordon, and whose evidence, with strange inconsistency, he impugns, in his letter to your journal, in the following words: "accepting the assignor's absurd affidavit, being interested in the estate assigned." At the following court the Deputy Clerk (I was absent from the country) states, and his statement is confirmed by several others, that the case was put at the foot of the list, to enable Mr. Gunn to procure the evidence of Gordon, and that it was not again taken up until reached in numerical order, as ordered by the Judge; that judgment was then given in favor of the plaintiffs, who were represented by an agent.

The merits of the case are briefly these: Messrs. Hope and McKay, as assignees, sue Mr. Gunn for an open account for groceries, for the sum of 17s. 4d. Gunn defends, stating that he had given a note of one Parks to settle this account; but when judgment was given, as above stated, Gunn applies for a new trial, and Mr. Gordon's (the witness required by Gunn) affidavit is filed to oppose the application. In this he contradicts on oath the whole of Gunn's statement relative to the note, and states it was only taken by them as collateral security, and not paid.

Regretting that your valuable columns should be occupied with this petty matter, the grievance of Mr. Marcus Gunn, which has no existence in fact; and trusting that in justice to me you will give this an insertion,

I have the honor to be, Gentlemen, your obedient servant,

JOHN C. MEREDITH,
Clerk 1st Division Court Co. Middlesex.

[We think that whenever the conduct of a public official is assailed, that official, or some one on his behalf, should have an opportunity of being heard. Acting in this spirit, we give place to the above. But, while doing so, we must once for all state that our columns shall henceforth be closed as against any further correspondence on the same subject.—EDS. L. J.]

To the Editors of the Law Journal.

GENTLEMEN,—A places an execution in the hands of a bailiff of a Division Court for the sum of $80, who levies, and is notified by B that he holds a chattel mortgage on the goods for $475, and also claims to retain for a year's rent, and serves him with a notice accordingly, the rent claimed being $472, which makes the amount $947, to be made before A can detain the amount of his execution. A, however, tells B that his notification for rent destroys his claim under his chattel mortgage, or that he would sell the goods mentioned in the chattel mortgage to make the rent. B then said, I will allow A the amount of his execution, and go on and sell the goods for my rent and chattel mortgage claim, $947, and pay it out of the same, which he did. In the meantime the bailiff received a notice from one C, that she holds a chattel mortgage against the same goods, filed for $600. A clerk of an adjoining division issued several executions against the same goods, directed them to the bailiff of his own division, and delivered them to one of the plaintiffs, who sends them to the bailiff who first seized. The executions not being directed to him (the latter bailiff), or indorsed to him, by the outer bailiff or any judge, in order to aid the outer bailiff to collect the outer executions, he agrees to hold them. The goods are sold, as first said, to pay the first execution, the rent, and as far as possible the first chattel mortgage. The bailiff then pays the first execution, and the rent, which he knew to be correct; but as there were six months' more rent become due, and as there was a dispute between the two holders of the chattel mortgages, he does not pay either, but retains in his hands the balance of money, to be afterwards appropriated as the law may direct, but offers to pay B if he would indemnify. The outer executions, handed to him to be collected, as a friendly act, from the outer division, the bailiff who levies on the goods returns to the bailiff of the outer division, indorsed on one of them, "Accounts not made up; when accounts made up, if any funds to apply, will remit," or words to that effect. In the meantime B and the tenant or mortgagor against whom the chattel mortgage was, had a settlement, and it was agreed that the mortgage of B ($475), in the bailiff's hands, should be paid to B. Whilst the dispute between C and B about the two mortgages was open, the bailiff was sued for a false return, on one of the executions sent from the outer division, alleging that he should have made the money on the same, the bailiff to whom those executions were directed, and who should have returned the same, not being sued, and judgment was given against the first bailiff.

Now, the question is, could a judgment be legally given by a judge in the face of these facts? Was the first bailiff really obliged to return or act, or could he legally act on those outer executions, not indorsed to him or directed to him, and are the sureties liable for such a judgment? If the bailiff does not pay, can a Division Court thus take the money from the chattel mortgage holder and landlord, without first ordering an interpleader trial — or rather, should not the judge have refused to interfere as against the first bailiff, and told the execution creditor of the outer execution to cause the bailiff of the outer division to interplead? Or is the clerk of the outer division, or the bailiff of the outer division, or the bailiff who first seized, liable?

Your opinion—so impartial in many difficult cases relating to Division Court practice—is respectfully requested.

Yours, &c.,

JOHN COOL,
Bailiff Tenth Div. Court Co. Peel.

Brampton, April, 1860.

[We do not answer Mr. Cool's question, "Could a judgment be legally given by a judge on these facts?"

The conductors of the *Law Journal* do not mean to sit in judgment upon a judge's decision, and cannot further notice the point, on the statement of the losing party. With a full report of the case before us, the evidence *pro* and *con*, and the grounds of the judge's decision, its value might be examined; but at present we can only express an opinion on the general point, that a bailiff to whom a writ is not directed, and who does not undertake to act for the bailiff to whom it is directed, is not liable to the plaintiff in the action; and we think that a recovery against a bailiff in an action in the Division Courts, is not conclusive evidence against his sureties.

The rest of Mr. Cool's letter comes within a class of questions which we do not, as Editors, undertake to answer.]—EDS. L. J.

U. C. REPORTS.

QUEEN'S BENCH.

HILARY TERM, 1860.

IN RE. RICHARD IBSON V. THE PROVISIONAL CORPORATION OF THE COUNTY OF PEEL.

Stat. 19 Vic. cap. 66, sec. 4—County Town, County of Peel—By-law—Resolution.

It was enacted by the Provincial statute 19 Vic cap. 66, sec. 4, that the Provisional Council of the County of Peel should, at some meeting to be held after the 1st February, 1857, "proceed to select a place for the county town of the said county," and that "the place so selected shall be the county town of Peel."

Held, 1. That the selection of a place by *resolution* of the Council was a sufficient compliance with the terms of the statute. 2. That it is not in the power of the Council, having once selected the place to alter by by-law or otherwise, the place selected.

R. A. Harrison obtained a rule *nisi* to quash a by-law of the county of Peel for selecting a place for the county town of the county of Peel, passed 26th January, 1860, on the ground that the corporation, having on the 7th December, 1859, selected Malton as

the county town, pursuant to the statute 19 Vic. cap. 66, was disabled afterwards to pass the by-law moved against, for that Malton was then, by their previous appointment, the county town.

The by-law recited that under the statute 19 Vic. cap. 66, the Provisional Council of the County of Peel were authorized and directed, at some meeting of the Council to be held after the 1st February, 1857, to proceed to select a place for the county of Peel, and that the place so selected should be the county town of the said county, and that it was necessary and expedient to make such selection by by-law; and that the village of Brampton be, and the same was thereby selected as the place for the county town of the said county of Peel; and that the said village of Brampton being the place so selected, should be and was thereby declared to be, according to the statute, the county town of the said county of Peel.

It was shown by affidavit that on the 7th December, 1859, the Provisional Municipal Council of the county met, according to the 4th clause of the statute, to select and appoint the site for the county town, and that a resolution appointing Malton the county town was passed by a vote of six to five of the members present.

This resolution, and others passed at the same meeting, making certain arrangements in pursuance of the first resolution, were certified under the corporate seal, with the signature of the clerk. At the time of passing the resolution, the Council had no seal.

It was shown, further, that at a meeting of the Provisional Council, held on the 29th December, 1859, steps were taken respecting the selection of ground upon which to erect a gaol and court-house in the village of Malton, and respecting the providing plans for such buildings.

On the other hand, it was stated in an affidavit that the meeting of the 7th December, at which the resolution was passed selecting Malton for the site of the county town, was a meeting held by adjournment from a meeting that was held on the 5th December (two days before), and was not a meeting called for any special purpose, or with any formality out of the ordinary course; that at the next meeting of the Council the report made by a select committee, which had been appointed to select ground in Malton for a gaol and court-house, was not adopted; that no land for the purpose had been selected or acquired; and that the plans for the public buildings had not been accepted by the Provisional Council.

Adam Wilson, Q.C., showed cause.

M. C. Cameron and *R. A. Harrison* supported the rule.

Robinson, C. J., delivered the judgment of the court.

There seems to have been no statute passed that can affect this matter, since the statute 19 Victoria, chapter 66. For the constitution and powers of provisional councils, who are to take the necessary measures for perfecting the separation of a junior county from another to which it has been united, we must refer to the statute 12 Victoria, chapter 78.

Taking that act and the statute 19 Victoria, chap. 66, together, it seems clear that the reeves and deputy reeves for the time being, chosen within the junior county, are to compose the provisional council, which may continue to exist and act as long as may be necessary for carrying out the powers committed to it.

There is nothing in the objection taken, in arguing this case, that the provisional council could not continue after the first year.

The delay in selecting a site for a county town is not accounted for, and does not seem to me to be material, looking at the terms of the special act 19 Victoria, chapter 66.

The first question, then, is, as to the selection made of Malton, at the meeting of the 7th December, 1859, was that done in a sufficient manner? I think there is no ground on which we can determine otherwise. It does not appear in any way before us, when the vote of the municipal electors of the county was taken, which sanctioned the separation from the county of York. For all that appears, it may have been shortly before the selection of the county town; but, however that may be, it is not shown that it was not declared and understood, at the meeting of council previous to the 7th December, that at the meeting to be held on the 7th December the council would proceed to select the site of the county town; nor is it shown that all the members of the provisional council were not attending at that meeting.

The Provisional Council, it is sworn, had then no seal; and if they had one, I am not of opinion that the affixing it to the resolution naming the site of the county town would have been indispensable, or that the act was one which could only be done under seal; for it was not an act divesting the corporation of any interest, or contracting any engagement with a stranger, or for the purpose of creating any legal interest or authority: it was simply an expression of their choice, made in pursuance of an act of Parliament which required them to select. And I do not think that a by-law was necessary, though it would have been more becoming the occasion to have used that formality. (Grant on Corporations, 54–57.)

The statute does speak, in the 5th section, of certain acts to be done by by-law *or otherwise*. In the 2nd section it directs a certain other act to be done by by-law; and in regard to this matter of selecting a county town, it does not prescribe with what formality it shall be done. It required, I think, to be done at least by a resolution properly put and carried, and entered on the minutes of the corporation, but not necessarily by a by-law.

The next question is, whether, if Malton was selected in a manner sufficient under the statute, it was in the power of the corporation to change the selection. In my opinion it was not, for they had no general continuing authority over the matter. They were merely empowered to act *pro hac vice;* for the statute indeed says in express words, that the place selected by them at some (that is to say any) meeting to be held by them after the 1st February following the vote of approval of the separation by the inhabitants, "shall be the county town of Peel." There can be no doubt that the Legislature so intended; for the inconvenience attending the exercise of an unlimited power of altering such a decision, would be very great.

I fear it is but too obvious, from the papers before us, that the case may be found to call for legislative interference; for there is an appearance of its being difficult to carry out the selection which has been made, from the difference of opinion existing in the Council.

Rule absolute to quash the by-law with costs.

CHAMBERS.

George H. Gordon, Judgment Creditor, Jacob Bonter, Judgment Debtor, and Durham Ockerman, Garnishee.

Garnishee—Garnishee order—Setting aside—Direction of execution.

Where the garnishee (a deputy sheriff) after the lapse of ten months, applied to set aside an order ordering him to pay to the judgment creditor the debt alleged to be due by him to the judgment debtor, upon the ground that when the garnishee order was made there was no such debt, and that he the garnishee was ignorant of the nature and effect of the proceedings being taken against him the application was refused.

A writ of execution against the goods and chattels of a deputy sheriff, may be directed to the sheriff of the County in which the deputy resides, and ought not to be directed to a coroner of that County.

In such a case plaintiff was allowed to withdraw his writ of execution and amend it by directing to the sheriff and not the coroner.

The garnishee obtained a summons calling on the judgment creditor to shew cause why the order of Wm Smart, Esq., Judge of the County Court of the County of Hastings, made in this matter bearing date the first day of February, 1859, ordering the payment of a debt alleged to be due from the garnishee to the judgment debtor, to be made to the judgment creditor by the garnishee, and in default thereof that execution might issue out of the County Court of the County of Hastings, and why the writ of *fieri facias* against goods and chattels issued thereunder, and all subsequent and other proceedings thereupon, and on the said order should not be set aside with costs, and an issue directed to be tried between the said garnishee and the said judgment creditor, or why such other order should not be made as to the court or judge should seem meet on the grounds that there was not at the time of the issuing in this matter of the garnishee order attaching the debt and summons dated the 22nd day of January last past, any debt due or accruing due from the said garnishee to the said judgment debtor; nor has there been at any time such debt, and on the ground of merits—and for irregularity in issuing the said order for payment or execution as shewn in the affidavits and papers filed—and on the ground that the writ of *fieri facias* was directed to the Coroner of the County of Hastings, instead of to the sheriff, and on the other grounds disclosed in the affidavits and papers filed, or why the said writ of *fieri facias* and all subse-

quent and other proceedings thereon, should not be set aside with costs, on the ground of irregularity in this that the same was directed to the Coroner of the County of Hastings, instead of to the sheriff of the same and upon other grounds and affidavits filed.

By the papers filed it appeared that an order to attach a debt due by the garnishee to the judgment debtor, was obtained from Sir J. B. Robinson, Chief Justice, in Chambers, on the 22nd January, 1859, and by that order the garnishee was directed to attend before the Judge of the County Court of the County of Hastings, at such time and place as the said judge should appoint to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment creditor.

Upon that order the 195th and 196th section of the Common Law Procedure Act of 1856, were endorsed conveying to the garnishee intimation of the consequences which would follow from omitting to attend before the judge at the time and place appointed by him, and the appointment of the Judge of the County Court for the attendance of the garnishee before him on the 27th day of January, 1859, at 12 o'clock noon, at his Chambers in the Court House, in Belleville, was also endorsed.

The order and appointment were served on the garnishee on the 25th January, but no notice was taken of them, and it was alleged by the garnishee "that at the time he was completely ignorant of the results of non-appearance or a garnishee summons."

The County Court judge on reading the order attaching any debt due to Bonter, in the hands of the garnishee, and calling upon such garnishee to appear and shew cause why the amount of such debt should not be paid to the judgment creditor, and on proof of service of that order and his own appointment in conformity with the statute, made an order on the 1st February, 1859, "that the garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor, or so much thereof as might be sufficient to satisfy the judgment creditor, and that in default thereof execution might issue for the same out of the County Court of the County of Hastings.

On the 14th February, 1859, an affidavit was made by Mr. G. E. Henderson, attorney for the plaintiff, "that the garnishee Ockerman had not paid the debt due from him to the judgment debtor or so much thereof as would satisfy the judgment debt, but made default therein—and that a copy of the judge's order directing such payment to be made was served upon the garnishee on the first day of of February, 1859, by Byron Moffat Britton, as he was informed and believed. On the order for execution to issue in default of payment forthwith, and the affidavit of non-payment the plaintiff's attorney took out execution on the 14th February, 1859, for the sum of forty pounds, being the amount stated in the affidavit filed when the attaching order was obtained.

G. E. Henderson for plaintiff. *J. Bell*, of Belleville, for garnishee.

McLean, J —The garnishee moves after a lapse of ten months, to set aside the order of the County Court Judge *with costs*, on the ground of merits, and on the ground of irregularity, but the summons does not point out the irregularity complained of, it refers to the irregularity "as shown in the affidavits and papers filed."

This is of itself an irregularity on the part of the applicant as the summons ought to point out the specific irregularity complained of—but not being objected to on the merits it is not necessary further to advert to it.

Looking at the affidavits, I find it is alleged that the service of the order of the Judge of the County Court for the payment of the money and the issuing of execution in default, is not made by the person alleged to have served such order, and that in the order for payment the original attaching order of the 22nd January, 1859, made by Sir J. B. Robinson, C. J., is stated as having been made by Wm. H. Draper, C. J., C. P.

As to the first of these alleged irregularities the affidavit merely states that a copy of judge's order was served on the 1st February, by Byron Moffat Britton, as the deponent was informed and verily believed.

The objection to that is not that there was no service or no affidavit of service, but that such affidavit was made by the person who served the order.

It is not attempted to be denied that the order was actually served—and as that was all the garnishee had a right to expect before execution was issued against him, he cannot now upon such an affidavit as he has made, take advantage of any such irregularity as he has stated.

Then as to the order being by mistake alleged to have been made by the Chief Justice of the Common Pleas, instead of by Sir J. B. Robinson, Chief Justice, it is impossible to attach any importance to the objection.

The papers shewed clearly by whom the order was made, and if the Judge of the County Court had in the order made by him, omitted any reference to the attaching order, his order could not on that account have been considered irregular so that it could be set aside.

It is quite clear, I think, that there is no irregularity in the proceeding up to the time of issuing execution, which can require the judgment to be set aside.

Then as to the merits, the defendant in his affidavit, states very unequivocally, that he had not at the time the attaching order was served upon him, any monies in his hand belonging to Bonter, and that he was not at that time indebted to him in any sum whatever—while Mr. Henderson, swears as positively that before the attaching order was applied for, the defendant admitted that he owed Bonter a sum of £40, that the order was applied for with the defendant's knowledge and consent, for the express purpose of attaching that sum, and that the defendant cautioned him not to let Bonter know that the order was applied for on information obtained from him, for fear that he should be annoyed by such information being given.

These statements are not the only ones which are wholly irreconcilable in the affidavits of the defendant, and Mr. Henderson. The defendant swears that he never had such a conversation with Mr. Henderson, as that stated in Mr. Henderson's affidavit—that he never told Mr. Henderson that there was any sum of money coming to Bonter, through him; and that the attaching order was not obtained with his knowledge or concurrence.

It is difficult to suppose that statements so diametrically opposed to each other, can have been made through misapprehension or mistake. If the conversation stated by Mr. Henderson did take place, it seems almost impossible that the defendant could have forgotten it, unless indeed, his mind was at the time under some strange influence. Yet if his affidavit is to be believed, Mr. Henderson must have imagined or fabricated the whole of the conversation with defendant, on which as he alleges his application for an attaching order was founded. These facts are certain and seem strongly to confirm Mr. Henderson's statement, that the attaching order was applied for, and obtained, that it was served on the defendant with the appointment of the County Court Judge, of the time when cause was to be shewn why the money in defendants hands payable to Bonter, should not be paid over to Gordon, his judgment creditor; that no notice was taken or cause shewn by the defendant, that an order on defendant to pay over the amount to Gordon, was made by the County Judge and served on him—but defendant still made no objection. and that when the execution actually issued against him, defendant told the Coroner in whose hands it was placed to hold on or delay a few days and he thought it would be settled, or something to that effect. Of the affect of all their proceedings, the defendant holding the position of deputy sheriff, now professes to have been ignorant—and desires that the judgment shall be set aside in order to give him now an opportunity of doing what he ought to have done when the attaching order was served on him in January, 1859.

I cannot allow ignorance to be a sufficient excuse to the defendant, for allowing the plaintiff to proceed from step to step against him, till a judgment and execution have been obtained. After the delay which has occurred and the total indifference and inattention which the defendant has shewn to his own interests, if his statement be true, I think the defendant is too late in making this application, and that the summons must be discharged.

The execution has been directed to the Coroner and placed in his hands—that is undoubtedly incorrect. The deputy sheriff has authority only from his principal, but cannot be recognized as holding the position of sheriff. Any execution therefore against him must be directed to the principal. In the case of *Letsom* v. *Bickley*, 5 M. & S. 144, it was held that it was irregular to direct a *testatum capias* to the Coroner, where one of the two sheriffs of

Bristol, was party to the suit, for it ought to have gone to the other. Process should be directed to the sheriff or sheriffs of the County where the defendant is supposed to reside, or if one of the sheriffs be a party, to the other, or if both sheriffs are parties, the Coroner and if he also be a party to Elisors named by the master in the Queen's Bench, or prothonotaries in the Common Pleas. *Andrew* v. *Sharp* 2 W. Bl. 9; *Grant* v. *Bagge*, 3 East.

The plaintiff under these circumstances, may withdraw his execution from the Coroner and amend it by directing it to the sheriff of the County of Hastings.

READ, LEITH AND READ v. COTTON AND MANNING.

Attorney—Action on bill—Reference—Consol. Stat. U.C. p. 420, s. 30.

The court has no power to refer a bill to taxation after it has been delivered for twelve months, unless under special circumstances.

The fact that an action is brought by an attorney on a number of bills delivered by him in the course of several years, during all which time defendant was his client, is not a "special circumstance," within the meaning of the act

Qu.: Is an overcharge, in the absence of fraud, a "special circumstance"?

This was an action brought on attorneys' bills, and *Robert A. Harrison* applied for the usual order to refer to taxation, with leave to dispute retainer as to a portion of the business done.

The facts were shortly as follows:

From 1854 down to September 1858, the plaintiffs were the attorneys of the defendants, who, being contractors in large business, were involved in much litigation.

In an important arbitration matter in 1855, some thousands of pounds were received by plaintiffs for defendants. Plaintiffs had then a large claim for costs. Bills with items were given to the defendants, and money retained to pay this claim. Defendants objected to the amount. Plaintiffs were always willing to have the amounts adjusted, and at last a reference to two professional gentlemen was agreed to in writing by the parties. Afterwards the defendants, to avoid the trouble and expense of the reference, came to a settlement with the plaintiffs. The latter made a considerable reduction in their claim, and the matter was closed.

The plaintiffs continued for several years doing business for the defendants, and every half-year rendered full bills of costs to the defendants. Many bills were thus rendered. No dispute whatever, or objection to any of the bills, took place, till within a few months before this action was brought. Many letters were written to the defendants in 1859, asking for a settlement, and offering to have the bills taxed. At last, on the 25th January, 1860, a writ was issued.

The defendants did not point out any overcharges, but merely swore that they considered the plaintiffs' charges excessive, &c.

Read, Q.C., showed cause, and insisted that as more than twelve months had elapsed since all the bills had been delivered, there could not be any reference. He cited *Cowdell* v. *Male*, 1 C.B.N.S. 332; *In re. Whicher*, 13 M. & W. 549. He also relied on the words of cap. 35, Consol. Stat. sec. 30: "No such reference shall be directed, &c., after twelve months from the time such bill was delivered, except under *special circumstances*, to be proved to the satisfaction of the court or judge."

Harrison contended that the fact of the plaintiffs' continuing to be solicitors for the defendants during most of the time while the bills were being delivered, was a "special circumstance" under the act; and the statute, which applied to "a bill," did not apply to an action on several bills. He cited the collection of cases in notes to Chitty's Statutes, vol. 1, "Attorney."

HAGARTY, J.—I am of opinion that the settlement in 1855 cannot now be opened by a reference of the plaintiffs' bills. Everything seems to have been fairly done. No pressure is shown, but a constant readiness to submit to taxation; and the defendants, after the agreement to refer, expressly agree to a compromise—waive the reference, and settle the amount due. I refer on this point to *Ex parte Turner*, before the Lords Justices, 1854, 27 Eng. Rep. 555.

As to the bills subsequently delivered, I have come to the conclusion that the defendants fail to show any special circumstances, within the meaning of the statute, to dispense with the twelve months limitation.

Were it the case of an isolated bill of costs delivered to defendants, the matter would be too clear for argument, and I cannot see how the fact of the bills being delivered annually or semi-annually during the several years that the relation of attorney and client continued, can in this case make any material difference.

There is no allegation that this relation in any case operated to induce the defendants not to have the bills taxed. They do not say that the plaintiffs made any representation to them as to the charges, or in any way induced them to abstain from inquiry. To my mind, the fact of the defendants' receiving these bills from time to time, and making no objection, and continuing to employ the plaintiffs, raises the presumption that they considered all to be right, and acquiesced in the charges.

It is a most important feature in the case that the defendants do not point to any overcharge, but content themselves with the general allegation that the charges are excessive.

I find it suggested in some of the cases that the "special circumstances" should be "some new matter which has come to the knowledge of the party," who should show that he has used due diligence in applying to the court on learning it." (See *In re. Whicher*, 18 M. & W. 549.)

Lord Craworth seems to adopt the same view, *In re. Barnard*, 2 D. G M. & G 359: "If special circumstances are allowed to be urged after a lapse of time, they must be circumstances which the party must show that he could not reasonably be expected to have urged before." Knight Bruce, L. J., says, "A mere overcharge cannot, in the absence of fraud, be taken to amount to a 'special circumstance,' to tax the bill after all that had been done." In this case judgment had been obtained for the costs.

Most of the cases on this subject are in equity; I have examined the following: *In re. Wells*, 8 Beav. 416; *In re. Shrewsbury* v. *Leicester*, Ry. Coy. 20 L. J. Chy. 325, 5 Eng. Rep. 43; *In re. Bennett*, 8 Beav. 467; *Ex parte Pemberton*, 19 Eng. Rep. 489; *In re. Tyson*, 9 Beav. 117; *In re. Williams*, 21 Eng. Rep. 551; *In re. Harrison*, 10 Beav. 57; *In re. Dickson*, 28 Law Jour. 153, 3 Jur. N.S. 29; *In re. Williams*, 15 Beav. 417; *In re. Barnard*, 2 D. G. M. & G. 359, 15 Eng. Rep. 298; *Blagrave* v. *Rulp*, 3 Jur. N.S. 39; *In re. Strottier*, 30 Law Jour. 633, Jur. N.S. 736. At law, I find, *In re. Deardon*, 9 Ex. J. 10 (dissenting from *In re. Harrison*, 10 Beav. 57), it is said to be a matter for the discretion of the court. The Chief Baron says, "The very object of the statute was to give such a discretion as not to fetter the exercise of it so as to stand in the way of justice being done between the parties in a case newly arising." The late case of *Cowdell* v. *Male*, cited by Mr. Read, seems to assent to the opinion that a general allegation of overcharges does not amount to a "special circumstance."

The defendants here are not shown to be ignorant men, not likely to understand their rights. They do not suggest that any deception was practised, or inducement held out, to prevent them at any time from ascertaining the correctness of the plaintiffs' charges. It is not necessary here to decide whether the bill should be referred to taxation after twelve months, in a case in which some very gross overcharges were pointed out—such overcharges as perhaps (in the language of several of the equity cases) might amount to fraud. After the lapse of several years, it is well known how difficult it becomes to prove all the items of account between attorney and client. The statute creates a bar after twelve months, unless special circumstances are shown; and it now seems conceded that the courts cannot act independently of that statute in their common law jurisdiction.

I think the defendants fail to bring their case within the exceptions, and therefore I discharge the summons to refer.

Summons discharged, without costs.

ELECTION CASE.

Before the Hon. Judge ARMSTRONG, of Ottawa. *Reported by* W. DUCK, Esq., *Barrister-at-Law.*

REGINA EX REL. HORNE v. CLARK.*

The Municipal Act—Resignation of Candidates.

Where at an annual municipal election one of three candidates, of whom two were to be elected announced on the second day between 10 and 1 o'clock, his retirement from the contest, whereupon, the returning officer immediately closed the poll, and declared the others elected, one of whom then thanked the electors and declared his acceptance of the office, and afterwards, at the first

meeting of the Council, made the declaration of office, and a writ of summons in the nature of a *quo warranto*, was applied for and issued, not within six weeks after the election, or within one month after the declaration at the close of the Poll by the defendant, of his acceptance, but within one month after the making of the declaration of office, *Held*, it not being shewn that the relator was present at the close of the poll, or had ever learned what then took place, that the application for the writ had been made in time.

Semble that where more persons are proposed than are to be elected, and all afterwards retire but the number to be elected, polling having begun, the Returning Officer cannot close the poll, unless under the circumstances stated in the 97 sec. of the Municipal Act.

The facts sufficiently appear in the judgment.

Armstrong, Co. J.—On the 15th February last, the relator applied for a summons in the nature of a *quo warranto* to remove Mr. Sparks from the office of alderman for this city, and filed affidavits alleging that defendant is interested in a contract with the corporation, and therefore disqualified. A writ is ordered, issued and served, and on the 6th, instant, the defendant, by Mr. Ferris, his attorney, appears and files affidavits, shewing that the election complained against, took place on the 2nd and 3rd of last January, and that defendant on the latter day publicly accepted the office, and contends that the application for the writ not having been made until after the lapse of six weeks from the election, the relator is too late in his application.

Mr. Ferris admits that if the application is in time, the relator is entitled to succeed.

The relator admits that his application was not made within six weeks of the election, but as it was made within a month after the defendant took the oaths of office, which he did on the sixteenth day of January, his application is in sufficient time according to the meaning of the 128 sec. of the municipal act, and argues that the poll being closed on the second day of the election before the hour of four o'clock, there could not be such an acceptance of office as would preclude him from objecting to Mr. Sparks' qualification, if his application be made within one month of the defendant's formal acceptance, by taking the necessary oaths.

The question, therefore, for my decision, is narrowed down to one point, and I regret to say, there is no case in the books that distinctly settles the question.

It appears by all the defendant's affidavits, that there were three candidates for the office of alderman, and only two required; on the second day of the election, one of the three, McHenry, between the hours of ten, a.m., and one, p.m., retires from the contest and *immediately* after his doing so, the returning officer closed the poll and declared Mr. Sparks and Mr. Scott, elected aldermen, and that Mr. Sparks then addressed the electors, announcing his acceptance of the office, and on the 16th of January took the oath of office.

The words of the statute are "if within six weeks after election or one month after acceptance of office by the person elected, the relator shews by affidavit to any Judge reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person declared elected was not duly elected, the Judge shall order a writ, &c."

It is clear that a qualified relator has in all cases six weeks after the election to commence his proceedings, but in no case which I have yet seen, is it laid down, that he may not have a longer time under certain circumstances.

I am of opinion that cases may arise in which a longer period than six weeks might elapse after an election, before a relator would be in a position to proceed; for instance, a party might be elected in his absence or without his consent, and it is not until he has done some act from which his acceptance of office can be inferred, that a relator would be in a position to sustain a writ of *quo warranto* against him. It cannot be said that a man usurps an office until he has done something from which his acceptance can be inferred. In case a party without his concurrence were elected, the first evidence of his acceptance might be his taking the oath of office, which might possibly be long after the period of six weeks from the election. If such a case were to occur, I cannot see any reason why a relator might not institute proceedings to remove a disqualified individual at any time within a month after he took the oath of office. This is established by the judgment of C. J. Macaulay, in *Regina ex rel Roseburgh* v. *Parker*, 2 U.C. Cham. Rep 15, in which he says six weeks are allowed to impeach an election, at all events, although the office may have been accepted for more than a month, but that if the application be not made within six weeks, then the test is whether the office has been accepted more than a month previously, showing that an application may be sustained although made at a time more than six weeks after the election.

In the case of *Regina ex rel Linton* v *Jackson*, 2 U. C. Cham. Rep. 26, to which Mr. Ferris referred, it appears the defendant publicly accepted the office at the close of the poll, on the second day of the election, in the presence of the relator and other electors; and as the affidavits state the relator (who was one of the candidates) acknowledged himself that he was beaten by Jackson. Mr. McKenzie for the defendant urged that the application was too late not having been made within a month from the acceptance of office which, he contended, took place at the time of election, as is contended in this case. In *Reg. ex rel. Linton* v. *Jackson*, the election was held on the 6th and 7th Jan., and application was made on the 11th of February. Mr. McKenzie seems to have urged this point strongly on the occasion, and Mr. Chief Justice Draper, goes into the question at considerable length; he gives no decided judgment upon it, but decides the case upon its merits I however think, that had he been of opinion that Jackson's public acceptance of office when he was elected, was that acceptance which the statute intended that all persons objecting to his election should be governed by, in their proceedings to remove him from the office, the learned Chief Justice would not have gone into the merits of the case as he did, but would have at once dismissed the relators case, for it was clear that proceedings were not commenced until after a month from such acceptance although, within six weeks after the election. He asks, "what is an acceptance of the office?" and says that he does not find in the statute any provision pointing out any distinct form or mode of acceptance, but the section of the act which requires the oath of office to taken before entering upon its duties, would appear, at all events, direct proof of acceptance, but admits that an acceptance may be evidenced otherwise than by taking the oath. Further on in the same case, he says, that in his view of the law, "the acceptance took place on the 7th of January, and the writ moved for on the 11th of February, more than a month after the acceptance, but within six weeks of the election was sufficient;" but in that case there does not appear to have been any other evidence of acceptance, than Jackson's public acceptance when elected. Again, the learned Chief Justice says, "The defendant contends that whenever there is an acceptance, the application must be made within a month from the date thereof, and under any circumstances within six weeks from the election; the relator, on the other hand, contends that he has six weeks from the day of election, at all events, and a further time of one month from the acceptance of office, if that month extends beyond six weeks after election. The opinion I have formed," he says, "on the merits, renders it unnecessary for me to found my judgment on this point, and I therefore abstain from pronouncing a judgment upon it, though I should think it prudent not to delay proceedings to set aside an election, beyond the six weeks;" and further, "If a consent before election, to be put in nomination, may subject a party to costs, should his election be contested and he should disclaim? I do not see why a declaration publicly made immediately the result of the election is promulgated by the returning officer, may not, in the absence of any provision in the statute, be considered as evidence of acceptance;" no doubt it would so far as to render him liable to a penalty for not taking the oath of office, and yet it might not be conclusive evidence of acceptance.

This is the strongest case put by the defendant, and although the Chief Justice by no means decided the point, still were the two cases, this and that of *Reg ex rel. Linton* v. *Jackson*, in all points analogous, I might be inclined to hold that the relator is a day too late n his application. In the case just refered to, the relator himself was a candidate, and present at the regular close of the poll, admitted the defendant's election, and heard his public acceptance of office, and the charge against the defendant was want of property qualification; in this case, the ground of objection to the defendant is, that he has an interest in some contract with the Corporation, which in all the cases is declared to be an insuperable objection to holding a seat in the Council. The slightest ground for believing that a party has a pecuniary interest, which may

possibly become a subject of discussion in the Council, is sufficient to disqualify any man from sitting in the Council; witness the very recent case of *The Queen on the relation of Bland* v. *Figg*, 6 U. C. Law Journal 44.

The manner in which the election in this case was closed, is not free from strong objections to its legality, and therefore leads me to doubt that any declaration made by Mr. Sparks on the occasion, could be considered as an acceptance, even if it were shown that the relator was present at the time, which is not stated in any of the affidavits before me, nor is it shown that the relator was aware of the fact of Mr. Sparks having even addressed the electors at the close of the election, or having in any way concurred in his election, for had he been a consenting party in any way to Mr. Sparks' election, or to the conduct of the returning officer on the occasion, I think he would be debarred from objecting to the election afterwards, unless under very peculiar circumstances; for where one recognizes the official character of another, by treating with him in such character or otherwise, this is at least *prima facie* evidence of his title against the party recognizing it. 10 East 104.

The defendant's affidavits all state that the returning officer on the day of the election, between the hours of ten a.m., and one p.m., immediately closed the poll upon Mr. McHenry's retiring from the contest, in favor of Mr. Sparks and Mr. Scott. The 97th section of the Municipal Act relates to and defines the duty of a returning officer. It says he may close the election in one hour after commencing it, if no more candidates are proposed than the number he is to return, but if polling takes place, he is to keep his poll open until four o'clock p.m., unless between three and four o'clock, free access, &c., to the poll being allowed, no elector gives or tenders his vote, in which case he may close the poll on the first day, and if he do not do so, he shall adjourn until ten o'clock next day, and may at any hour of such day, between ten and four o'clock, close the poll, but always provided no qualified elector gives or tenders his vote for one hour next before his closing. As before remarked, in this case the poll was closed immediately after Mr. Henry's retiring, without any evidence that no elector gave or tendered his vote for an hour before; *non constat*, that there were not many voters waiting to vote for Mr. Henry, and had time been allowed and a majority voted for him, he might have been forced to accept the office or pay the penalty for not doing so. The law declares that a returning officer has no right to take upon himself to close the poll, after a contest is once entered into, until an hour has elapsed without a voter presenting himself, and even if he be aware that all parties have full opportunity of coming to the poll, yet do not come, he cannot exercise any judgment in the matter, but must keep the poll open for the hour prescribed. See the judgment of Chief Justice Draper in *Lawrence* v. *Woodruff et al*, and also *Regina ex rel Smith* v. *Brouse et al*, 1 U. C. Prac. Rep. 180.

Had I, however, any conclusive authority, that such an act or statement as that made by the defendant at the close of his election, constituted the acceptance of office mentioned in the statute, I think I should be bound to consider the election properly closed, as the relator in his statement filed, makes no objection on this point. It is by the defendant's affidavits alone, that the manner in which the poll was closed appears.

May not the 128th section of the act contemplate different cases in which action may be taken by an elector? For instance, may he not object to an election on the ground that it was not held in the proper place, or on the proper days, or that the returning officer did not act legally in some part of his duty, and that for such cause, and without any charge being preferred against those elected, the election is vitiated. In such a case it is clear action must be taken within six weeks after such an election, because the relator has every means of knowing when and were the election took place, but if he proceed against an individual for usurping an office, he cannot know whether he does so or not until he has shown by some act of his, that he has accepted the office. The judgment in *Regina ex rel Roseburgh* v. *Parker* ubi supra, contemplates such cases.

As the only evidence I have of Mr. Sparks having accepted the office before the day of his formally taking the oath of office, is so unsatisfactory to my mind, and no evidence whatever being adduced, that the relator was aware of his having said or done any thing from which his acceptance of office could be inferred, until his oath of office became a public act, I am forced to the conclusion that the application was made in time, and that defendant is not entitled to hold his seat, and should be removed.

The spirit of the Municipal Act, and the solemn judgments of as many as four Judges, are so decidedly opposed to any person having a pecuniary interest in a matter which may become the subject of discussion in the Council, holding a seat in that Council, that I think I am bound to give the relator the benefit of any doubt I may entertain, as to the regularity of his proceedings.

My judgment, therefore, is that the defendant, Nicholas Sparks, is disqualified from holding the office of Alderman for the City of Ottawa; that he be removed from that office; that he pay the relator, Henry Horne, his costs; and that a new writ for the election of an Alderman instead of Mr. Sparks, be issued for Wellington Ward, in that City.

DIVISION COURTS.

In the First Division Court United Counties of Frontenac, Lennox & Addington.

PATRICK HYLAND v. JOHN WARREN.

The jurisdiction of the Division Courts is restricted to forty dollars in actions brought purely and simply to recover uncertain damages depending on matters of opinion, whether the cause of action arose out of tort or breach of agreement.

This action was founded upon the following particulars of claim:—"$100. Patrick Hyland claims from John Warren the sum of one hundred dollars for damages on a breach of contract."

The cause was tried before the Judge of the County Court at the sittings of the First Division Court at Kingston, in the month of January, 1860, when a judgment of non-suit was entered, on the ground that the Division Court had no jurisdiction to try the matter.

The plaintiff moved afterwards to set the non-suit aside and for a new trial, contending that the Division Court had jurisdiction.

MACKENZIE, JUDGE.—The jurisdiction of the Division Courts in Upper Canada is regulated by the 54th, 55th and 59th sections of 19th chapter of the consolidated statutes of Upper Canada. By the 55th section it is enacted that the judge of every Division Court may hold a plea of, and may hear and determine in a summary way, for or against any person, bodies corporate or otherwise.

1st. "All personal actions where the debt or damages claimed do not exceed forty dollars, and

2nd. "All claims, demands of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise where the amount or balance claimed does not exceed 100 dollars.

"And by the 59th section it is enacted that a cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction of a Division Court, and no greater sum than one hundred dollars, shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds 200 dollars."

It does appear to me when an action is brought in the Division Court purely and simply to recover uncertain damages depending on a matter or matters of opinion that the jurisdiction of the Division Court is restricted to forty dollars, whether the subject matter of the action arouse out of tort or contract. The statute divides cases tryable in the Division Court into two classes. The first into personal actions of debts or damages not exceeding 40 dollars, whether the subject matter of the action arises out of contract or tort. The second into claims and demands of debt, account or breach of contract, covenant or money demand, where the amount or balance claimed does not exceed 100 dollars.

The word Damages, which has in law a well understood and defined meaning, is not used at all in the Statute in reference to the second class of cases. It is confined in it to the first class of cases, namely, to personal actions brought for the recovery of debts or damages which do not exceed $40. Damages in reference to actions are, according to general acceptation, the estimated equivalent for detriment, injury, or breach of agreement, or in other words, a

recompense for what a plaintiff hath suffered by means of a wrong done to him by a defendant. In regard to the Division Courts, the word damages I apprehend, means that compensation which is adjudged or given by the Judge or Jury to a plaintiff to repair or make up the loss he sustained by reason of the defendant's wrongful act. The first class of cases enumerated in the statute embraces all personal actions (with a few exceptions specified in the Act) where the debt or the damages claimed do not exceed forty dollars. Whereas on the other hand, the second class is confined to claims and demands of debt, account or breach of covenant, or money demand where the amount or balance claimed does not exceed one hundred dollars. The words "amount" and "balance" regulating the second class of cases are not synonymous with the words debt or damages used in the statute as the regulating expressions of the first class. The word "amount" I conceive to mean the sum total of two or more numbers, or the sum arrived at when several parts or figures are added together, and the word "balance" the difference between two sides of an account. The second class of cases seems to me to be intended for the adjustment of accounts and ordinary transactions carried on by the ordinary agencies of entries and figures, and balances ascertained by the usual process of computation, or for the adjustment of subject matters of dispute, where an amount or balance can be arrived at by a common process of valuation and reckoning, whereas the first class of cases extends to the recovery of unliquidated damage to the extent of forty dollars, that is to say, for the recovery of uncertain damages to that extent, to be ultimately ascertained and estimated by the Judge or a Jury, as the case may be, according to the opinion which he or they may form, in respect of such facts and circumstances as shall be proved at the trial. The present action having been brought to recover uncertain or unliquidated damages to the extent of one hundred dollars, merely for an alleged breach of some agreement, I think the Court had no jurisdictiou to try it, its jurisdiction in this respect being limited to forty dollars, consequently a new trial must be refused.

New Trial refused.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—Can you inform me if the Courts, on an appeal against an award under the Municipal laws, have power, independently of form, to go into the merits of the arbitration, and in fact sit in the place of the arbitrators?

An answer in your next will oblige.

INQUIRER.

Walpole, 15th April, 1860.

[In the cases provided for by sec. 358, sub-sec. 13 (Consol. Stat. U. C. p. 631), of the Municipal Act, the Court, on an application to set aside an award, is to consider, not only the legality of the award, but the merits, as they appear from the proceedings filed, and may call for additional evidence, to be taken in any manner the Court directs, &c.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. LEVERSIDGE v. BROADBELT. *June* 15.

Contract—Agreement to pay debt to a person other than the creditor —Consideration.

C a builder, was indebted to L a timber-merchant, in the sum of £113, for which he had given two bills of exchange. B was indebted to C in a larger amount. Upon C being applied to for payment of one of the bills which had become due, he wrote and signed the following document: "I hereby agree to authorize B to pay L or his order the sum of £113, the amount of two acceptances together with the expenses on the bills and interest thereon, towards my account for building the cottages at W—B, to debit my account with the above money; also L's receipt to B I acknowledge shall be binding between myself and B on the contract." This document was taken by L to B who wrote thereon the word "acknowledged" and signed his name thereunder.

Held, that there was no binding agreement by B to pay the money to L, there being no consideration for the promise: and that an action could not be maintained by L against B for recovery of the money.

EX. GOODWIN v. CHEVELEY. *June* 14.

Cattle—"Damage feasant"—Distress of—Whether within a reasonable time—Question for Jury.

Where some out of a large number of cattle, which were being driven along the high road, strayed into a field adjoining the road, the fences of which were in bad repair, and the drovers, instead of immediately getting them out, drove the remainder to a place of safety and then returned for those that had strayed, and in the meantime the owner of the field impounded them.

Upon an action of trespass by the owner of the cattle for impounding them before a reasonable time had elapsed for him to remove them.

Held, that what was a reasonable time should be decided by the jury with reference to the circumstances of the particular case, and the learned Judge having directed a verdict to be entered for defendant, this verdict was set aside and a new trial granted.

EX. C. BONOMI AND WIFE v. BACKHOUSE.

Statute of Limitations—Mines—Right to support—Cause of Action Excavation of contiguous land more than six years before Action—Consequential damage within six years—Easement.

The right to the support of land rests upon a different footing to that of buildings, the former being *primâ faciæ* a right of property, but the latter being founded upon prescription or grant. In either case where the right exists, no cause of action accrues to an adjoining owner against the owner of the contiguous land; but a cause of action will accrue to an owner adjoining when accident to his land or buildings results from such excavation.

Therefore, where in an action by the plaintiff, as the owner of the reversion of certain messuages and buildings, for negligently working mines without leaving proper support, so that the buildings of the plaintiff and his reversionary interest therein were damaged, it was proved that the plaintiff was the owner of the surface under and on which were an ancient house and other buildings, and that the defendant having worked the mines under and near the plaintiff's premises leaving proper support, afterwards worked other mines 280 yards from the plaintiff's property, and in such a way that the roof and surface fell in and caused a thrust, which gradually extended through the intervening workings to those under the plaintiff's premises, causing the surface to subside so as to damage the foundations and walls of the plaintiff's buildings; and the working which caused the thrust was more than six years before action brought, but the actual damage to the building did not commence till within the six years.

Held, (reversing the judgment of the Queen's Bench) that no cause of action arose until the actual damage, and therefore that the statute of limitations was no bar to the action.

EX. MYLTON v. THE MIDLAND RAILWAY CO.

Railway Company—Contract to carry passengers over line of other Company—Responsibility for loss of baggage.

Where a railway company undertakes to carry a passenger to a station upon the line of another company, and gives a ticket for one fare for the entire distance, the contract is an entire contract with the company granting the ticket; and they do not act as agents for the other company so as to give the passenger a right of action against the other company in case of loss of baggage while travelling upon their line; but the action must be brought against the company who gave the ticket.

Q. B. LOZANO v. JANSON. *June* 16.

Policy of Insurance—Capture at Sea—Total loss.

A ship upon which there was a policy of insurance against (*inter alia*) "takings at sea, arrests, and detainers," was captured by a British vessel of war as being engaged in the slave trade, she was condemned by the Court of Admiralty at St. Helena, and notice of abandonment was given to the insurers. Two years afterwards the decree of the Court of Admiralty at St. Helena was reversed by the Privy Council, at which time part of the goods being perishable had been sold, and the remaining part might have been carried to their destination at an expense something less than their value when delivered.

Held, that the capture was within the terms of the policy. That there was a total loss at one time of the goods insured. That the circumstances which supervened did not reduce that total loss to a partial loss only.

EX. STURGIS, *Assignee, &c.*, v. DARRELL, *Administrator.*

Statute of limitations—Speciality—Abatement by death—Commencement of action against Administrator within reasonable time, although more than twenty years from accrual of cause of action.

An action on a bond abated by the death of the obligor. Within a year after letters of administration were taken out the assignee of the plaintiff (who had since the abatement of the action taken the benefit of the Insolvent Debtors' Act) commenced an action against the administrator.

More than twenty years had at the time such second action was brought elapsed since the forfeiture of the bond.

Held, that the statute of limitations afforded no answer since the second action was commenced within a reasonable time after the taking out of letters of administration.

EX. HORTON v. SAYER. *June* 8.

Arbitration — Covenant for referring disputes, when binding — Ouster of Jurisdiction.

By a covenant in a mining lease the parties covenanted to refer to arbitrators to be chosen by themselves, after any dispute should arise, "any difference, varience, controversy, doubt or question which should arise,—touching and concerning any covenant, clause, proviso, word, matter or thing in the indenture, expressed or contained, or the meaning or construction thereof," and covenanted not to sue in respect of any of these matters.

Held, that the covenant afforded no answer to an action for breach of another covenant contained in the lease, since its operation being to oust the Courts of their jurisdiction, it was therefore void.

CHANCERY.

L. J. TAYLOR v. THE GREAT INDIAN P. R. CO. *July* 15.

Vendor and Purchaser—Transfer of Shares in Blank—Agency—Fraud.

A., who was the holder of £2 and £20 shares in a railway company, instructs his broker to sell sixty of his £2 shares. The broker brought A. for his signature two deeds of transfer, the numbers and particulars of shares, and the name of the transferee being left in blank.

The transfer deeds, which bore a stamp sufficient to pass upwards of sixty £20 shares were signed in this state by A. in the belief that his £2 shares would be thereby transferred. B. fraudulently offered for sale on the Stock Exchange eighty £20 shares of A. which were purchased by C. at the market price. The blank transfer deeds were handed to C., who filled up the numbers of the shares and the name of the transferee. It appeared to be the custom among brokers and jobbers to accept blank transfers in this manner.

Held, that notwithstanding A.'s negligence in executing the deeds in blank and in not taking notice of the stamp upon them, C., who had taken an instrument on the face of it void at law, was not entitled to rely on his purchase, which was accordingly set aside. The Court refused to recognise the alleged custom of accepting transfers in blank, as being contrary to the policy of the law.

L. J. *Ex parte* WOOLASTON RE H. C. & G. L. ASSURANCE CO.

Joint Stock Company—Contributory—Misrepresentation—Forfeiture.

The secretary of a company represented to W. that two medical referees only would be appointed, and that he might be one of them if he would qualify himself by taking 200 shares. W. took 200 shares, and was appointed a medical referee; but soon afterwards finding that four referees had been appointed he resigned his office, and demanded back the sum which he had paid.

Held, that there was no such misrepresentation or breach of contract on the part of the Company as to exonerate W. from his liability as a shareholder.

The deed of settlement of a Joint Stock Company provided, that if any shareholder did not pay his calls the secretary might send him a notice requiring payment within 21 days; and if he did not pay in that time the directors might declare the shares forfeited, and the same should be forfeited accordingly. A shareholder having refused to pay his calls the secretary sent him the required notice, that if he did not pay the calls within 21 days his shares would be forfeited.

The shareholder made default and took no further notice of the matter, and the company made no further declaration of forfeiture, but suffered the shareholders name to remain on the register for more than two years until the company was wound up.

Held, that the shares were absolutely forfeited, and the shareholders name was removed from the list of contributories.

Whether the declaration of forfeiture was made before or after the expiration of the 21 days was a matter of form not of substance.

L. J. THOMPSON v. WEBSTER. *July* 21.

Voluntary settlement—Consideration—Costs—Stat. 13 *Eliz., ch.* 5.

A. being indebted to the plaintiff, but not insolvent, applied to his mother for a loan of £190. She consented to advance the money, on condition that A. would settle a certain freehold estate on his children. Two deeds were accordingly executed, by one of which A. mortgaged certain other estates to his mother, to secure the repayment of £400; and by the other he settled the first mentioned estate on himself for life, and after his death, on his children and their issue. Neither deed contained any reference to the other. A. afterwards became insolvent.

Held, that the settlement was made for valuable consideration, and was within the proviso contained in the 6th section of the 13th Eliz., c. 5; and that it was not material whether the whole of the £400 secured by the mortgage, was actually due from A.

The preparation of such a settlement, without disclosing on the face of the deed the true circumstances of the case, was unjustifiable, and led to grave suspicion. And the Court, wishing to encourage complete investigation of similar transactions, dismissed the plaintiff's bill without costs.

M. R. HARTLAND v. MURRELL. *July* 6.

Will—Construction—Charge of debts.

Under a will containing a direction to the executors, to pay debts, and a devise of all realty to them upon trusts, for the benefit of the widow and family.

Held, that the executors had power to mortgage the real estate for payment of debts.

M. R. ARMSTAGE v. WILLIAMS. *July* 21.

Will—Construction—Class—Vesting.

Under a direction to trustees of a will, that a trust fund was to be applied to the education of the children of A. and B., in equal shares, and on their attaining to the age of 21, the whole to be sold and divided equally among them.

Held, that all the children took vested interests on their birth, and that the fund was divisible *per capita*.

L. J. PAYNE v. MORTIMER. *June* 30.

Voluntary bond—Subsequent assignment for value.

A. entered into a voluntary bond for the payment of a certain sum, to be divided among his children as therein mentioned. Two of the sons afterwards married, in the lifetime of A., and in consideration of marriage, assigned their shares under the bond, to the trustees of their marriage settlement; A., or his solicitor, having notice in both cases of the intention to do so.

Held, that the shares of the sons were not to be considered in equity, as debts voluntarily incurred; but ranked as specialty debts for value, in the administration of A's. Estate.

M. R. BANK OF LONDON v. TYRRELL. *June* 30.

Solicitor—Sale to client—Extent of relief.

A solicitor while engaged in getting up a bank, but before the Company was formed, arranged with the owner of certain premises —the purchase money of which was for the most part unpaid—to take half his interest, and negotiated a sale of the premises to the Company when it was formed, and he had been appointed solicitor without disclosing his interest in the premises. On the discovery of the fact, the bank filed a bill to make their solicitor and his co-owner, account for their profits on the sale to the bank, but did not rescind the purchase.

Held, that the solicitor was liable to account for his profits, but no decree against his co-owner.

P. C. W. TRICKER v. KINGSBURY. *July* 16.

Will—Construction—Condition in restraint of marriage—Cesser of interest.

W. M. by his will, after devising the fee simple of his real estates to his son and daughter, gave the rents and profits thereof to his wife, until his son should attain twenty-one.

He then bequeathed to her his funded property, in consideration of her maintaining and educating his children, and also gave her his household furniture, &c. But his will was, that if she married again before his son attained twenty-one, all her interest under the will should cease.

Held, that the condition was not merely *in terrorem*, and that the whole of her interest under the will ceased on her second marriage.

L. C. RABBETH v. SQUIRE. *June* 8.

Will—Construction—"Use and occupation"—Conditional gift.

A testator desired that his two sons should, if it were their desire, have the use and occupation of M's. lands, they paying a certain rent, &c. And that in default of payment, &c., they should no longer have possession.

Held, that the gift was not not conditional upon personal use and occupation.

L. C. WILSON v. KEATING. *July* 16.

Specific performance—Sale of shares.

A transfer of shares from W. to K., was negotiated through the intervention of third parties. The deed of transfer recited a contract by K., to purchase 105 shares at £5 per share, and the receipt of the purchase was acknowledged but not endorsed. W. executed the transfer with the understanding that K. was purchasing for himself, and that the money was to be paid within a year, the shares being, in the meantime, deposited as security. K. executed the transfer at the request of S., and upon the representation that the money had been paid, and that K. would be merely a holder in trust for S. W. was not a party to the representations made by S.; and, except by executing the transfer, K. had entered into no contract, and had given no authority for the purchase of the shares. The purchase money was not paid. Upon a bill for specific performance by W.,

Held, confirming the decision of the Master of the Rolls, that K. was bound by the contract, and liable to pay for the shares so transferred to him.

L. C. SQUIRE v. RABBETH. *June* 8.

Will—Implication of cross remainder.

Gift by will of one-fifth share of real and personal estate, for each of testators children for life; and after his or her decease, for his or her children, which he or she should leave at death; and and if he or she should leave none, then, as to *corpus* for grandchildren, *per capita*. One child died, leaving a child who died in the lifetime of others of the testator's children.

Held, that the grandchild did not take any estate during the life of the surviving children of the testator.

Held, also, that cross remainders were not to be implied here.

L. J. THOMPSON v. WHITELOCH. *July* 4.

Will—Construction—Mistake—Legal representatives—Lapse—Exception out of residue.

A testator gave a legacy to each of his brothers and sisters by name, or to their legal representatives, to be paid to them in two years after his death; and he also gave other legacies to his nephews; all of the legacies together amounting to £6,100. He then gave the residue of his property to his widow, absolutely, except £4,100, which she was to have during her life, and after her death, it was to be divided among his relations, "in proportion to the legacies left above, which will just make their legacies double the first bequest." One of his sisters, and two of his nephews, died in his lifetime, after the date of his will.

Held, on the construction of the will, that with respect to the apparent miscalculation as to the £4,100 doubling the previous legacies, it was not sufficiently clear that that sum was written by mistake, to justify the Court in departing from the words of the testator.

That the words "or their legal representatives," did not constitute a substantive gift, but that the share of the deceased legatee, lapsed.

That the sum of £4,100, was not a portion taken out of the residue, but excepted from it; and therefore the share that lapsed, fell into the residue, and did not go to the next of kin.

V. C. S. THIEDEMAN v. GOLDSCHMIDT. *July* 18.

Bill of Exchange—Acceptance obtained by fraud—Forged bill of lading—Right of acceptor to relief in equity against indorsee, for value.

The consignee of goods, who has accepted bills of exchange drawn by the consignor, residing abroad, and which were presented for acceptance by the endorsees for value, accompanied by a document which purported to be, and which they believed to be, a genuine bill of lading of the goods, but which afterwards proves to have been a forgery, is not bound by his acceptance, and is entitled to an injunction restraining the endorsees, though innocent parties to the fraud, from negotiating or enforcing payment of the bills.

M. R. PEARSON v. AMICABLE SOCIETY. *July* 8.

Voluntary assignment—Policy.

A voluntary assignment of a policy on the assignor's life, containing an irrevocable power of attorney, held good against the executors of the assignor.

L. C. & L. L. J. SCHOLEFIELD v. TEMPLER. *June* 24.

Principal and surety—Fraud—Mutual mistake.

B. and T. being indebted as principal and surety to S., upon some promissory notes, false representations were made by B., upon which T. pressed S. to accept, and S. did accept, as a security for the debt, the transfer of a mortgage, and thereupon erased T's. name from the notes. The mortgage proved invalid and worthless.

Held, that although T. was innocent of the fraud, yet he must not be allowed to gain by it, and he, therefore, was still liable as surety, notwithstanding the erasure of his name.

V. C. W. RE SEYMOUR'S TRUST. *June* 30.

Will—Construction—Contingency.

Testator gave a sum of £2,000 to pay the interest, &c., for the support and benefit of his son A. during his life, and after his death to pay and divide the *corpus* between testator's daughter B, and such of her children as should be living at the death of A, and the executors or administrators of such of B's children as should be then dead, leaving any child or children living at the death of A. in equal shares, so that such executors or administrators of any such grandchild (of testator) so dying and leaving a child or children should take the same, share as such grandchild would have taken if he had been living at the death of A.

The testator died in 1846, and A. in 1858. In 1855, C. one of B's children, became bankrupt, and his reversionary interest in the £2,000 was sold by his assignees. C. died in 1856, leaving an infant child, and having appointed his widow his executrix.

Held, that the gift to the "executors and administrators" of the grand-children was not to them beneficially, and that the purchaser of C's reversionary interest from the assignees, was entitled as against C's executrix and infant child.

M. R. SMITH V. EVERELL. *June* 27.

Good will—Banking business—Executors' power to bind each other.

The good-will of a banking business belongs, in the absence of special agreement, to a surviving partner and the executors of a deceased partner, in proportion to the shares of partners. But in apportioning the proceeds of a sale of the business, regard must be had to the circumstances—as, for instance, that the premises belong to the surviving partner, and the right of issuing notes belonged exclusively to the surviving partner.

One or two executors may settle an account so as to bind their co-executors, in the absence of fraud, or possibly, of very gross error.

L. C. & L. L. J. STRINGER V. GARDINER. *July* 2.

Will—Construction "Niece"—Parol evidence.

A testator bequeathed a legacy to his niece E. S. At the time of making his will and of his death, he had not a niece E. S.; but some years before he had one so named, of whose death he was aware.

Held, that E. J. S., a great-great niece then living, was entitled.

L. J. DICKSON V. WILKINSON. *July* 8.

Solicitor—Negligence—Jurisdiction—Receiver.

Where a firm of solicitors act for a plaintiff in a suit, and also for the receiver, remittances made by the receiver to them, are received in the character of solicitors to the receiver, and they are not accountable for them to the plaintiff.

Whether there is any jurisdiction in the Court of Chancery, to make a solicitor answerable to his client for negligence, where there has been no fraud or misconduct, *quære*.

If there be such jurisdiction, it is a matter of discretion whether the Court should exercise it. And in such case, the client must show a clear case of damage, and that the Court of Chancery can alone give complete relief.

L. J. RE CANT'S ESTATE. *July* 8.

Right of pre-emption—Railway Company—Compulsory powers.

A testator gave real estate, including some garden ground, to trustees, in trust for his wife for life, and after her death, upon trust to sell and divide the proceeds among his children, with a proviso that one of his sons should have a right of pre-emption of the garden ground, at a fixed sum. After the testator's death, but before the trust for sale arose, a railway company took the garden ground under their compulsory powers, and paid the compensation money, which was more than the price fixed by the testator, into Court.

Held, that the right of pre-emption was not lost by the compulsory sale, but that the son was entitled to compensation money, subject to the deduction of the price fixed the by testator.

REVIEW.

THE LAW CHRONICLE: Editor, Henry Flowerden; Publisher, David Robertson Clark, High Street, Dundee, Scotland.

We have to thank the proprietor for Vols. II. & III. of this neat and useful publication. The editor is procurator before the Burgh Court of Dundee, and Sheriff and Commissary Courts of Forfarshire. The *Law Chronicle* contains reports of cases decided in different Sheriff's Courts, illustrative of the practice prevailing in the County Courts of Scotland. It contains besides, observations on the constitution of the Sheriff's Courts, and mooted questions of Law Reform, in connexion with the Courts. We are quite surprised to find so complete and so useful a Law serial, published in a Provincial Town of Scotland, and shall often recur to its pages for information. In some respects the administration of Law in Scotland excels that of England, and we have to thank the proprietor of the *Law Chronicle*, for enabling us to some extent, to make the comparison.

HARPERS'S MONTHLY MAGAZINE. Published by J. Harper & Brothers, Franklin Square, New York.

We have to acknowledge the receipt of the May number of this well known Magazine. It completes the *twentieth* volume. The publishers, in referring to its history, say: "With each successive number of the Magazine, the number and value of the original papers offered has increased, and for five years the Magazine has been filled mainly with original papers by American writers especially for its pages." It is also mentioned that the design of the publishers having been to make the Magazine one of art as well as literature, nearly seven thousand illustrations, at a cost of $150,000, have been inserted in its pages.

Terms.—One copy for one year, $3; two copies for one year, $5; three or more copies for one year (each), $2. Clergymen and teachers supplied at $2 per year.

THE UNITED STATES INSURANCE GAZETTE for April, and GODEY'S LADY'S BOOK for May, received.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

HENRY W. DAY, Esquire, M.D., Associate Coroner County of Hastings.—(Gazetted 14th April, 1860.)

HENRY W. DAY, Esquire, M.D., Associate Coroner County of Northumberland, —(Gazetted 14th April, 1860.)

ALEXANDER HAMILTON, Esquire, M.D., Associate Coroner of United Counties York and Peel,—(Gazetted 14th April, 1860.)

P. TERTIUS, Esquire, Associate Coroner County of Welland.—(Gazetted 14th April, 1860.)

CHARLES WILLIAM BUCHANAN, Esquire, M.D., Associate Coroner City of Toronto.—(Gazetted 21st April, 1860.)

ALEXANDER McKENZIE, Esquire, Associate Coroner United Counties Stormont, Dundas and Glengary.—(Gazetted 21st April, 1860.)

NOTARIES PUBLIC.

GEORGE S. McKAY, of Yorkville Esquire, to be a Notary Public in Upper Canada.—(Gazetted 14th April, 1860.)

ALEXANDER LAWSON, of Port Coborne, Esq., to be a Notary Public in Upper Canada.—(Gazetted 14th April, 1860.)

WILLIAM GREY, of Woodstock, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 14th April, 1860.)

HENRY WHITE, of the City of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 21st April, 1860.)

GEORGE NEIMEIER, of Newstadt, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 21st April, 1860.)

TO CORRESPONDENTS.

DIVISION COURT CLERK — A DIVISION COURT CLERK — JOHN C. MEREDITH — JOHN COOL—Under "Division Courts."

INQUIRER—Under "General Correspondence."

DIARY FOR JUNE.

2. Saturday..... EASTER TERM ends.
3. SUNDAY..... *Trinity Sunday.*
4. Monday..... Last day for notice of Trial for County Court.
10. SUNDAY..... *1st Sunday after Trinity.*
12. Tuesday ..... Quarter Sessions and County Court Sittings in each County.
14. Thursday ..... Sittings of Court of Error and Appeal begin.
17. SUNDAY..... *2nd Sunday after Trinity.*
24. SUNDAY ..... *3rd Sunday after Trinity.*
30. Saturday ..... Last day for Co. Councils finally to revise Ass'mt Rolls, and for apportionment of School Moneys by Chief Superintendent of Schools. Chief Sup'dnt to report state of Grammar Schools.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JUNE, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60." *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The "*60*" has reference to the year, and not to the amount represented as due.*

THE EFFECT OF FOREIGN JUDGMENTS.

Our attention has been directed to a bill introduced during the recent session of the Legislature, by the Attorney-General for Upper Canada, intitled "An Act respecting foreign judgments."

Eminent judges, both of early and late years, have differed and differed widely as to the effect of a judgment when sought to be enforced in a country other than where recovered.

The question is one of international law, and the difficulties which surround it arise in great part from the different rules observed by different nations in respect to it. All men are amenable to the laws of nature, but no subject of one power not domiciled or resident within the dominions of another is in general bound by its local or municipal laws.

It is, according to Vattel, the province of every sovereignty to administer justice in all places within its own territory and under its own jurisdiction, to take cognizance of crimes committed there and of controversies that arise within it. Other nations, owing to courtesy, or as it is termed comity, respect this right, and hence in certain cases an effect may be given to a judgment beyond the confines of the sovereignty or power within which it is pronounced.

The question in this view becomes narrowed to one of degree. Is that judgment, as between the parties to it, in all places and at all times to be deemed conclusive or only *prima facie?*

Before proceeding further, let us inquire—1. What is a judgment? 2. How many kinds of judgment there are?

A judgment is the sentence of the law pronounced by a proper tribunal upon a case within its jurisdiction. Therefore the operation of every judgment must depend on the power of the Court to render that judgment, or, in other words, on its jurisdiction over the subject matter of adjudication. Judgments are of two kinds—*in rem* and *in personam.*

Where the judgment is *in rem* little difficulty is experienced. If the subject matter of the judgment be land or other immoveable property, the judgment pronounced in the *forum rei sitæ* is of universal obligation. So it would appear if the subject matter, though moveable property, be within the jurisdiction of the Court when judgment is pronounced.

Where the judgment is *in personam* it may be considered in the following aspects: whether between subjects or between foreigners, or between subjects and foreigners—whether set up by way of defence in a foreign tribunal, or sought to be enforced in that tribunal.

The person against whom a judgment is pronounced, in order to render it effectual, must be subject to the jurisdiction of the tribunal that pronounces it. This jurisdiction may be founded either in respect of the domicile of that person in the territory of the tribunal or in respect of his being possessed of some estate within it. (Burge Col. L. 3, 1016.)

No Sovereign is bound to execute any foreign judgment within his dominions, and if he do so out of comity he is at liberty to examine into its merits, and refuse to give effect to it if opposed to natural justice or otherwise unjust

or unfounded. It is otherwise however where the defendant sets up a foreign judgment as a bar to proceedings. The party dissatisfied with a foreign judgment, if in all respects legal and binding, has no right simply because of dissatisfaction to bring the matter into controversy elsewhere.

These doctrines are subject to the following limitations: 1. That the judgment has not been obtained by fraud. 2. That the proceedings to obtain it have been regular. 3. That the parties interested have had notice, or an opportunity to appear and defend their interests. (*McPherson et al* v. *McMillan*, 8 U. C. Q. B. 30; *Reynolds et al* v. *Fenton*, 3 C. B. 187; *Warrener et al* v. *Kingsmill et al*, 8 U. C. Q. B. 428, Burns, J.; *Meuus* v. *Thellusson*, 8 Ex. 638.)

Supposing the judgment to be correct on these several heads, the next question, and the one as to which so much difficulty exists, is as to its effect when produced in a country other than where recovered. Is it to be deemed conclusive? If not, is defendant at liberty to go into its original merits? If yes, what manner and to what extent are the original merits to be inquired into?

Here we find ourselves plunged into the troubled waters of judicial strife. On one side we hear yes, on another no; and on all sides the uncertain sounds of hesitation and doubt.

It is said that the common law recognizes no distinction whatever as to the effect of a foreign judgment, whether it is between citizens or between foreigners, or between citizens and foreigners. (Story's Conflict. s. 610.) The following distinctions drawn by Boullenois, an eminent foreign writer, are however deserving of much attention. He says, if the foreign judgment is in a suit between natives of the same country in which pronounced and rendered by a competent tribunal, it ought to be executed in every other country without any new inquiry into merits. His reasoning is to the effect that the judgment, having emanated from a lawful authority and been rendered between persons subject to that authority, ought not to be submitted to discussion in any other tribunal, which for such a purpose must necessarily be incompetent. He also argues that if the judgment be rendered in a suit between mere strangers found within the territorial authority of the Court rendering it, and the jurisdiction be in all respects rightfully exercised over the parties, that it should be equally conclusive; but that the jurisdiction cannot be rightfully exercised merely because the foreigners are there, unless domiciled there.

The inclination of the English Courts is to sustain the conclusiveness of foreign judgments (*Reimer* v. *O'Niel*, 23 Beav. 145, 3 Jur. N. S. 147, 26 L. J. Ch. 196); while that of the American Courts is to make them *prima facie* evidence only, and so impeachable. (Story's Conflict. s. 608.)

It is for us to examine the question from an Upper Canada point of view, by the light of our own adjudged cases.

As early as 1835, we find the late Chief Justice of the Common Pleas (Sir J. B. Macaulay) reported as using the following language:

"It may fairly be inferred from all the cases, that a foreign judgment had in a court of competent jurisdiction is conclusive upon the parties *inter se prima facie*, subject to be drawn in question by the party sought to be charged or estopped by such judgment. They seem to possess a validity equivalent at least to a promissory note, or a receipt in full. They afford sufficient foundation for an action of debt or assumpsit in favour of creditors obtaining them, and ought to be equally available in favour of a defendant. In the plaintiff's case, they are regarded as more than mere evidence of a debt, for they are declared on as upon awards, promissory notes, &c. They import or constitute in themselves sufficient consideration or evidence thereof to raise an implied promise. In other words, they clothe the plaintiff with a *prima facie* right of action thereon, and are so far *per se* conclusive upon the defendant. The latter may shew a want of jurisdiction, fraud, injustice, or irregularity in the recovery; but until assailed by him, they are conclusive and sufficient ground of action. Being more than evidence in favour of the plaintiff, namely, the substratum of an action of debt or assumpsit, conclusive upon the defendant until impeached, they would by analogy seem more than evidence in favour of a defendant when sued a second time, and pleaded in bar, though requiring perhaps more technical precision than when declared upon; and conclusive upon the plaintiff until avoided by him, upon grounds *dehors* the record, or apparent upon the face thereof. Yet they do not merge or change the nature of the original demand; a remark equally applicable, however to negotiable securities, awards under parol submissions, and other proceedings that might be named." (*McPhedran* v. *Lusher*, 3 U. C. O. S. 603.)

The Chief Justice of Upper Canada (Sir J. B. Robinson, Bart.), in *Warren et al* v. *Kingsmill et al*, 8 U.C.Q.B. 414, speaking of the foreign judgment sued upon in that case, says, "The judgment of the foreign court cannot be conclusive except as to *persons* and *things* within its jurisdiction."

In the same case in appeal, 13 U. C. Q. B. 60, Mr. Justice McLean is reported as follows:

"A foreign judgment is *prima facie* evidence only, and liable to be impeached, if the foreign law or any part of

the proceedings of the foreign court are repugnant to natural justice; or if, for a cause of action arising out of the jurisdiction of such court, the decision is made according to the law of the country in which the suit is tried, instead of, and contrary to the law of, that country in which the cause of action arose."

So Mr. Vice Chancellor Esten:

"The law regarding the obligation of our Courts to enforce foreign judgments seems tolerably clear. It is admitted that where an attempt is made to enforce a foreign judgment in our Courts, it is examinable, but *prima facie* valid and binding, and furnishes a good cause of action. In truth, every presumption is to be made in its favor; and if it can possibly be right under the circumstances which appear, it is the duty of the Courts to allow it to be enforced." (13 U. C. Q. B. 65.)

Mr. Justice Burns, in the same case, 8 U. C. Q. B. 424, is reported as follows:

"With respect to the question whether a foreign judgment is to be treated as conclusive evidence on the merits of the original action, or only *prima facie* evidence on behalf of the plaintiff, there has been a great conflict of opinion among English judges from time to time. Some of the most eminent have held with great confidence that the evidence should be conclusive, while others have so held with less confidence; and on the other hand, judges equally eminent have strenuously contended that foreign judgments are merely *prima facie* evidence. The latter view seems to prevail in America, though the extent to which it should be carried is certainly not definitely settled there. It can scarcely be expected upon such a question, seeing such difference of opinion, that I can do more than give my adherence to one side or the other, and in doing so, I adopt the language of Mr. Justice Story, who says, "Indeed, the rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it, by opening all or any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment, by shewing that the court had no jurisdiction, or that he never had any notice of the suit, or that it was procurred by fraud, or that upon its face it is founded in mistake, or that it is irregular and bad by the local law *fori rei judicatæ*. To such an extent, this doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits of the original causes at large, and to put the defendant upon proving their merits." (Story Con. of Laws, s. 507.)

And at p. 430, as follows:

"The presumption is in favor of the judgment, and that presumption must prevail until displaced, and it must be displaced by shewing every thing to negative it. We find this principle applied strongly in cases where it is alleged the judgment has been obtained without the person having had an opportunity of defending himself; and there certainly is no reason why it should be less applicable when the person admits he did defend himself. Not to uphold the principle in the latter case, would be in effect to re-try the original cause."

Again, at p. 68 of 13 U. C. Q. B., as follows:

"I was and am of opinion that the judgment is not conclusive, but that it is open to the person against whom the judgment operates to shew that by our laws and by the laws of the country where the judgment was obtained, it was obtained contrary to the course of natural justice; and the question now is, whether this plea is sufficient to displace the legal obligation arising upon the judgment, or does it allege circumstances and facts from which we must say the original merits must again be tried; or, in other words, that we cannot allow an action on the judgment itself to be sustained because that judgment was obtained against the course of natural justice. Whether the judgment is to be opened or not is a question of law upon the facts admitted, or if disputed to be ascertained upon trial."

And at p. 75 of same volume, as follows:

"I take it to be the result of the cases—that a foreign judgment sought to be enforced here is to be presumed correct, and that a legal obligation arises thereon which should be enforced; that it may however be impeached either by intrinsic or extrinsic evidence; and if it is impeached by extrinsic evidence then two things are requisite; first, that the party impeaching it must show that he was altogether ignorant of the proceedings to obtain the judgment, and therefore not bound by it, in which case he must negative all and every possible circumstance on which the judgment might be sustained; and secondly, if the party has appeared and defended himself, then his extrinsic attack should be accompanied by the intrinsic evidence of what the pleadings were, if any, or the points raised, and which came on for trial, by whatever means and process the same came on, and the points disposed of, and how, by the court."

Mr. Vice-Chancellor Spragge, at p. 78 of same volume, is thus reported:

"The tendency of modern decisions appears to be to hold foreign judgments *conclusive upon the merits*, and only impeachable where the foreign court had not jurisdiction, or the defendant was not duly summoned to answer, or the judgment was obtained by fraud. The notes to the Duchess of Kingston's case in Smith's Leading Cases, con-

taining a summary of the decisions upon the subject; the case of *The Bank of Australasia* v. *Harding*, (14 Jur. 1094), and the more recent case of *The Bank of Australasia* v. *Nias* (15 Jur. 967), all bear in favor of the conclusiveness of foreign judgments.

It is observable, however, that in all the cases where the foreign judgment has been held conclusive, the cause of action has arisen within the country of the court which has rendered the judgment; and great weight has justly been given to the consideration, that if the court, in which an action upon a foreign court has been brought, were to inquire into the merits of that judgment, it would do so under great disadvantages, and with inferior means of arriving at the truth and justice of the case than were possessed by the court by which the judgment was rendered; and so it has been said with great force, that 'invariably experience shews that facts can never be inquired into so well as on the spot where they arose; laws never administered so satisfactorily as in the tribunals of the country governed by them."

Precisely as this language is forcible for the conclusiveness of judgments in the cases to which it refers, it is forcible against the conclusiveness of judgments rendered in the courts of countries where the cause of action did not arise, and when sought to be enforced in the country where the cause of action did arise."

Where judges so eminent differ so widely, it would be presumptuous in us to think of laying down the law. The differences will we hope have at least one good effect, which will be ere long a legislative declaration of the law. The Attorney General deserves much credit for the attempt, which we hope will be renewed during next session of the Legislature in time to become law with some modifications. His bill contains four sections, as follows:

1. A Foreign Judgment, rendered without this Province against a party domiciled in this Province, shall not be conclusive, either when the matter comes incidentally in controversy before any Court in this Province, or where a direct suit is brought in this Province to enforce such Judgment.

2. A Foreign Judgment, rendered without this Province, against a party not domiciled in this Province when the Judgment was rendered, and then subject to the jurisdiction of the Court rendering such Judgment, shall be conclusive in bar of a new action brought in this Province on the same case and between the same parties; but the party who seeks to enforce such Judgment in this Province, must bring a new suit upon it, in which the Judgment shall be *primâ facie* evidence only.

3. A Foreign Judgment, rendered in either Upper or Lower Canada, against a party domiciled in the other section of the Province, shall be conclusive in bar of a new action brought in such other section of the Province on the same case and between the same parties, but the party who seeks to enforce such judgment in such other section must bring a new suit upon it in which the judgment shall be *primâ facie* evidence only.

4. In either of the cases mentioned in the two next preceding sections, the defendant may contest the merits, and shew not only that the judgment was irregularly obtained, but that it is unjust and illegal.

DORMANT EQUITIES.

Opinions have hitherto been much divided as to the true construction of the Dormant Equities Act, 18 Vic. c. 124. Many members of the profession construed the act so as to include cases of mortgages, and as many gave it a different construction. The case of *Caldwell* v. *Hall*, reported in other columns, decides the latter to be the true construction. We are informed that the case is to be appealed, with a view to the final determination of the question.

ACTS OF LAST SESSION.

We subjoin a few of the most important Acts of last Session that are now in force, and the provisions of which are necessary to be known and acted upon at once by the profession:

CHAPTER 42.

An Act to repeal certain provisions of "the Common Law Procedure Act."

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. The two hundred and fourth, two hundred and fifth, three hundred and twenty-sixth, and three hundred and twenty-seventh sections of "the Common Law Procedure Act," and the third section of "An Act respecting Absconding Debtors," are hereby repealed, save only so far as may be necessary for upholding and continuing writs issued or proceedings had thereunder before the passing of this Act, and any further proceedings necessary to be taken for the completion of the same.

II. The following section shall be substituted for the repealed two hundred and fourth section of the first mentioned Act, and shall, in lieu thereof be read as the two hundred and fourth section of the said Act:—"The party entering any such Record shall endorse thereon whether it be an assessment, an undefended issue or a defended issue: and the Deputy Clerk of the Crown shall make two Lists, and enter each Record in one of the said Lists, in the order in which the Records are received by him; and in the first List he shall enter all the assessments and undefended issues, and in the second List all defended issues, and the Judge at *Nisi Prius* may call on the causes in the first List, at such time and times as he finds most convenient for disposing of the business."

III. The following section shall be substituted for the repealed two hundred and fifth section of the said Act, and shall, in lieu thereof be read as the two hundred and fifth section of the said Act:—"In Town causes the Records shall be entered with the Clerk of Assize, who shall, for the purpose of receiving and entering the same, attend at the Court House on the Commission or opening day, from nine in the morning until noon, after which he shall not receive any record without the order of the presiding Judge, who shall have the same power, in this respect, as set forth in the two hundred and third section, and the Clerk of Assize shall make two Lists, as aforesaid, which shall be regulated and the business disposed of as in Country causes."

IV. "In any action depending in any of Her Majesty's Superior Courts of Common Law in Upper Canada, in which the amount of the demand is ascertained by the signature of the defendant, and in any action for any debt in which a Judge of either of the said Superior Courts shall be satisfied that the case may safely be tried in the County Court, any Judge of

either of the said Superior Courts may order that such case shall be tried in the County Court of the County where such action was commenced, and such action shall be tried there accordingly and the record shall be made up as in other cases; and the order directing the case to be tried in the County Court shall be annexed to the record; and the trial shall take place in such County Court in the same way as ordinary cases are tried therein; and judgment may be entered in any such action on the fifth day after verdict rendered, unless the Judge who tries the case shall endorse on the record under his hand a certificate that the case is one, which, in his opinion, should stand for motion in the Court in which it was brought, in which case no judgment shall be entered until the fifth day of the term of the Superior Courts next following the date of the Certificate."

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23 VIC. CHAP. 25.

An Act to exempt certain articles from seizure in satisfaction of Debts.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. Chapter twenty-eight of the Ordnances of the Legislature of the late Province of Lower Canada, passed in the second year of Her Majesty's reign, is hereby repealed.

II. So much of Section one hundred and fifty-one of Chapter nineteen of the Consolidated Statutes for Upper Canada as exempts certain chattels from seizure under writs of execution issued under the provisions of that Act, is hereby repealed, and in lieu thereof the following words are substituted, and shall be read immediately after the word "excepting" in the said section, namely, "Those which are by law exempt from "seizure."

III. Section two hundred and fifty-four of chapter twenty-two of the Consolidated Statutes for Upper Canada is hereby repealed, and the following substituted therefor, namely:

"254. The goods and chattels exempt by law from seizure, "shall not be taken in execution under any writ from either "of the said Superior Courts, or from any County Court."

IV. The following chattels, are hereby declared exempt from seizure under any Writ issued out of any Court whatever in this Province, namely:

1. The bed, bedding and bedsteads in ordinary use by the debtor and his family;

2. The necessary and ordinary wearing apparel of the debtor and his family;

3. One stove and pipes, and one crane and its appendages, and one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six teacups, six saucers, one sugar basin, one milk jug, one teapot, six spoons, all spinning wheels and weaving looms in domestic use, and ten volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use;

4. All necessary fuel, meat, fish, flour and vegetables, actually provided for family use and not more than sufficient for the ordinary consumption of the debtor and his family for thirty days;

5. One cow, four sheep, two hogs, and food therefor, for thirty days:

6. Tools and implements of or chattels ordinarily used in the debtor's occupation to the value of sixty dollars.

V. Nothing in this Act contained shall exempt from seizure in satisfaction of a debt contracted for such identical chattel, of any article enumerated in Sub-sections three, four, five or six of Section four of this Act.

VI. The debtor may select out of any larger number the several chattels exempt from seizure under this Act.

23 VIC. CHAP. 50.

An Act to amend An Act respecting the Municipal Institutions of Upper Canada.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. The three hundred and seventy-seventh section of the fifty-fourth chapter of the Consolidated Statutes for Upper Canada, intituled: *An Act respecting the Municipal Institutions of Upper Canada*, is hereby repealed.

II. The following section shall be substituted for the repealed three hundred and seventy-seventh section of the said Act, and shall, in lieu thereof, be read as the three hundred and seventy-seventh section of the said Act:

"The Recorder's Court shall hold four Sessions in every year, and such Sessions shall commence on the second Monday in January, and on the first Monday in the months of April and July, and on the third Monday in the month of November."

LAW AND EQUITY BILL.

HOUSE OF LORDS.—*April 24.*

The Lord Chancellor in moving the second reading of this bill, said that we had arrived at a crisis in law reform, and the question now was, whether there should be a further fusion of law and equity. That subject had been commended to the careful attention of Parliament in the speech delivered from the Throne at the commencement of the session, with a view to enable the courts of common law finally to determine, in a satisfactory manner, any case which might be duly brought before them. There prevailed in this country what he believed was unknown in any other civilised State—a distinction between the law administered in one tribunal and the law administered in another. That had arisen from what he must call the narrow-minded and technical decisions of the common-law judges in former times. Justice having been denied to the subject in the courts of common law, it became necessary to apply to another tribunal. Another tribunal was constituted, from which the most important advantages were derived by the country—he meant the Court of Chancery. The great men who had presided in that court had constructed a most beautiful system of jurisprudence, the admiration of the whole world. For many generations a conflict went on between the courts on one side of Westminster Hall and the courts on the other, and Lord Mansfield made an attempt to bring about some reconciliation. That jurist incurred great obloquy for his endeavours, because it had unhappily been the practice of the law courts for centuries before to regard their respective rules as absolute perfection. He remembered, indeed, that when he himself entered the profession the equitable doctrines of Lord Mansfield were sneered at and contemned. Thus things continued, until fortunately a commission was appointed by her Majesty, to consider what improvements could be made in the courts of equity. The commission consisted of eminent men—viz. Sir J. Romilly, Lord Justice Turner, Sir W. P. Wood, Mr. Justice Crompton, Sir R. Bethell, Sir J. Graham, Mr. Henley, Mr. J. Parker, and Mr. W. M. James. Their recommendations, as far as the courts of equity were concerned, had been almost entirely carried into effect; but he was sorry to say that in the common-law courts much yet remained to be done. The commission took the most enlightened view of the subject, and offered most valuable suggestions. In the report which they presented to her Majesty in 1852 they stated:—

"The mischiefs which arise from the system of several distinct courts proceeding on distinct, and in some cases antag-

onistic, principles, are extensive and deep-rooted. These mischiefs, we believe, have arisen in part from the different principles by which the different courts are governed, and the different systems of law from which those principles are derived, and in part from inherent defects in the powers of the several courts. * * It happens that in many cases parties, in the course of the same litigation, are driven backwards and forwards from courts of law to courts of equity, and from courts of equity to courts of law. A defendant in an action at law, who has a just ground of defence, is often obliged to resort to equity to control the decision of a court of law, or to restrain the plaintiff at law from proceeding to obtain a judgment which cannot in equity be permitted to be available. * * Again courts of law have no powers for the preservation of property pending litigation. A court of equity has such powers; and parties suing in courts of law are thus frequently driven into equity for the preservation of the property pending the suit at law."

The commissioners laid down principles he wished to see adopted. They said—

"It is obviously most desirable, that in every case the court which has the cognisance of the matter in dispute should be able to give complete relief."

Having then discussed the various remedies which had been suggested, they continued—

"We have arrived at the conclusion, that without abolishing the distinction between law and equity, or blending the courts into one court of universal jurisdiction, a practical and effectual remedy for many of the evils in question may be found in such a transfer or blending of jurisdiction, coupled with such other practical amendments, as will render each court competent to administer complete justice in the cases which fall under its cognisance. We think that the jurisdiction now exercised by the courts of equity may be conferred upon courts of law, and that the jurisdiction now exercised by courts of law may be conferred upon courts of equity, to such an extent as to render both courts competent to administer entire justice, without the parties in the one court being obliged to resort to the aid of the other."

There the ground was laid down on which this bill was founded—one cause and one court. It was not proposed that a suit should be brought in the Court of Queen's Bench against a trustee for breach of trust, or that an action for assault and battery should be brought in the Court of Chancery; but that legal rights should be enforced in the courts of common law, and, if equitable questions arose incidentally, that those courts should have power to dispose of them without entailing on the parties the necessity of going to another tribunal, employing another set of counsel, and thus incurring infinite delay and expense. His hon. and learned friend Sir R. Bethell, who is not only a great advocate, but a profound jurist, in an address which he delivered at the inauguration of the Juridical Society in 1855, said—

"For above a century this country has exhibited the anomalous spectacle of distinct tribunals acting upon antagonistic principles, and dispensing different qualities of justice. It is the rule and duty of the one set of courts frequently to refuse to recognise the real right of ownership—to ignore defences and claims founded on the best established rules of justice; and the prevention of gross injury committed in the name of the law is made to depend upon the other court being quick enough to overtake and arrest the first in its career of acknowledged injustice, and prevent it from deliberately committing wrong."

The commissioners who were appointed to inquire into the common-law procedure had reported on the same subject, and the country was deeply indebted to them for their labours. Whatever might be thought of their suggestions respecting the equitable jurisdiction, their recommendations for amending the pleadings and process of the common-law courts would be generally admitted to have been most valuable. During the first nine months after the Procedure Bill of 1852 came into operation, the rules granted by those courts were reduced from 38,009 to 3,081, although a greater number of actions were brought and depending. The Common-law Commissioners were Chief Justice Jervis, Chief Justice Cockburn, Mr. Justice Willes, and Baron Bramwell. In their second report in 1852, the commissioners stated—

"We think we shall not outstep the limits of our commission by so far expressing our opinion, upon what is commonly called the fusion of law and equity, as to say, that, whether or not it may be thought conducive to the despatch of business and satisfaction to the administration of justice to do away altogether with the present division of labour between the courts of law and equity, so far as that division arises out of the diversity of the subject-matters over which either class of courts exercises an exclusive and complete jurisdiction, it appears to us that the courts of common law, to be able satisfactorily to administer justice, ought to possess, in all matters within their jurisdiction, the power to give all the redress necessary to protect and vindicate common-law rights, and to prevent wrongs, whether existing, or likely to happen unless prevented."

They then went on to recommend specific improvements, on which the present bill was partly founded. On the recommendation of the commissioners, jurisdiction was given to the courts of common law in all cases where there was an equitable defence; but the courts of equity held that suitors were not bound by the judgment where there was power to set up an equitable defence; so that, if judgment were given against them, they might go into a court of equity, file a bill, and have the whole case tried over again. Sir H. Cairns, a great ornament of the profession, had brought in a bill which did give to the courts of equity the powers that were required to do full justice to suitors who came before them; whereas formerly it was necessary, when a legal question arose, to go into a common-law court, having an issue directed to try the point. Sir H. Cairns' Act enabled the court of equity to decide legal questions arising in an equitable suit; but he was sorry to say that the equity judges were very reluctant to avail themselves of the power, and it was often necessary in an equitable suit to resort to an action in the common-law courts to enforce a legal right, and to incur great additional expense by employing two distinct sets of counsel. In their third report, the Common-law Commissioners—Cockburn, Martin, Willes, Bramwell, and Walton—pointing out the evils and remedies, said:—

"It is our intention and wish that the result of what is proposed should be ingrafted upon, and become part of, the common law, and that the distinction between Common law and Chancery law should be so far abolished. If, in addition to this, the Court of Chancery is prohibited from interfering in cases where common-law rights are thus rendered capable of complete vindication in the courts of common law, and in which, therefore, its interference will have become useless, the greater part, if not the whole, of the field of conflict will be done away with, by confining the operation of the courts respectively to subject-matters peculiar to each. Thoroughly to effect this it is necessary to confer upon common-law courts power to give, in respect of rights there recognised, all the protection and redress which at present can be obtained in any jurisdiction, and it is upon this principle that we have acted in our suggestions. If they be carried into effect there will no longer be the spectacle of jurisdictions imperfect in themselves, and clashing with one another, but each court will be armed in itself with exclusive jurisdiction over the subject-matter within its cognisance, and with full power to give all the protection and redress which the law at present affords by means of a plurality of suits. The conflict of jurisdiction will be done away with, because the occasion for it will no longer exist, We have only to add, that we have given our best attention

to the question, whether it is necessary to adopt the procedure of the Court of Chancery in cases where it is proposed to borrow from its remedies; and we have arrived at the conclusion, strengthened by an experience of the working of the Common-law Procedure Act of 1854, that the desired object can be attained as effectually, and with less expense, by means of the ordinary proceedings of the common-law courts."

This report having been presented to her Majesty, no time was lost to carry it into execution. The bill, of which he now moved the second reading, had been framed entirely and exclusively on the suggestions of those eminent lawyers, the commissioners. The bill for which he took no merit, was drawn by Mr. Justice Willes. He had introduced it without altering a single line. It was approved by all the common-law judges; but the equity judges, including the Master of the Rolls and Lords Justices Knight Bruce and Turner, signed a memorial against any further fusion of law and equity. He should not ask their Lordships to pass this bill unless the objections of the equity judges could be obviated; and therefore he proposed, if the bill were read a second time, to have it immediately referred to a select committee. Lord Chief Justice Cockburn had assured him, that, after having carefully considered the question, he did not believe those objections to be tenable; and Mr. Justice Willes was of a similar opinion. He should not enter in detail into the provisions of the bill, but he might observe, that in those cases in which a court of equity possessed the right, on fixed principles, to grant relief against the forfeiture of leases, and an ejectment was brought by the landlord against the tenant, relief was sought to be afforded by dispensing with the present dilatory proceedings. The noble and learned lord concluded by moving the second reading of the bill.

Lord St. Leonards observed, that in so far as the bill tended to alter the present system of legal proceedings, it might be characterised as a measure calculated rather to promote the confusion than the fusion of law and equity. He should in the first place, draw the attention of the House to the fact that the commissioners had not been authorised to make the report which they had done, in reference to equity jurisdiction, inasmuch as their inquiry had been directed to the principles of pleading in the courts of common law, the manner of conducting suits before those tribunals, and other circumstances connected with their proceedings. The commissioners had, therefore, gone beyond the scope of their powers in reporting that it was expedient to give to the courts of common law all the material functions which were now discharged by courts of equity; and this without the slightest necessity. By this process it was supposed that the two different systems would be amalgamated; but all they would do was to take equity from the courts that understood it, and persons competent to administer it, and give it to the courts that did not understand it, and persons who were not competent to administer it. If there must be a fusion of the two systems, they must have a code of laws drawn up for the purpose. As the law at present existed, no man had ability enough to execute both common law and equity. Let them consider a moment how the courts, the machinery of both systems, stood. There were seven judges in the courts of equity—the Lord Chancellor, the Master of the Rolls, two Judges of Appeal, and three Vice-Chancellors. How they had answered the purpose intended was proved by the fact that in no country was a system of equity law ever so well or so cheaply administered as in England at present. The Lord Chancellor sat separately, the Master of the Rolls and Vice-Chancellors were always sitting. What did the bill propose to substitute for this machinery? The fifteen judges of the common law, whose time was already fully occupied by the business of their own courts. Only a few evenings since the noble and learned lord on the woolsack asked their lordships to agree to the bill for increasing the powers of the judge of the Divorce Court, on the ground that the common-law judges were too much occupied to be able to sit as assistant judges in the Court of Divorce. Then, how was it possible to ask their lordships, without necessity, to transfer the duties of the courts of equity, which they were perfectly competent to execute, to the courts of common law, that could hardly do all their own work? They were quite inadequate to discharge the new duties required of them or undertake the amount of business that now occupied the six equity courts and the seven judges. The consequence of the change would be, the equity courts would not be fully occupied, and the courts of common law would be encumbered with too much work. The machinery of the two systems, as at present constituted, enabled each division to discharge its own duties. But he thought, with all respect to the common-law judges, that they were rather too fond of making cases brought before them the subject of reference to arbitration which was not the case in the Courts of Chancery. It would be found impossible to transfer the business of one set of courts to the other. It was inevitable that the common law judges should not be learned in the law of equity; yet it was proposed to transfer to them a system of procedure they had never studied, and in which they had not had the practice indispensable to form an equity lawyer. The consequence of referring equity cases to the courts combined must be confusion, and a mass of conflicting opinions. He had the greatest respect for the learning of the common-law judges in their own line, but common-law lawyers themselves would be ready to admit that they were not equity lawyers. If there existed a want of capacity in the judge, insufficient time for dealing with these questions, and a want of adequate machinery for executing the decisions which might be made, with what prospect of success, he asked, could it be proposed to confer equitable jurisdiction on the courts of law? By taking on themselves to act under the provisions of this bill, these courts would frequently be forced to take charge of the money belonging to suitors. In Chancery this portion of the duties of the court had been reduced to a perfect system. All monies were paid in to the Accountant-General, whose office was one of long standing, and who had under him a large staff of clerks, while in the Bank of England there was a large department appropriated to the Court of Chancery, with a view to insure the security of the funds and their due application. Was it intended that there should be a similar large establishment for the courts of common law, or were they to have a repetition of what had already happened, where a suitor, coming to claim his money, found that it had been dealt with by the person to whom it was intrusted? In the case of a fraudulent or improvident trustee the person entitled to the equitable estate would have little difficulty, and would incur comparatively trifling expense, in causing the property to be conveyed into proper hands; but before the common-law judges a fraudulent trustees would be able to make out a much better case; and under the provisions of this bill, the owner he contended, would be compelled to make good his equitable right, as against the trustee, before it would be competent for the judges to decide on the evidence. The result of the measure, if passed, would be, that the equity courts would sit inactive, while the law courts, with insufficient machinery, time, and information, would be engaged in the attempt to execute imperfectly and ineffectually the business which it was sought to withdraw from the proper channel. As for amending the bill in committee, there was but one thing which could be done with it, and that was to run a pen through all the clauses relating to the equitable jurisdiction. The third report of the common law commissioners proposed that certain equitable powers should be given to the law courts, which they refuse to assume on the ground that they had not sufficient jurisdiction. It was not, however, a want of power on the part of the judges, but a want of determination to execute that power which prevented them from doing so. The judges found—and nobody was better acquainted with the fact than the noble lord on the woolsack—that they were unable to deal with the subject, and they refused to assume the authority which the act of Parliament had conferred on them. Now, it was proposed, in so many words, that they should have the power which they had before

declared they were unable to execute. The bill directed that in cases where the judges found they were not able to do justice they should let the party go to equity. Was ever such a provision heard of? It was proposed, as an improvement on the existing system, that powers should be transferred from the court of equity to a court of law, and if the latter found itself unable to deal with the cases brought before it, the remedy provided was, that they should be sent back to the very court to which at the present moment they belonged! He maintained, as he had often done, that the tendency of modern legislation was to drive suitors from the uncertainty and conflict of jurisdictions into an arrangement of their suits by way of arbitration. The bill proposed to give to courts of law power to enjoin courts of equity not to give relief; and a more monstrous proposition he had never heard. The noble and learned lord had referred to the example of America, where the equity jurisdiction was at one time in a most unsatisfactory state. The remedy applied was to enable judges of the courts of law to sit also as judges of equity; but that was not a fusion of law or equity—it was a mere confusion of judges. The judges of the Court of Exchequer here had at one time an equity jurisdiction; but the result of their being both law and equity judges was, that the equity jurisdiction was administered so unsatisfactorily that an end was put to it by the unanimous assent of all men, at a vast expense in the way of compensations and retiring allowances. And yet Parliament was now asked to sanction the re-establishment of a system with regard to all the courts of law which had already been tried and failed signally! When this bill was produced it had thoroughly astounded him, and he had no hesitation in saying that his surprise was shared by every lawyer in and out of Parliament. He had suggested to his noble and learned friend on the woolsack to refer it to the working judges of the courts of equity—since the report of which it was the echo was drawn up entirely by common-law judges. That was done, and the report of the Master of the Rolls and the three Vice-Chancellors was now on the table, condemning the bill on every ground. To every word of that report he thoroughly subscribed. The Lords Justices had not been included in the reference, but they had also expressed their opinion in strong condemnation of the bill. Therefore the noble and learned lord on the woolsack—new to the court and to its practice—stood alone against the other six judges of the court, whose lives had been spent in it. A more important question had scarcely ever came before their lordships, and whether the bill were to be referred to a select committee or not, he should certainly take the opinion of the House in the present stage.

Lord Cranworth said that he was not at present prepared to say whether the bill would be dealt with better in a select committee, or in a committee of the whole House; but it was very unfair to endeavour to crush the bill at once, merely because some of the details might be objectionable. The object of his noble and learned friend on the woolsack was to enable every court to complete the suit, and to decide finally on every matter brought before it. No one could doubt that it was better that each case should be decided quickly, cheaply, and before one tribunal, rather than before many; and therefore in the object of the bill he entirely concurred. He thought, for instance, that it was manifestly useful that, when an action of ejectment was brought, the court of common law should be able to restrain parties from committing waste, without the necessity of an injunction from the Court of Chancery; and that if upon an action being brought for forfeiture for non-payment of rent, and the money were paid within a certain time, a court of common law should be able to stop the action, in the same way as the Court of Chancery could now do. But with regard to the great bulk of the clauses, he should feel great reluctance in giving his assent. The real practical reason why they could not make a fusion of law and equity was, that one class of subject-matter in litigation required one sort of machinery, and another class required another. If law and equity were fused, all the courts must have the same machinery in order to do justice. As an illustration—if a person died in debt, the creditor might sue the executor at law, and obtain judgment; but then the court of equity would step in, and require all the assets to be collected, and distributed ratably among all the creditors. The courts of common law could not possibly deal with such a case, because they had not the machinery whereby full justice could be done. The question was not whether the judges were equally competent, but whether the courts had equally competent machinery. All the learning and intelligence in the world would not do unless there were the means to collect the assets, and distribute them ratably. On the other hand, there were cases in which it was unjust for the plaintiff to sue at all, yet the defendant could not stop the action without going to the Court of Chancery. It was to meet this state of things that provision was made in the second Common Law Procedure Act, whereby parties were allowed to plead equitable defences, if the court did not feel incompetent to deal with the matter. In the first year after the passing of that act two cases arose which completely illustrated the necessity of the alternative which enabled the courts of common law either to admit or refuse an equitable plea. In the first case an action was brought in which the equitable defence depended on the defendant executing a proper surrender, and doing other acts which the courts of common law had no means of enforcing. In that case, therefore, the plea was not allowed. In the second case an action was brought to recover the value of machinery in a mill. The equitable defence was, that 10,000*l.* had been paid for the mill and machinery, but, by a mistake, the machinery was not mentioned in the bought and sold note. The court of common law could deal with such an issue as that, and the plea was admitted. By this bill it was proposed to enact that a party should be able to obtain an *ex parte* injunction upon what was called an summons from a judge at chambers. At present such injunctions were only granted by the Court of Chancery, to prevent irreparable mischief, upon a bill and affidavit disclosing all the circumstances both for and against the party applying. No such security would, as he understood the bill, be obtained under the present measure. More than this—it was obvious that an injunction, granted with the view of preventing irreparable mischief to one person, might cause an equal injury to him against whom is was granted. Accordingly it was essential to justice that there should be an immediate and ready means of getting rid of it. Under the present system the Court of Chancery was in theory, and to a great extent, in practice, always open; but if injunctions were to be granted by judges at chambers during vacation, it might be several weeks before parties considering themselves aggrieved had an opportunity of applying to a court of common law for their dissolution. He had felt it his duty to state his views upon these subjects to their lordships, but at the same time, the bill contained a great many useful provisions, and he therefore hoped that they would give it a second reading.

Lord Kingsdown said that no bill more important in its consequences than this had ever been laid before their lordships, because, whether rightly or wrongly, it would subvert the system of law which had prevailed in England for above 200 years, and would introduce into the administration of justice a confusion and an uncertainty to which the nation had hitherto happily been a stranger. The distinction between law and equity arose from the circumstance, that any system of jurisprudence which pretended to effect justice must apply different remedies to the assertion of different rights, and to the redress of different wrongs. The evil which was proposed to be remedied by this bill, and which the report of the learned commissioners suggested needed a remedy, was not that the system administered by the Court of Chancery required to be altered, not that it was wrong, not that it failed to do justice, but that it would be more efficiently applied by courts other than those to which its administration was now intrusted.

The question was not whether some particular items of improvement might be adopted, but whether the general change, termed "a fusion of law and equity," was in itself desirable; and if so, whether this bill would satisfactorily carry it into effect. He collected from the report of the commissioners, that his noble and learned friend opposite (Lord Cranworth) objected on a former occasion to proposals which were again submitted to their lorships in this measure. In this matter he must say his noble and learned friend had added another to the many acknowledged, or but ill-acknowleged, obligations which the country owed to one who, while he held the Great Seal, unostentatiously discharged his high duties in a manner that might challenge comparison with his predecessors. The provisions of the bill with respect to granting injunctions and the hearing of appeals, instead of diminishing delay and expense would largely increase them. After describing the various costly stages through which litigants would have to pass without obtaining a settlement of the questions in dispute between them, the noble and learned lord said he had every respect for the commissioners on whose recommendations the measure was stated to be based; but it was not in the nature of things, that they should understand the equitable principles, practice, or pleading which they desired to apply to the common law courts. It was with surprise he had heard the authority of his learned friend the Attorney-General cited in favour of this bill.

Lord Chancellor.—I quoted, in support of the principle of the bill, his address to the Juridical Society.

Lord Kingsdown continued.—They all knew the precision and accuracy of the Attorney-General; and it was impossible for him to persuade himself that his learned friend had ever given his high sanction to one single clause in this measure. Judging only from the internal evidence of that document, he must say that no man in the slightest degree conversant with the doctrines and practice of a court of equity could give his sanction to such a bill as that. It was said to be desirable that courts of law should possess the jurisdiction by way of injunction now exercised by the courts of equity. And how was it proposed to carry out that object? In the courts of equity an injunction was granted most rarely, and guarded with extreme precautions, in order to restrain the infraction of a right. It was given only in cases where, if withheld, irreparable injury would be done to property. His noble and learned friend said he was responsible for this bill. One could hardly believe that he had ever read its provisions. While professing to confer this jurisdiction on courts of law, instead of confining it as it had been confined by courts of equity, the bill actually extended it to every possible case in which actions for breach of contract or other injury might be brought. All actions at common law were founded either on contract or on tort; and in what cases were courts of law to be empowered to issue writs of injunction? Why, before any proceedings had been taken, "in all cases of threatened breach of contract or other injury of such a nature that an action at law for damages might be maintained for the same if committed." Was there ever anything so monstrous? Any action for a threatened breach of the peace—the most important or the most trivial—might be the subject of these injunctions, because a court of equity might issue them. Looking through this report, as he was bound to do when told it was the foundation of this bill, he had met with a passage which had rather surprised him, and which he was utterly unable to comprehend. It spoke of the jurisdiction of the Court of Chancery "to entertain bills technically called bills for new trial." He must say he had never heard of such bills. He should apologise to their lordships for entering into these details, but it was important that the matter should be fully discussed. A good deal had been talked of the fusion of law and equity, but he could not help thinking that there ought to have been a fusion of equity and common-law judges on the commission. He had no apprehension that this bill, or anything like it, could ever by possibility pass into law. He had not much apprehension that this bill would go to the other House of Parliament in its present shape. He confessed he distrusted all these attempts to tamper with the existing legal institutions of the country. Our judicial system was like our legislative system; they were both the native growth of England; they had grown with the growth of the people, and accommodated themselves gradually to their wants. There might be irregularities or a want of symmetry in some parts of the system, but they had combined to give the country a greater share of order, freedom, and security of property than had ever been enjoyed by any other country under the sun; and he did trust their lordships would pause long before they adopted speculative alterations either to impair the efficiency of the courts or endanger the security of property.

Lord Wensleydale entirely agreed in the panegyric pronounced by his noble and learned friend on the woolsack on the various commissioners who had considered this subject, but he objected to this bill going so much beyond the original cases in which the equity and common-law courts came in contact with each other. He therefore entirely agreed with the noble lord who first addressed their lordships in opposition to this measure, as to the extreme impropriety of extending the jurisdiction of common-law courts to cases of injunction. The noble and learned lord concluded by observing that he could not concur with his noble and learned friend (Lord St. Leonards) in objecting to the motion for the second reading of the bill.

Lord Chelmsford said he entirely concurred with his noble and learned friends by whom he had been preceded in their opposition to the bill, and added, that when the question which it involved came on for discussion again, it would be desirable that the House should consider whether a measure of such a character ought to be introduced, proposing to effect, as the greater portion of it did, important alterations in the jurisprudence of the country, and adopted, so far as its reference to a select committee was concerned, because it contained certain clauses which were in themselves unobjectionable.

The Lord Chancellor, in reply, said that as the bill was about to be read a second time without oppostion, he should not enter into a discussion of the various objections which had been urged against its adoption. He could not, however, help expressing the great surprise which he felt at the statement which had been made by his noble and learned friend who had left the House, (Lord St. Leonards), to the effect that he regarded it as an act of great presumption on the part of the Common-law Commissioners that they should have dared to meddle with the subject. His noble and learned friend, indeed seemed to look upon the conduct of the commissioners in that respect as the right reverend bench might be supposed to view a proposal for the rejection of the ten commendments; but he should remind the noble lord that the commissioners had been authorised to examine how far the courts of common law might be improved, and that they had come to the conclusion that a great obstacle to that improvement was the want of equitable jurisdiction. Their having made a report in accordance with the authority with which they were invested, constituted the head and front of their offending; and he could not help adding, that the objections to the bill, which were founded on that report, seemed to him to be based on an entire misapprehension of its meaning; for it did not propose that suits, of whatever character they might be, might be brought indiscriminately before either equitable or common-law tribunals, but that if, incidentally, a question of law arose in a suit in equity, the equity courts might be empowered to deal with it, and *vice versa*. Any amendments in the bill which might be suggested would, he need hardly say, receive his most careful consideration,

In reply to *Lord Chelmsford*,

The *Lord Chancellor* said, when the memorial from the

equity judges should be addressed to him he would lay it before the House; and when their lordships had had an opportunity of reading the objections on one side and the other, he should be ready to refer the bill to a select committee.—*Jurist.*

LECTURES

ON THE JURISDICTION AND PRACTICE OF THE HIGH COURT OF ADMIRALTY OF ENGLAND.

BY JOHN MORRIS, ESQ.

(*Conclusion.*)

I now come to the jurisdiction and practice of the Prize Court. My remarks under this head must be extremely general. Time prevents my entering upon it at all in detail. I need scarcely say, that I shall not profess to enter upon the principles of prize law; to discuss such a subject would require more time than I have allotted to me for both my lectures. I shall merely refer to the jurisdiction and practice of the Prize Court (for the present happily of minor importance), with the view of giving you a general notion thereof, that being necessary in order to complete the subject which I have undertaken.

The rule of locality, to which our attention has been so much directed in reference to the Instance Court, never prevailed in the Prize Court. In the language of Dr. Browne, "In matters of prize, the rule which the civilians so much, so justly, but so unsuccessfully laboured to establish in the Instance Court, is universally confessed and admitted."

The Prize Court exercises its functions by virtue of a special commission from the Crown, issued at the commencement of each war.

The Crown is, as it has been termed, the "fountain of prize." "No man has or can have any interest in it," said Lord Stowell, "but what he takes as the mere gift of the Crown; beyond the extent of that gift he has nothing." To whom, then, does the Crown grant prize? It is not everyone who can seize enemies property. In our wars prior to the last, licenses were granted to privateers to seize prizes. The officers of the navy have always had direct power from the Crown to seize, without any express license. In the last war no licenses were granted to privateers,* the power to seize was, therefore, limited to the officers of the navy.

Captors, even when Crown officers, have only a right to seize subject to the duty of bringing to adjudication; "a duty," as Lord Stowell remarked, "enjoined that they may not make seizure, without bringing the ship and goods seized to the notice of the proper tribunal, in order to prevent the right of seizure from degenerating into piratical rapine."†

It is a principle of prize law, both in this and other civilised countries, that the sovereign power can direct the release of ships taken as prize, before final adjudication. An exercise of this power occurred in the late treaty between France and Austria—one of the articles of which was, that France should give up all Austrian ships not condemned.

In matters of prize the Admiralty has exclusive jurisdiction. The Courts of Common Law cannot interfere. This point was expressly decided in the great case of *Lindo* v. *Rodney*.‡ Lord Mansfield, in that case, gave a luminous exposition of the jurisdiction of the Prize Court. He said, "The Prize Court is peculiar to itself—it is no more like to the Admiralty (viz. the Instance Court) than to any court in Westminster Hall. The Instance Court is governed by the Civil Law, the laws of Oleron, and the customs of the Admiralty, modified by statute law. The Prize Court is to hear and determine according to the course of the Admiralty, and the law of nations. The end of a Prize Court is to suspend the property till condemnation; to punish every sort of misbehaviour in the captors; to restore instantly, *salis levatis*, if, upon the most summary examination, there does not appear a sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard. A captor may and must force every person interested to defend; and every person interested may force him to proceed to condemn without delay."

The Prize Court tries all captures in ports, havens, &c., as well as on the high seas; and so, even, as to prize taken on land, if it be the result of a fight begun on the water. But, as remarked by Lord Mansfield, in the case* which I have just referred to, "as to plunder or booty in a mere continental land war, without the presence or intervention of any ships or their crews, it never has been important enough to give rise to any question about it. It is often given to the soldiers upon the spot, or wrongfully taken by them contrary to military discipline. If there is any dispute, it is regulated by the Commander-in-Chief. There is no instance in history or law, ancient or modern, of any question before any legal judicature ever having existed about it in this kingdom. To contend that such plunder was within the rule and jurisdiction of the Prize Court, might be opposed by the subject matter, the nature of the jurisdiction, the person to whom it is given, and the rules by which he is to judge."

By the Statute of Victoria,† it is enacted, s. 22, as follows—viz. "That the said High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof which it shall please her Majesty, her heirs and successors, by the advice of her and their Privy Council, to refer to the judgment of the said Court; and in all matters so referred, the Court shall proceed as in case of prize of war; and the judgment of the Court therein shall be binding upon all parties concerned."‡

The Prize Court proceeds according to the law of nations; as Lord Stowell remarked,‖ "what foreigners have a right to demand from it, is the administration of the *law of nations*, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable repugnance."

One of the principles of the law of nations is, that the question of prize must be decided by the Courts of the country of the captor. Thus, supposing in the late war between France and Austria one of our ships had been seized, either for carrying contraband of war, or for any other reason for which the property of neutrals is liable to seizure, the Courts of France or Austria, as the case may be, would have had to decide on the important and delicate questions which might have arisen out of such a seizure; hence the great importance of maintaining in this country, in time of war, the high character which our Prize Court has attained, through the eminence and ability of its judges, seeing the great influence the decisions of the Court might have on our relations with other countries, especially neutrals.

On one occasion Lord Stowell is reported to have said—"The seat of judicial authority is locally here in the belligerent country, according to known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm: to assert no

* One of the articles of the late Treaty of Paris was, that privateering should be abolished: but this, of course, only applies as between the contracting parties The United States of America have refused to be bound by it.

† *The Elsabe*, 4 Rob. 185. ‡ 2 Douglas, Rep. 613.

* *Lindo* v. *Rodney*, 2 Doug. Rep. 613. † 3 & 4 Vict. c. 65.

‡ The registrar stated to me after the lecture, that no orders in Council have as yet been made under this section. He also mentioned to me the case of a seizure during the Russian war of a vessel in course of building in this country for Russia; it was condemned as prize—not by the Admiralty, it being seized *on land*—but by an inquisition from the Crown.

‖ *The Recovery*, 6 Rob. Rep. 341

pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character.

The Prize Court, in administering what has been termed the law of nations, is frequently controlled or guided by the Orders in Council, proclamations, &c., of the sovereign. Lord Stowell remarked *—"It is strictly true that, by the constitution of this country, the king in council possesses legislative rights over the Prize Court of Admiralty, and has power to issue orders and instructions, which it is bound to obey and enforce; and they constitute the written law of this Court. These two propositions—that such Court is bound to administer the law of nations, and that it is bound to enforce the king's Orders in Council—are not at all inconsistent with each other, because these orders and constitutions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the Court itself—or they are positive regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing. The constitution of the Prize Court, relatively to the legislative power of the king in council, is analogous to that of the Courts of Common Law relatively to that of the Parliament of this kingdom. These Courts have their unwritten law, the approved principles of natural reason and justice; they have likewise the written or statute law in Acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large, if they were left to the imperfect information which the Court could extract from mere general speculations."

Such are the leading outlines of the jurisdiction of the Prize Court.

The following is a short outline of its mode of procedure, as set forth in a letter from Lord Stowell and Sir John Nicholl to Mr. Jay, the American ambassador, in 1794, and it is believed that the practice is still substantially the same as there described. [The lecturer, instead of reading this extract, referred his hearers to "Story on the Practice of Prize Courts," by Dr. Pratt (a book easily to be procured at a low price), which contains not only the letter referred to, but also a great deal more of valuable and instructive information. This book was recommended to the attentive consideration of the student.]

I ought here to mention, what no doubt most of you are familiar with—viz. that the appeal from the Admiralty Court, both the Instance and Prize Court, is to the Privy Council; the same applies to the Vice-Admiralty Courts in our colonies, from which there used to be an appeal to the Court of Admiralty here.

Before concluding, I wish to make a few general observations and suggestions.

Mr. Pritchard. in his introduction to the Admiralty digest, described the branch of law which we have been considering "as highly interesting, from its great importance to the commercial interests of Great Beitain, and from the simplicity and purity of its principles, as contradistinguished from the intricate ramifactions of the municipal law, consequent upon an artificial and highly refined state of society.

A comparison of the procedure of the Court with that of our superior courts of law and equity, will, I think, suggest the reflection whether this Court might not usefully have extended to it concurrent jurisdiction, with our courts of law and equity, in all maritime matters. The prejudice against the civil law, which first occasioned the passing of the restraining statutes, has no longer any place with us. The probate and divorce jurisdiction is now administered by our municipal judges, and the procedure of those Courts, as well as that of the Admiralty Court, is now assimilated, as near as may be, to the practice of our other Courts; but the expedition with which the ship can be arrested, the completeness with which justice may be done upon the whole case without the expense of Chancery, and a *relative* superiority in the mode of taking evidence, are advantages which would, I think, bring suitors to the Admiralty Court, if they were allowed a free choice of courts.

On this point I will read to you the language in which Sir Leoline Jenkins summed up his celebrated argument before the House of Lords on the Admiralty jurisdiction, in the reign of Charles II.:—"I hope, my Lords, to conclude with something that will give all parties content, and must be understood to be a *conveniency:* it is, that we of the Admiralty are content that suitors may have *their option* of the court they would sue in. If mariners will go for their wages, owners for their freight, merchants for their damages, material men for their money, to the common law, we shall not in the least regret it; but if they choose rather to come to the Admiralty (as certainly they will not, unless they find the dispatch quicker, the proceedings less chargeable, and the method of judgment and execution more suitable to their business), we desire leave to receive them, and do them justice without the danger of a penal statute, and without the interuption of prohibitions when once we are possessed of the cause. And this is all we desire."

I can only echo the quaint language of the old Admiralty judge, as clearly expressing what, it seems to me, will alone meet the necessity of the case at the present time.

In America, where Admiralty law is administered by the same judge, and in the same courts, as common law and equity, the judges have struggled, and successfully, to maintain and uphold the Admiralty jurisdiction, and the consequence is that, in that country, the Admiralty has concurrent jurisdiction with the other courts in all or most civil maritime matters. In America the Admiralty process *in rem* is only applied where there is a lien, either by the maritime or statute law or by contract; where there is no such lien the only remedy available is *in personam*, and this seems to me the true principle, and one which should be borne clearly in mind in any extension of the Admiralty jurisdiction with us. Hitherto it has not, I think, been properly attended to. Thus by the statute of Victoria, a foreign ship is made subject to proceedings in Admiralty for necessaries, and thereupon it has been held that the proceeding *in rem* applies, that being one (although, as we have seen, not the only) mode of Admiralty procedure. No doubt this was what the Act of Parliament intended, but it would have been far better, I submit, to have created an express lien by the statute. One of the inconveniences of not having done this is, that if a question should arise as to necessaries to a foreign ship in any other court but the Admiralty, it would be there held that there is no lien, and thus the two tribunals would be administering what is practically different law. Another inconvenience of there being no lien created is pointed out by Dr. Lushington, in the case I referred to when upon the subject of "necessaries." But so it is in most of our legislation, we don't like to go straight at the point; now, although I advocate the extension of the Admiralty jurisdiction, I do not enter upon the question of the extension of the lien on the ship, or the proceeding *in rem*, which is the necessary and proper accompaniment of the lien. Put the extension of the jurisdiction on its proper ground—viz. the free choice of the suitor—and it will, I think, be carried; but if we mix up with it the question of lien, we at once open up different considerations, on which there is a good deal to be said on both sides. Time will not permit me, and if it would, this is hardly the place, to enter upon that question. All that I now contend for is, that the Admiralty jurisdiction should be extended in the way I have suggested, providing, at the same time, as is

* Edwards's Adt. Juridic. p. 240.

the law in America, that the remedy *in rem* should, as to any cases not now cognisable by the Admiralty, only apply where there is a legal lien; in other cases letting there be a remedy *in personam* only.

In the Admiralty Courts in our North American colonies, the Admiralty jurisdiction remains on its ancient footing. The reason given by Dr. Lushington is,* "that after the revolution of 1640 broke out; there was a great jealousy against the Ecclesiastical Courts, and this was extended to the Court of Admiralty; and so in Lord Holt's time its jurisdiction was curtailed, whereas in our North American colonies there were no Ecclesiastical Courts to excite any such jealousy."

The Scotch Courts are enabled to act *in rem*,† by virtue of their ordinary powers of arrest, without the aid of the maritime law. Until within modern times there was, however, a special Admiralty jurisdiction in Scotland (as there is still in Ireland and also in the colonies—in the latter, under the title of Vice-Admiralty Courts), but now it is vested in the Court of Session, which, as you no doubt know, is a Court administering both law and equity, as is usually, if not universally, the case with the Courts of all countries, whose jurisprudence, as in Scotland, is founded on the Roman civil law.

In this country, the public mind is quite disposed to give a fair trial to any mode of procedure, which aims at greater simplicity than that which prevails in our courts of law and equity.

It is scarcely necessary for me to refer you to what I have already said, as to the advantages of proceeding in the Admiralty, instead of at common law, in collision causes. Over charter-parties there seems no valid reason why the Admiralty Court should not have cognisance; and there is the reason in favour of it, that the Admiralty clearly had jurisdiction in such cases long before the passing of the Restraining Statutes. At the time when efforts were made at an arrangement between the Common Law and Admiralty Courts in the reigns of James I. and Charles I., it was conceded that the Admiralty should have jurisdiction in cases of charter-parties. So, in suits for wages, why not abolish the distinction, which precludes suits in this court where there are special contracts? Such abolition was, *I believe*, recommended in the report of the select committee, to which I shall presently advert. Why has the Court of Chancery had conferred on it by the Merchant Shipping Act, s. 504, sole jurisdiction, where there are several claims on the ship for damage and the value of the ship is insufficient to pay them all, to apportion the value amongst the several claimants, when it might, I submit, have been as well if not better exercised by the Court of Admiralty, which has generally to adjudicate on the very claims which necessitate the interference of the Court of Chancery? ‡ Why in such case could not the Court of Admiralty have power to complete justice, without going to a second, and that a very expensive court?

Then, again, in marine insurance cases, where there are several underwriters, a separate action at common law can be brought against each. It is true that these actions may be consolidated, but not until the expenses of the initiatory steps in each action have been incurred; whereas, in the Admiralty one suit would determine the whole matter.‖

In this court the proceedings are not cramped, by limiting the matter to be tried to certain defined issues between plaintiff and defendant; but the Court can not only try disputed questions, whether of law or fact, but can also, in the same suit, administer equity, as between the parties to it, without sending them to another court. This is what it does in salvage cases, where in the first instance, the Court determines how much salvage is to be paid, and then, in the same suit, apportions the amount amongst the salvors, if more than one, according to their respective degrees of merit.

There is a case reported in the 14th *Jurist*, where bottomry creditors seized the cargo under the Admiralty process; and, there not being enough, otherwise, to satisfy the bonds, the cargo was applied to that purpose, and the owners of the cargo, in order to recover the value of it from the owners of the ship had to bring actions at law; whereas, if the Admiralty had the enlarged jurisdiction I have suggested, it could, in one suit, have adjudicated on the rights of all parties arising out of the bottomry transaction.

At present the Admiralty Court has no power of enforcing its decrees, where the ship or its proceeds are not arrested, except by attachment. If the jurisdiction is extended, the Court ought, I submit, to have the same powers of issuing execution directly, against goods and lands, as are now possessed by the courts of law and equity; it is only within the last few years that such powers have been conferred on the Court of Chancery.

In the report of the select committee of the House of Commons on the Admiralty Courts, in 1833, and the evidence taken thereunder, great fears were expressed as to the effect of throwing open the Ecclesiastical and Admiralty Courts, as tending to discourage the special study of the civil law in this country. The great importance of having a judge, and a body of practitioners, skilled in civil and international jurisprudence, was urged, and properly so. What would have been the position of this country during the early part of the present century, if it had not had a judge like Lord Stowell to administer the numerous, important, intricate, and delicate questions of international law which then arose—questions which, between us and neutrals especially, might have influenced decisions of war or peace? So, again, as was properly urged in the report it is of great importance that we should have some judges skilled in the civil law to sit in the Privy Council, on the decision of appeals from our colonies, in some of which the civil law, or some modification thereof, prevails.

We must, if possible, keep a sufficient amount of Admiralty business together, to occupy a competent judge, and to attract a proper class of practitioners, both as advocates and proctors. In this way the danger referred to in the report may be best avoided, and it affords another, and a strong argument for extending the Admiralty jurisdiction.

I have taken notes of some cases in the reports, bearing upon the duties of proctors in this court, which I thought might not be without use on an occasion like the present.

The first I have is of a case as to the preparation of affidavits; the note of it is as follows:—"It is contrary to the duty of persons preparing affidavits in salvage cases, &c., to make out the statements to which the witnesses are to swear, in language contrary to the natural tone in which the parties would unassisted, express themselves. They should consist of a plain statement of the facts and circumstances, as the witnesses themselves state them, and as they would state them if examined in court. The Court wishes always to have the statements of such witnesses in their own language."—*The Towns*, 8 Jur. 222.

The note of another case is as follows:—"Proctors are to take all practicable care to be assured, as far as circumstances will permit, that they are duly authorised to appear for the individuals on whose behalf they profess to act."—*The Haidee*, 1 Notes of cases, 597.

In another case (one as to mariner's wages, where the

* *The Royal Arch*, 30 Law T. 199.

† See an interesting case, *Harmer* v. *Bell*, 7 E. F. Moo. 268. in which the distinction between the Admiralty process *in rem*, and the power of the Scotch Courts to arrest, and of the Mayor's Court in London to attach, was fully considered.

‡ See the case of *Cope* v. *Doherty* (27 L. J., Ch., p. 600). It is a striking illustration of the mischief I have pointed out in transferring to Chancery the jurisdiction in such cases. It was held in that case that an American ship could not avail itself, either against another American ship or a British one (for it was not clear what the character of the other ship was), of the limitation of the owner's liability for damage: and that notwithstanding a suggestion that the law of America was the same as ours on this point. I do not think the Court of Admiralty (which is an international court) would have decided so liberally. *S. C.*, 4 K. & J. 367; 2 De G. & J. 614.

‖ See 3 Black. 74, as to the "Court of Policies of Assurance," created by st. 43 Eliz. c. 12. The remarks there made seem to be confirmatory of the views I have here urged. See the case of *De Lovio* v. *Boit*, before referred to, in which Judge Story held, that a policy of marine insurance was cognisable in the Admiralty of America.

claimants were illiterate), Lord Stowell remarked that, "the proctor has in these cases something of a public, as well as a private duty thrown upon him, something that in such cases he owes to a fair administration of justice, as well as to the private interest of his employers. The interests propounded for them ought, in the proctor's own apprehension, to be just, or at least fairly disputable; and when such interests are propounded, they are not to be pursued *per fas et nefas*." In the same case he said, "I adhere to the opinion that I have expressed, that where an intercourse for such a purpose as the definite settlement of a claim is to take place, it is most effectually conducted by the proctors themselves, and not by their clerks; they have both a personal and legal weight, and an authority that can better support them against overweening pretensions, and there is a direct responsibility belonging to them, highly proper to intervene in any point so extremely important as the proposed final adjustment of a cause." Further on he remarked, "That not only is a practitioner bound not to stifle evidence, or to instruct witnesses, when examined, not to commit themselves, or in other words, not to tell the whole truth; but, moreover, that where a meeting is held for amicable arrangement, and the parties are personally produced for the purpose of fair agreement, and to prevent litigation, it is contrary to the purpose of such a meeting, to resist fair disclosures of all facts leading to a just conclusion, or to suppress facts without a knowledge of which real justice is unattainable; for men ought not to come to such a meeting as to a catching bargain, but in the full spirit of equitable adjustment." *The Frederick*, 1 Hagg. 211, 220, &c., in which case Lord Stowell ordered the proctor to pay all the costs.

There are other cases, but I forbear to trouble you with them.

I take the liberty of suggesting to the Incorporated Law Society that they should watch over, and endeavour to promote all proper amendments in our Admiralty Law; and the same Committee, if there be one, which attends to probate and divorce law, might take this also under its cognisance. I would also suggest the extension of the examination of articled clerks to include both Probate, Divorce, and Admiralty law and practice; an extension which might be easily carried out now that the examination is extended to two days; although, of course, it would require some notice to enable articled clerks to prepare for examination on these subjects.

For the student who desires to pursue this subject further, I would mention that the most useful works which I have found are Mr. Pritchard's "Admiralty Digest;" Mr. Edwards's work on the "Admiralty Jurisdiction;" Dr. Browne's "Treatise on the Civil and Admiralty Law," (2nd edit. 1802). I particularly recommend Dr. Browne's work for perusal. Then there is "Abbott on Shipping," and the series of "Reports of Admiralty Decisions," commencing with those of Christopher Robinson, in which Lord Stowell's decisions commence. I might also mention the Admiralty cases in the *Jurist*, which appear to me particularly well reported. There are also several American works on Admiralty Law which claim attention. A list of them will be found in a catalogue of American law books, which may be obtained on application at Trübner's, in Paternoster-row. Judge Story's Judgments on Admiralty Law are well worthy of attentive perusal.

Here, gentlemen, we part company. I trust I have not wearied you. The subject was an interesting one. Compression was difficult. The result you have before you. If I have given you a taste for a science, with which are interwoven such names as Stowell, Tenderten, Story, Lushington, and others almost equally eminent, I shall not regret my attempt to bring this subject before you. It can be hardly necessary for me to remind you that the masterly judgments of Lord Stowell are among the classics of the language, and, as has been well remarked by an American writer, will command and receive universal admiration and respect, "so long as the nations judging and recording in the English tongue shall maintain any supremacy in the maritime relations of the globe."

DIVISION COURTS.

OFFICERS AND SUITORS.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMAN,—Approving of your frequent recommendations to the Clerks of Division Courts, to form themselves into County conventions for mutual aid, I have joined with one or two others, in an effort to accomplish that object in this County; but I am sorry to say, we have failed.

The following statement, showing the operations of the 91st clause, in this Court, was prepared with the view of having it embodied with similar statements from the Clerks of the other Divisions; but as no such general statement for the County is likely to appear, you may, perhaps, think an isolated instance, which corroborates the evidence hitherto furnished by your journal in favor of that part of the law which has been so fiercely assailed (I really think without due consideration), worthy of a place in your columns. If so it is at your service.

I beg, however, to make one remark, which I believe has been made by others before me, it is this:—The amount set down in the statement as having been "realized," from judgment summonses, is not to be taken as representing the entire efficiency of that mode of procedure. Many debtors have undoubtedly paid in anticipation of a summons; and besides most,—perhaps, nearly all, of the cases "withdrawn, or not presented," and those in which "orders for commitment" were made, some not carried into effect, were, in all probability arranged to the satisfaction of the plaintiffs. Were the facts in connection with all these cases in my possession, it is very probable I should be able to report 60 or 70 per cent. as realized or secured, instead of 24.

The following is the statement to which I allude. It covers twelve months ending the 31st December, 1858.

SECOND DIVISION COURT, COUNTY OF OXFORD.

Total number of suits entered		815
Of these, judgment summonses		68
Proportion of the latter to the former		8·34
No. of actions withdrawn or not presented		21
No. dismissed		23
No. of orders for commitment		9
No. actually committed to prison		0
Total amount sued for	$28,763	81
Of this, sought to be recovered by judg't. sum's.	1,877	00
Proportion of the latter to the former	7	90
Amount realized	448	86
Per centage realized	23	91

W. H. LANDON,
Clerk 2nd D. C.,
C. of Oxford.

Drumbo, May 2nd, 1860.

[We regret the apparent apathy of Division Court Clerks towards their own interests, manifested in a neglect to form County Conventions, but shall nevertheless be at all times glad to hear from such of the Clerks as are alive to their interests as members of a large body of intelligent and (in their several localities) influential men. Among the latter we are glad to record the name of our worthy correspondent, W. H. Landon.—EDS. L. J.]

DIVISION COURT CURIOSITIES.

The Judge of a County Court more than one hundred miles from Toronto, when on his circuit in an outer division, was called upon one morning previous to going into court by a very tidy looking daughter of the Emerald Isle. Her salutation on entering "the presence," was, "And sure you don't know me.—*Judge.* Your face seems familiar, but I cannot say that I recollect you.—Sure, do you not know Biddy?—Oh! yes I recollect now; you once lived in my family as cook. Well Biddy how are getting on?—Oh! bad luck—a drunken husband and five childer.—I am sorry to hear it; what can I do for you."

"I have a cause in Court to day, and I wanst to give ye an insight in'til it. Stop Biddy I cannot listen to you here, but when your cause comes to trial you may depend upon it I will do you all the justice in my power.

In due course the cause No. 92, *Bridget S.*——— v. *Patrick O*——— was called on, and the parties walked up to the bar. Pat gives the Judge a knowing wink and turning to the plaintiff asks, Where's the *ould-one*; has he given ye a *poor* of *attorney* to *plade* for him.—*Paddy.* Troth and its my own cause, and its able I am to be my own attorney forenenst you. *Defendant.* I axes for a nonshute your Reverence; the ould one is alive yet, if he is not *dead drunk.* Here was a poser, but the judge desirous of hearing what Biddy's chances for a judgment were desired her to call her witness.

Ah! sure whats the use of a witness? the ould sinner knows that I taiched his childer for a year at my school and never saw the colour of his money. Will yee's deny *that*?—*Pat.* I would scorn to do the likes; but here's my *off-skurt.* Did I not furnish *seed* with seed *praties* last spring and help *yees* to plant them when the *ould* man was off on the spree.—*Biddy.* did I ever deny it? but yees mind when I balanced that same by tinding your Misses in child-bed and nursing the babe when she had'int a drop of suck for it. By the same token the child is a dacenter boy than his father, and by my teaching, more of a gintleman.—*Pat.* It is true for you Biddy, but did I not take *yees* in my own sleigh to have *yees* inspected for *yees character* for taiching? and, did I not go afterwards *wid yees* to get the government money on a *false certificate*?—No you old *decaver* the certificate was signed by honester men nor you. But did you not stop at every tavern on the road to give your horse *water*, and yourself *whiskey*, and did *yees* not *leave* me to pay the *expenses* of the journey? Did ye not stop both nights at my Uncles where *yees* drank more hot punch than water by the ould horse? Oh! it was a mighty bad cauld you had that night, and much troubled yees was with the *wind in your stomach*: and sure the poor ould horse never saw the sight of oats before, and did not know the use of them till my uncle showed him how to ate them.—Pat admitted the whiskey and hospitable treatment, but denied the *oats*, it was only *shorts* and *short* allowance of that same. The laughter became so loud in the Court that the judge was compelled to bring the pleadings to an end. Pat you will have to pay this demand.—*Biddy.* Thank your Honor's self. There ye ould sinner! did I not say that he would put in till ye? Pat left the room a sadder if not a wiser man, and Biddy retired in triumph.

It is necessary to add that the Judge paid the debt and costs to the Clerk with injunctions not to tell Biddy out of whose pocket the money came, as he was quite certain she would not receive it. Pat without knowing it, got the benefit of his motion for a *nonshute*, and Biddy got more *justice* than perhaps an *execution* would have produced her.

U. C. REPORTS.

QUEEN'S BENCH.

HILARY TERM, 1860.

Reported by C. Robinson, Esq., *Barrister-at-Law.*

FRASER V. PAGE AND ROBINS.

Taxes—Seizure of goods not owned by party assessed—Refusal to take other property offered by him—Evidence of possession—Liability of collector for acts of his bailiff—Evidence of distress made.

A bailiff having a warrant from the collector to distrain for taxes due by A. on his lands, went to the premises, where A. pointed out to him property of his own amply sufficient to cover the amount due. The bailiff, however, insisted on seizing a pair of horses then in the stable, and which A. was at the time putting to a waggon in order to use them, but A. refused to let him take these, saying that they belonged to his son-in-law, who lived in the house, but was then away from home. The bailiff declared that he seized the horses for the taxes, though he did not touch them, but A. drove them away, and three days after the bailiff returned and took them from the stable, no one being present. The owner replevied, and it appeared on the trial that the horses belonged to the son-in-law, who kept them in a part of the stable reserved for his exclusive use. There was no evidence that the collector interfered in any way in the execution of the warrant—the jury having found for the plaintiff against both defendants.

Held, (McLean, J., dissenting) that the horses were in the possession of A., and liable to seizure under the 16 Vic., ch. 182, sec. 42; that the facts proved amounted to a distress; and that the defendants, therefore, were entitled to succeed, though the bailiff might perhaps be liable in another form of action for his unreasonable conduct.

Quære, per Robinson, C. J., whether the collector in this case could be held liable for the acts of his bailiff? Per McLean, J.—He was liable.

Replevin.—The declaration charged that the defendants took and detained a pair of horses belonging to the plaintiff.

Pleas—1. Not guilty.

2. That the defendant Page was at the time when, &c., a collector of taxes for the Township of Thorold, in the County of Welland: that on the collector's roll one Joseph Upper, a resident inhabitant of the said township, was assessed for £14 4s. for taxes on certain lands in the said township: that Page demanded payment from him at his place of residence: that he did not pay, and after fourteen days had elapsed from the time of such demand, the said taxes remaining unpaid, the said defendant Page, authorised the other defendant as his bailiff to levy the same with costs, by distress and sale of Upper's goods, wherever they might be found in the County of Welland: that Robins did seize and levy upon the horses in the declaration mentioned for the said taxes, the said horses being then upon the land and premises for which the said taxes were in arrear, and in the possession of the said Upper, and the said Robins, as such bailiff, then detained the said horses to satisfy the said taxes, as he lawfully might, &c.

The plaintiff replied that at the said time when, &c., the said Joseph Upper was possessed in his own right of goods and chattels then being upon the premises and in the possession of the said Joseph Upper, sufficient to pay the said claim for taxes, and all costs and expenses in and about the seizure and sale, &c., and which said goods and chattels the said Upper voluntary offered to the said bailiff, to be taken and sold to satisfy the claim for taxes, and all costs, &c., yet that the said Robins, acting under the authority of the said defendant Page, refused to take such goods, but forcibly, and against the will of the plaintiff, seized and took the said horses of the plaintiff in the avowry mentioned, they casually being upon the premises of the said Joseph Upper, *but not in his possession*, the said defendants well knowing the said horses to be the property of the plaintiff, and that a sufficient distress of the property of the said Joseph Upper was then found and being upon the premises of the said Upper, and offered to the said defendant Robins, contrary to the form of the statute, &c.

The defendants took issue upon this replication, and also demurred to it.

At the trial, at Merrittsville, before McLean, J., evidence was given on the part of the plaintiff, which proved that when Robins went to Upper's farm to levy for the taxes, Upper pointed out to him property of his upon the place more than sufficient to cover four times the sum which he was directed to make, and told him that he might take enough of it away to satisfy the taxes, or if he would leave it till the sale, he would give him security for its being forthcoming for the sale: that Robins saw in the stable a pair of horses, which he said he would seize, and although Upper

told him they were not his property, but belonged to the plaintiff, his son-in-law, who lived in the same house with Upper but was not then present, Robins insisted upon taking them: that Upper, who was then putting them in a waggon, intending to use them, refused to let him take them and drove away with them, though Robins expressly declared that he seized them for the taxes which he was directed to levy. It was not sworn that he touched them. Three days after the bailiff came to the premises again, and took the horses out of the stable, no one being present, and the plaintiff replevied.

This evidence was uncontradicted, and no attempt was made to prove that the horses which Robins took away, and which the plaintiff afterwards replevied, were not in fact the property of the plaintiff

The conduct of Robins, unexplained as it was, seemed most unreasonable, for the property of Upper which he pointed out to Robins as his, consisted of horses, a valuable bull, a waggon and a mowing machine, all articles saleable, and easy to be removed.

There was no evidence that the defendant Page, who issued the warrant as collector, interfered in any way in the execution of it, or that he had any knowledge of what the bailiff did or intended to do in time to give him any direction.

It was contended, on the part of Page, that there was nothing to connect him with the wrongful act complained of, and nothing to show that Robins was authorised to seize any goods but those of Upper, or such as he should find in his possession.

It was admitted that Page was duly appointed collector for the year 1858: that Upper had been assessed in that year for £14 4s.: that Page issued his warrant to Robins, directing him to levy the tax from the goods and chattels of Joseph Upper, or from any goods and chattels in his possession, as directed by the statute 16 Vic.. ch. 182, sec. 42.

The replication was allowed to be amended at the trial by inserting an allegation that the horses were not in Upper's possession.

The jury found a verdict for the plaintiff. The learned judge reserved leave to defendant Page to move to have a verdict entered for him, in case the court should determine that he was not liable on the evidence.

R. A. Harrison moved for a new trial on the law and evidence, and for misdirection, contending that under the statute 16 Vic., ch. 182, a collector is authorised after demand to distrain *any* goods in the possession of the party liable for the taxes, and that no claim of property or lien, nor any privilege of the owner, can avail against that authority: and further that Page, the collector, was in no manner liable for the plaintiff's horses being seized, even if that act were wrongful, but only the bailiff. He cited *Clark* v, *Orr*, 11 U. C. Q. B. 436.

Ball shewed cause.

Robinson, C. J.—First, was there any wrong done here in seizing and selling the property that belonged, not to Upper, by whom the taxes were due, but to Fraser, who was living in Upper's house on the land in respect of which the taxes were charged, and who, it was sworn, attended to his horses himself in a part of the stable reserved for his exclusive use?

As a general principle, and independently of our Assessment Act, 16 Vic., ch. 182, I find no authority for holding that the goods of a stranger may be sieed on a distress for a land tax due by another, though the stranger's goods may be upon the land assessed. The British statute 43 Geo. III., ch. 99, sec. 38, does not appear to authorise it in England, and from what is said in Burns' Justice, and in Williams' Justice in this respect, and from the form of warrant given to the collector, I infer that the goods of the defaulter only are treated as being liable. In an elaborate work on Tax Titles by Blackwell, an American author, pages 184 to 213, there is nothing to lead to the supposition that the goods of a stranger are there authorised to be seized for taxes, unless perhaps in case of goods found upon unoccupied land, for which no person has been assessed by name. I mention this as only affording ground for argument that may assist us in coming to a conclusion upon what was probably intended by our legislature when they passed the statute 16 Vic., Ch. 182. If that statute is in itself clear upon the point raised in this case, it must of course govern us, whether it be or be not in that respect in accordance with what is directed or permitted in other countries. As a general rule, the authority to distrain on the goods of a stranger seems, I think, to be confined to cases of distress for rent, and is a privilage given to landlords. It has been held not to extend even to cases of distress for a rent charge, though that seems doubtful.

It has been determined that the goods of a stranger are not liable to distress for an amerciament: that is, goods of a stranger upon the premises of the person amerced.

Then what is the provision of our statute upon the subject? It is to be found in the 42nd section of the act 16 Vic,, ch. 182, which provides that when the taxes are not paid in fourteen days after they have been demanded, "the collector shall levy the same, with costs, by distress and sale of the goods and chattels of the party who ought to pay the same, or of any goods and chattels in his possession, wherever the same may be found within the township, village, town, or city, in which he is the collector; and at any time after one month from the date of the delivery of the roll to him, the collector may make distress of any goods and chattels which he may find upon any of the land of non-residents, on which the taxes inserted against the same on his roll have not been paid; and no claim of property, lien or privelege thereupon or thereto, shall be available to prevent the sale, or the payment of the taxes and costs out of the proceeds thereof."

This clause is not so framed as to exclude all room for doubt upon the question we are considering, but I think the construction to be given to it is that the goods in possession of the party taxed, whether they are found on or off of the land rated, are liable to be seized, provided they are within the local jurisdiction of the collector.

The reason of the distinction made in the case of the land of non-residents is obvious, for in respect to them I apprehend no one is rated by name in the collector's roll, but the land itself is assessed, unless the absent owner has desired to be assessed by name. The collector therefore in such cases does not know from the roll who is the party that ought to pay the tax, and cannot tell whether any goods he finds on the land are the goods of such party or not. He is consequently authorised to take any goods he may find upon the lands of non-residents.

And further, I think that the last few lines in the clause, which provide that no claim of property, lien, &c., shall prevent the sale, &c., is applicable to all the cases of seizure of goods authorised by the clause, and is not to be confined to the case of goods seized on the lands of non-residents.

Then giving the clause this effect, we are to consider whether the horses seized in this case were in the possession of Upper? They were kept in his stable upon the land assessed, and he certainly acted as if he were at liberty to use them, as the evidence shews, although it appears that Fraser, their owner, was living in the same house with Upper. I have had a good deal of doubt upon the point, but that is the conclusion I have come to,

This being so, the plaintiff had a legal right to seize, and could not be a trespasser in taking the horses, though he might or might not be liable to an action of another kind for seizing the plaintiff's horses, when there was abundance of property of Upper's own out of which the money could have been levied.

My opinion is that the Assessment Act 16 Vic., ch. 182 sec. 42, clearly authorises a levy under the warrant upon any goods or chattels in possession of the party who ought to have paid the taxes; that is upon any goods or chattels in possession of Upper.

That indeed is not denied, but the question upon the evidence is whether the horses were distrained while in Upper's possession.

I think they were. They were taken on his premises while no other person was in possession of them, the owner not being at home. The bailiff, when he went there the first time, found the horses in Upper's stable and Upper with them. He acquainted Upper with the fact that he had come to distrain for taxes, and though Upper pointed out property of his own to the bailiff which he might seize, and told him that those horses were not his, but belonged to Fraser, the bailiff, notwithstanding that, distinctly announced his resolution to distrain upon them. It cannot be said that Upper was not in possession of the horses, for he was putting the harness upon them at the time, and persisted in doing so though forbidden; and in presence of the bailiff, and in defiance of him, he drove them away so as the bailiff should not take them. What was said and done upon that occasion I think a-

mounted to a distress, though it was not proved that the bailiff actually took hold of the horses or touched them. When the bailiff distinctly announced that he seized the horses then in wiew, and Upper forbade him to take them, it was not necessary for the bailiff to bring on a breach of the peace.

Not being able to take the horses away, which he had sufficiently distrained upon, as I think, the bailiff retired and went to a magistrate, and complained that Upper had rescued the horses after he had distrained upon them, but he did not succeed in obtaining a warrant from the view the justice took of the case. This accounts for the delay of two or three days, at the end of which time the bailiff went and got the horses. There is nothing in his conduct that could be construed into an abandonment of the seizure made on the first occasion, if what passed then amounted to a distress, as I think it did. If a person had come with a *fi. fa.* in the interval, and seized the goods, he would have had colour for insisting that the distress of the horses was abandoned by the bailiff going away and leaving no one in possession, but it is very different when the question of abandonment is discussed between the owner of the goods and the officer. The distinction is laid down in *Swann* v. *Earl of Falmouth*, (8 B. & C. 459). It is of no consequence whether we look upon what was done by the bailiff on the first occasion or on the second as the act of distraining, further than that on the first day the horses were at the very time undeniably in the possession of Upper, who was harnessing them and using them at the very moment when the bailiff told him that he seized them for the taxes.

Then if the bailiff had authority to distrain these horses and did distrain them, the plaintiff must fail in this action, which is founded on an allegation of an unlawful taking and detention, and not merely for reckless or negligent conduct in the manner of making the distress. I find no precedent or authority for an action for distraining the goods of a stranger *without necessity*, upon the allegation of there being goods enough of the defendant in the warrant out of which the money could have been made, and if an action lies for such an injury the declaration should be framed to suit the complaint, as it should have been if what the plaintiff complained of in the case, was the taking the two horses when one would have been sufficient.

As I think the plaintiff's action failed against both the defendants, it is immaterial to consider the question whether, when a bailiff in executing a warrant from a collector to distrain for taxes, seizes goods which do not belong to the party assessed, and which are not even in his possession, it can be held that the collector, who merely issued the warrant in proper legal form, can be held responsible for the trespass, though he neither directed the bailiff to do what he did nor was in any manner privy to it.

That is an interesting and important general question, on which at present I give no opinion. Undoubtedly where a bailiff under a warrant from a sheriff under a *fi. fa.* against the goods of A., seizes the goods of B., the sheriff is liable. There the writ is directed to the sheriff, whose proper and immediate duty it is to execute the process or see that it is executed. He is paid for doing it, and whoever is employed to execute the writ which he is himself commanded to execute, and is paid for executing, is looked upon as acting in his place, and as one person with the sheriff.

The collector, on the other hand, though he is authorised to demand the taxes and levy them by distress when they are not paid, stands perhaps in a somewhat different position. He is not commanded by any process to make the levy himself, and can scarcely be expected to do so. He is not therefore delegating to another the particular duty of seizing and selling which by any process of law has been imposed upon himself, and he has no claim to fees for what the bailiff does, any more than a magistrate has who grants a warant in a criminal matter. Neither is the levy made for his benefit, as in the case of a distress which a landlord authorises a bailiff to make for rent. He cannot be truly said to be ratifying and adopting an act done for his interest.

At present I do not say that I am clear he is not liable for what the bailiff does, though contrary to the command contained in his warrant, but it will require to be carefully considered whether he is liable or not. I have not found any decided case upon the point, though I should infer that the Court of Common Pleas in England, which gave judgment in the case of *Hall* v. *Smith* (2 Bing. 160, 161), would in a case like the present have held the collector not liable. In that case the Chief Justice says, "The maxim of *respondeat superior* is bottomed on this principle, that he who expects to derive an advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it. This maxim was first applied to *public officers* by the statute of Westminster 2, ch. 11, from the words of which statute it is taken.—'*Si custos gaolæ non habeat per quodjusticietur vel unde solvat, respondeat superior suus qui custodiam hujusmodi gaolæ sibi commisit.*' The terms of the statute of Westminster the second, embrace only those who delegate the keeping of gaols to deputies, and were intended only, as Lord Coke tells us, to apply 'to those who having the custody of gaols of freehold or inheritance, commit the same to another that is not sufficient.' The principle of the statute has, however, since been extended to sheriffs, who are responsible for their under-sheriff and bailiffs, but has not been applied to any other public officer. Although the office of sheriffs be now a burdensome one, yet they are entitled to poundage and other fees for acts done by their officers, which in old times might be a just equivalent for their responsibility."

This language is very applicable to the position of Page, in the the case now before us.

If the collectors of taxes appointed by the municipalities to serve for the year are to be regarded as "public officers," as I think they must be, and if the principle of "*respondeat superior*" is correctly laid down in this judgment, it would seem to decide that the defendant Page is not liable in the present case under the circumstances, though the case of *Hall* v. *Smith*, in which the judgment was given, is one very distinguishable from the present in its facts.

The collectors of taxes here are officers annually appointed to collect the taxes generally, which in far the greater number of instances it may be expected they will be able to do by merely calling upon those against whom they are charged. In those cases in which they may have to resort to compulsory measures, although the Legislature has enabled them to levy in person, and without the authority of any process, yet I do not imagine that it was contemplated that the collectors would themselves, as a matter of course, act the part of bailiffs and auctioneers in seizing and selling, for these are duties with which they can hardly be supposed to be familiar, being persons chosen from among the inhabitants to serve for the year.

Of course the collector would be liable for anything being done which he had authorised the bailiff to do, if that were alleged; but whether he is liable, like the sheriff, for anything done by the bailiff without the authority of or contrary to the direction given in the warrant, will be in this case the question, if it is eventually found that the horses distrained upon were neither the property of Upper nor at the time in his possession. It is a question of interest to the public. On the one hand, when a constable, having a warrant from a collector to seize goods of A, seizes the goods of B, it would be very desirable for the party whose goods are illegally taken by the mistake or wilful conduct of the bailiff, to have the collector to look to for indemnity, and not merely the bailiff only, who may be a man of no property. Yet where, as in this case, the person wronged, hearing of the matter in time, pursues his remedy by replevin, he is sure of getting back the property if he succeeds in the action, and the advantage he would have in being able to recover against the collector concerns only the costs of the suit.

On the other hand, if, when the authority given to the bailiff by the warrant is exceeded, the action should be found to be against the bailiff alone, and not against the collector, the party whose goods have been illegally taken would be in no other situation after all than parties clearly are in all the cases where a constable exceeds his authority in levying fines or penalties under a warrant from a justice of the peace.

The question is, whether a collector of taxes giving a warrant to a constable comes more clearly under that class of cases, or under that where a writ is given by a sheriff.

The point is a nice one; for though undoubtedly in such cases the collector is not, like the sheriff, employing a constable to do a duty which he himself has been commanded by writ to do, yet he employs him to do what he is in general terms authorised and directed by act of Parliament to do, whenever it may become

necessary for collecting any portion of the taxes. It may therefore be reasonably argued that there is no substantial difference between the two cases, though there is a substantial difference in another respect. If I am right in assuming that while the sheriff is the officer legally entitled to the poundage and other fees for executing writs, remunerating his bailiff as may be agreed between them, the collector does not interfere with the fees given by law to the bailiff whom he employs to distrain.

I have met with no decision in a case of the same kind. If Page, the collector, had directed Fraser's horse to be seized, or had in any manner authorised it, or if, after the difficulty arose, he had been informed of the facts, and had interfered to prevent the horses being given up, he would then stand in the same situation as the bailiff, otherwise, as I have already said, I doubt whether he is liable; and as in my view of the case upon the evidence I think neither the one nor the other was liable, for that the plea of justification was proved, it is not necessary at present to determine the point.

In my opinion there should be a new trial, and without costs, as I think nothing illegal was done, though the bailiff acted unreasonably and vexatiously, which might give rise to an action against him of another kind.

McLean, J.—This is an action of replevin tried before me at the last spring assizes at Welland, and verdict rendered for the plaintiff.

The verdict was certainly in accordance with my views at the time, and I am still inclined to think it was correct, though in that respect my learned brothers take a different view of it. Page was collector of taxes for the Township of Thorold, and Robins acted as his bailiff under a warrant to distrain the goods of Joseph Upper on the property of Upper, or any goods in his possession, for the purpose of levying the amount of taxes due by Upper. When the bailiff expressed his intention to seize the horses which were replevied by the plaintiff as his property, and which had been in his possession, though kept in a stable on Upper's farm, Upper proved that he had offered abundance of property which belonged to him, and urged the bailiff to seize it, at the same time informing him that the horses belonged to the plaintiff, and that, though he was permitted to use them occasionally, they were in fact in the plaintiff's possession and subject to his control, he being at the time living in a separate part of the house of his father-in-law, Upper, and occupying a separate stable for the use of his horses.

There was no doubt of the fact that the horses belonged to the plaintiff at the time they were taken away as a distress for taxes by Robins, and the only question for the jury was, whether they were in possession of the plaintiff or of Upper. If in the possession of Upper, then they were liable to be seized under the 42nd section of 16 Vic., ch. 182, and the verdict should be for the defendants; but if in the exclusive possession of the plaintiff and subject to his entire control, then the verdict should be for the plaintiff. There is no objection to my charge at the trial, and upon the whole case as left to the jury they rendered a verdict for the plaintiff.

An objection is urged that the defendant Page was not liable, the bailiff having acted upon his own judgment, without any special directions in seizing and taking away the horses under the warrant, which only authorised him to take Upper's goods, or goods in *his* possession. Leave was reserved to move the court to have a verdict entered for Page, in case the court should consider him entitled to it.

It appears to me that Page, who by his warrant set Robins in motion, is responsible, and cannot relieve himself from the responsibility of what was done by Robins as his officer, precisely to the same extent as a sheriff is responsible for a trespass committed by his bailiff in executing a writ. The collector's roll was in the hands of Page, the same as a writ in the sheriff's hands. A collector or sheriff may act upon any authority in their hands to levy money, but if they choose to employ an officer under them, they each have by law the power of doing so, and if that officer, instead seizing the goods of the proper person, seize the goods of a stranger which are not liable, I cannot see any distinction in the two cases which should leave the sheriff liable, and at the same relieve a collector from such liability for the act of his officer. In putting power into the hands of a bailiff any collector must, I think, be considered responsible for the exercise of it.

He stands in a different situation from a justice of the peace, and is not entitled to the same measure of protection. If a warrant be issued by a justice of the peace, and a wrong person be arrested by a constable, or if a warrant be issued to levy a fine from the goods of one person, and the goods of another be seized by the constable, the constable alone would be responsible. The justice of the peace would not in such case be putting power into the hands of a stranger to be executed, but into the hands of an officer whose *duty* would require him to execute it, and for whose acts in executing a legal warrant the justice of the peace would not consider himself, and could not be held, responsible or answerable in damages. I think, therefore, that Page is properly joined and liable in this action, and as I concur in the view taken by the jury as to the possession of the horses by the plaintiff at the time they were seized, I think the verdict for the plaintiff should not be disturbed.

Burns, J.—The conclusion I have arrived at is, that the plaintiff had no legal right to replevy the horses from the hands of the defendant Robins without first tendering the amount of taxes for which the bailiff had seized the horses. The question turns upon the point, whether Upper had these horses in his possession. The 42nd section of 16 Vic., ch. 182, enacts that not only shall the goods and chattels of the person owing the taxes be liable to be seized, but any goods or chattels in his possession wherever the same may be found within the township, village, town or city in which the person taking them is the collector. It is evident the legislature intended the taxes should be paid in some way, and we must suppose they thought it better to make the goods in possession of a person liable, without doubt, for the taxes, than that the collector should be at the risk and expense of contesting title with every one who had the possession of goods who might set up title in some one else. Of course there may be cases where the rule will work hardly upon individuals, but we must take it the legislature thought it better for the interest of the public that the enquiry whether one to whom another lends his goods, or otherwise allows to have the possession, has or no not paid his taxes, should be cast upon the person so lending or allowing him to have possession, than that the trouble, inconvenience and expense should be cast upon the collector, or be a charge upon the collector, or be a charge upon the funds collected.

The question in this case is, whether the evidence established that Upper had the possession. The plaintiff is his son-in-law and lived with him. No doubt he owned the horses, but they were kept in Upper's stable, and Upper used them for ploughing occasionally upon the farm, and in other ways when he wanted them. At the very time when the bailiff went to seize, though Upper told him the horses were the plaintiff's, yet he then used them himself as if they were his own, and drove them away. If the bailiff had followed him, and found him driving the horses along the highway, it would have been difficult, I think, to say they were not then in his possession. If so, then why are they not equally in his possession when in his stable, and more particularly so when Upper told the bailiff he should not have them. If they were not in his possession, how could he say to the bailiff, you shall not take them from me? He could not have taken from him what he had not; and upon the whole evidence it appears to me plainly, that although the horses were the plaintiff's property, yet they were as much in possession of Upper's property as they were in that of the plaintiff.

It is true that the bailiff did not lay his hands upon the horses, but I am of opinion that what the bailiff did on the occasion when he went to Upper's house and the barn, did in truth amounts to a seizure at that time. Upper would not allow the bailiff to take away the horses, but drove them away himself, and the bailiff forbid him to do so. It is not necessary that an officer should in fact lay his hand upon the property seized in order to constitute a seizure. In this case what was proved, I think, amounted to a seizure.

The property being then seized in fact, and, as I view the evidence, being in Upper's possession, who was the person who owed the taxes, the plaintiff could not legally replevy without tendering the amount of the taxes.

Rule absolute.—McLean, J., dissenting.

CHAMBERS.

THE QUEEN ON THE RELATION OF WM. WALKER V. WM. HALL.

Election—Misconduct of Returning Officer—Costs.

The Courts will presume that a Returning Officer acts properly and honestly until the contrary is shown, and where it is intended to charge that officer with unfairness and impartiality the case should be plainly stated and clearly made out.

In this case it was held that the charges made, which were general, were met as broadly as they were made.

The Master on taxing costs to the successful party on a *quo warranto* summons should consider whether the successful party produced an unnecessary number of affidavits, or affidavits unnecessarily diffuse, and act accordingly.

(Chambers, May 16, 1860.)

This was an application to set aside the election of Defendant as Councillor for Ward No 5 in the Township of Brant (election held on 10th and 11th February, 1860), on the following grounds:

1. That Relator's voters were not allowed by the Returning Officer, George D. Lamont, or the Constables in his employ, freedom of voting.

2. That votes were recorded for the Defendant by Returning Officer, although polled for Relator.

3. That the Returning Officer conducted himself about the election in an arbitrary and illegal manner, and with the full determination of returning none other than the said Defendant.

4. That several of Relator's voters, seeing the partiality of the Returning Officer and his determination to have Defendant returned, deemed it useless to vote for Relator at the risk of exposing themselves to insult from said Returning Officer.

5. That before the close of the election, the friends and supporters of Relator protested against the legality of the said proceedings, and desisted voting.

6. That there were many votes in the ward, in consequence of the premises, unpolled at the said election.

Relator stated in his affidavit, that from motives of spite, malice, or some other motives to him unknown, the Returning Officer unlawfully exerted himself to defeat his election by securing the election of his opponent, and that the Constables under his control acted in like manner: That persons supposed to be friendly to him, though having undoubted votes, were insultingly questioned by the Returning Officer: That others, whom it was well known were his supporters, voted for him, but their votes against their will were recorded by the Returning Officer in favor of Defendant: That votes were refused, if friendly to him, on the most whimsical and groundless reasons, such as the temporary absence of a householder from his dwelling house on any night or nights during the month next preceding the election, although the family of the said householder always continued in his said dwelling during his temporary absence: That every thing was done by the Returning Officer and his employees to intimidate, insult and otherwise baffle persons who either voted or intended to vote for him or were supposed to be friendly to him: That 33 votes were polled for him, and 39 for defendant: That on the second day of the election, before the close of the poll, his supporters finding it almost useless to bear up against the many obstructions thrown in their way by the said Returning Officer and employees, after having entered a solemn protest against the illegality of his and their conduct, desisted further exertions on his behalf, under the full conviction that the election could not stand, but would be declared illegal by the courts: That at the close of the election he had good reason to believe there were as many as nine votes unpolled, the whole of whom were his supporters.

Nicholas Willoughby swore that he saw David Long, a duly qualified voter, take the oath of qualification: That the Returning Officer asked him if he understood the nature of an oath, when he replied he did; and the Returning Officer refused to record his vote, as he came up as he believes to vote for Relator.

David Long swore that he is a duly qualified voter in said ward and came to record his vote: That when he took the oath of qualification, the Returning Officer turned away his head and refused to record his vote: That he told the Returning Officer, if he was going to vote for defendant his vote would not be refused: That it was his belief the Returning Officer kept back all the votes he could for Relator, as did one of the Constables, Geo. Simpson.

Thomas Armstrong swore that when asked who he voted for, he said "Bill," meaning Relator: That his vote, as he believes, was recorded for Defendant: That after hearing of this and before he left the polling booth he declared that Relator was the man he intended to vote for, and that he never mentioned Defendant's name on the occasion, except to say that he would *not* vote for him (Hall): That he offered to make affidavit before he left the polling place that he had voted for Relator: That the Returning Officer positively refused to accept such affidavit or to enter his vote for Relator.

Thomas Riley swore that when he came up to record his vote, the Returning Officer refused to take his vote until he would take the oath of qualification, which he considered was done through spite or some other improper motive, as he well knew his vote was good: That he told him he never had taken an oath and did not think it was necessary to do so in that case, and he was thereby prevented from voting for Relator; and he told the Returning Officer, when he asked him who he was going to vote for, that he would vote for Relator, and it was then he (the Returning Officer) demanded he should be sworn.

William Burgess swore that in his opinion the conduct of the Returning Officer was such as to prevent Relator's votes being polled, and if he had acted impartially Relator would have been in the majority: That Thomas Armstrong voted for Relator, and his vote was recorded for Defendant, which Armstrong disclaimed on the spot, and offered to make affidavit that he voted for Walker: That before the close of the election, Relator's friends, including himself (Deponent), seeing there was no fair play, protested against the proceedings of the Returning Officer, and refused to take any further part in the election.

Thomas Cosgrove swore that the conduct of the Returning Officer was so partial that he, with others, protested in consequence of the Returning Officer's misconduct and that of the Constables: That he is a voter in the ward, and is aware that there were several voters of Relator who could not get voting at the said election.

Thomas Nelson swore that he observed a designed and determined partiality on the part of the Returning Officer in favor of Defendant, in preference to Relator.

Thomas Couch swore that he saw several voters similarly situated in regard to residence and qualification refused by the Returning Officer when they were supposed to be Relator's friends, but admitted when supposed to be Defendant's friends: That had the Returning Officer and his Constables acted fairly and impartially, Relator would have been elected and not Hall.

George Cosgrove swore that when the Returning Officer put the question, who do you vote for, to a voter present and about to vote, added the word "Hall;" this was in the case of Thomas Armstrong: That he told Relator he would vote for him if it came to a tie, but in consequence of the majority and the absence of votes which were not polled, he did not vote.

There were in all ten affidavits filed on behalf of the Relator.

For Defendant the following affidavits were filed. The Returning Officer was also made a party.

George D. Lamot, the Returning Officer, swore that the election was conducted by him according to law, the utmost freedom of voting being given to voters and the strictest impartiality shown to both the candidates, as well as their supporters: That as Returning Officer he took no part to secure the election of either of the candidates in preference to the other: That Thomas Wilson voted for Relator, and was afterwards sworn in and acted as special constable during part of the election, and shewed a partial feeling towards Relator: That two other county constables were present and acted as constables in the most impartial manner: That no votes polled for Relator were put down for Defendant: That the friends and supporters of Relator, as well as Relator himself, after the protest on the second day, did solicit support for Relator, and polled one vote (Archibald Muir) for him, and presented in two instances other parties to vote for him, urging them to take the oath, and others of Relator's followers urged them to take the oath, but they, Thomas Riley and William Muir, refused to take the oath; Thomas Wilson and William Burges, supporters of Relator, urged them to take the oath after the protest was given: That he offered no insulting language to any one

at the election, nor did he act in any unbecoming manner: That relator was guilty of improper conduct and feuds and violence: That Thomas Armstrong answered, when asked for whom he voted, "Hall," and then went away, and after Robert Armstrong (his brother) had voted for Defendant, came back with a number of Relator's supporters and said he had voted for Relator, and wanted his vote changed, which the Returning Officer refused: That David Long offered to vote, but his name not appearing on the copy of the assessment roll as a householder or freeholder, he refused to allow him to vote; and Long did not say for whom he intended to vote: That there were 112 names on the copy of the assessment roll furnished him by the Clerk for the Ward, of whom 22 were not mentioned as householders or freeholders, 1 was a minor, 18 were absent from the township during the election, 2 refused to take the necessary oath as desired by Hall, and 7 never presented themselves; and 72 voted, 39 for Hall and 33 for Relator; 5 persons voted for Walker who had no votes, of whom 3 were not on the roll, and the other two were neither freeholders nor householders: That Hall was duly elected: That as long as Walker was in the majority peace and quietness prevailed, but when Hall obtained the majority, Relator and his supporters caused much trouble and were most quarrelsome; whilst with Hall and his supporters there was no trouble.

William Hall, the defendant, by his affidavit, swore that the election was conducted according to law, the utmost fairness of voting being given: That before the commencement of the election he told the Returning Officer, in the presence of Relator, he wished the election to be conducted strictly according to law, as he thought Relator would take advantage of any defect: That he received no favor or partiality from the Returning Officer at any stage of the proceedings: That three Germans, not being able to speak the English language fluently, voted for Relator, and when they discovered their mistake wished to change their votes to Defendant, but the Returning Officer refused to permit it: That Thomas Armstrong voted for him (Hall), and when Relator became aware of it he wanted the Returning Officer to change his vote, remarking that he would give Hall any that had been given to Relator in mistake, and though he would have been gainer by the change he advised the Returning Officer not to consent to the change: That as long as Relator was in the majority the election proceeded quietly, but when Defendant began to go ahead Relator and his party became very quarrelsome and troublesome.

Joseph J. Lamont, the Poll Clerk, swore that Returning Officer asked Thomas Armstrong "what is your name?" "who do you vote for?" to which he answered to the first question "Thomas Armstrong," and to the second "William Hall:" That Returning Officer did not prompt any vote at the election: That after Relator handed in the protest there was a vote recorded for him, and he continued to solicit votes to the close.

George B. Lamont, Acting Constable during the election, swore that one David Long presented himself as a voter, but refused to take the oath, and left the poll: That Thomas Armstrong voted for William Hall: That Returning Officer instructed him to call forward voters.

John Malcolm swore that David Long came to the poll to vote as he thought; he refused to take the oath, saying he did not reside on his own place, but was hired with one Nelson.

William Leggitt swore that he saw Walker and others trying to induce one David Long to take the oath.

Benjamin Leggitt swore that David Long was urged by a number of persons to take the oath, but he did not see him do so; when he (Long) first came to the poll he appeared to decline taking the oath, and turned away from the poll and commenced talking with some of Walker's supporters.

James Leggett swore that one David Long came forward to vote, but went off without doing so. Relator's party strongly urged Long to take the oath, the not taking of which appeared to be the reason why he had not voted when he first came to the poll.

George E. Simpson swore that he acted as constable during the election: That Thomas Armstrong voted for William Hall: That David Long, William Muir and Thomas Riley, presented themselves to vote at the said election, but refused to take the necessary oath: That the Returning Officer threw no obstacles in the way of qualified voters voting as they pleased, but throughout the election acted in the most impartial manner: That Relator, on the second day, after protesting against the election, brought forward three persons to vote for him; one of them did so, the two others refused to take the necessary oath, whereupon Relator used abusive language to the Returning Officer to coerce him into taking the two votes: That George Cosgrove was not in the room at the time Thomas Armstrong voted: That the Returning Officer did not prompt the said Thomas Armstrong, when he voted for Wm. Hall.

Henry McNally swore that he was at the poll during both days' polling, and heard the Returning Officer call for voters to come forward. He saw no person refused the privilege of voting who was entitled to vote. The Returning Officer shewed during his stay at the poll the greatest fairness and the strictest impartiality: That when David Long came forward as he supposed to vote, William Hall, one of the candidates, requested the Returning Officer to administer the oath to him; Long refused to take it and turned away from the poll, after which he heard several parties urge him to take it.

David Keeth swore that he saw David Long come forward to the poll to vote, but refused to take the oath. The Returning Officer asked him if he had been a householder for a month preceding the election. He answered, he had not. After which he declined taking the oath.

Robert Carmon swore that he saw David Long refuse to take the oath, and consequently he did not vote during his stay at the poll.

Benjamin Carmon swore that he saw David Long refuse to take the oath, leave the poll, and go and converse with Relator; and heard Returning Officer call for voters, and did not notice any partiality.

James Brocklebank swore that he was at the poll the greater part of both days' polling, and saw Relator and his father, on the second day, browbeating the Returning Officer: That he saw no obstacle thrown in any voter's way to hinder him from recording his vote for either candidate; the Returning Officer shewed the strictest impartiality and fairness towards the voters of both candidates during his stay at the place of polling: That since the last election he met Thomas Armstrong, who told him he had voted for Hall at the election, but said he intended to vote for Walker, but did not; he admitted having been, at the time he voted, under the influence of whiskey.

James Benson, constable, swore that Returning Officer shewed the strictest impartiality: That Relator and his father, on the second day of the election, acted in the most uproarious and disorderly manner, so much so that the Returning Officer ordered him (the Constable) to preserve the peace; he resided in Canada over 17 years, and has been three times elected councillor for Brant, and never saw a candidate and his supporters conduct themselves in a manner so disorderly as the said Walker and his friends did.

John Leggett swore that he was at the polling place nearly the whole of the first day and so long of the second day as the poll was kept open: That for many years he was a Returning Officer in the Township of South Crosby: That Lamont, the Returning Officer, conducted the election in the most impartial and fair manner: That he paid great attention to his conduct during both days' polling, more so than he would have done had he not been a returning officer himself for so many years.

The affidavits of three persons who voted for Walker were put in, stating that they were not obstructed and that everything was fair.

Other three affidavits were filed to shew that four persons, whose votes were unpolled, would have voted for Defendant, there being as stated by the Returning Officer only nine unpolled votes in the ward.

There were seven more affidavits to shew that, in the opinion of the Deponents, the Returning Officer acted in a most fair and impartial manner.

There were in all twenty-nine affidavits filed on behalf of the defendant.

R. A. Harrison for Relator.

C. J. Carroll for Defendant and the Returning Officer.

RICHARDS, J.—I have read all the affidavits, considered them carefully, and have arrived at the following conclusions.

1. As to the first ground stated in the Relator's statement. It is not pretended that the Relator's supporters were prevented by physical force from coming forward to vote for him, or if it is so pretended there is no evidence brought forward to sustain that position. No voter is named who was hindered in going forward to vote; so that if the voters themselves were unwilling to come forward to offer their votes in consequence of the conduct of the Returning Officer, that would more properly come under the ground of complaint. As to the first ground, then, I think the Relator fails to make out a case.

2. That votes were recorded for Defendant, though polled for Relator.

This charge relates only to the case of Thomas Armstrong. He says, when asked who he voted for, he said "Bill," meaning Relator: that after hearing his vote had been recorded for Defendant, and before he left the polling booth, he declared Relator was the man he intended to vote for, and that he never mentioned Defendant's name on the occasion, except to say he would not vote for him: that he offered to make an affidavit before he left the polling place that he had voted for Relator; but the Returning Officer refused to accept such affidavit, and would not enter his vote for Relator. William Burgess also states that Thomas Armstrong voted for Relator, but his vote was entered for Defendant, which Armstrong disclaimed on the spot, and offered to make affidavit that he voted for Walker; and George Cosgrove states that when the Returning Officer put the question, "who do you vote for," to Thomas Armstrong, he (the Returning Officer) added the name "Hall."

In relation to this vote, the Returning Officer states that when Thomas Armstrong was asked "for whom do you vote," he answered "Hall," and then went away; and after Robert Armstrong, his brother, had voted for Defendant, came back with a number of Relator's supporters, and said he had voted for Relator and wanted his vote changed, which he (the Returning Officer) refused to do. The Defendant (Hall) states that Thomas Armstrong voted for him; that when Relator became aware of it he wanted the Returning Officer to change his vote, and offered to allow any votes that had been recorded for Relator by mistake to be given to Defendant. That three Germans voted for Relator, who intended voting for Defendant, but he (Defendant) advised the Returning Officer not to consent to any change after the votes were recorded. Joseph J. Lamont, the Poll Clerk, states that Thomas Armstrong, on being asked "who do you vote for," answered "William Hall," and that the Returning Officer did not prompt any voter during the time of the election. George B. Lamont, Acting Constable, states that Thomas Armstrong voted for William Hall. George Simpson, who acted as constable, states that Thomas Armstrong voted for William Hall: that George Cosgrove was not in the room when Armstrong voted, and the Returning Officer did not prompt him when he voted for Hall. James Brocklebank states that, since the last election, Thomas Armstrong told him he had voted for Hall, but intended to vote for Walker and did not, and admitted having been at the time he voted under the influence of whiskey.

Mr. Armstrong himself states that, when asked for whom he voted, he replied "Bill," meaning Relator. Now, if he used this as meaning William, it would apply equally well to Relator and Defendant, for they are both called William. If it be true that Armstrong was under the influence of liquor when he voted, that might account for the confusion. At all events, the Returning Officer, the Poll Clerk, the Defendant, and the Constables, understood he at first voted for Defendant. I am not therefore prepared to support the Relator's case on this ground.

3. The third ground is too vague, the charge too general, and the affidavits filed to support and repel the charge are equally vague and general. It is met quite conclusively as a general charge.

4. There is no affidavit from any elector that he omitted to vote for Relator on the ground suggested, nor is any elector named who declined voting for Relator for the cause suggested.

5. It is true that Relator protested, but it seems equally beyond all doubt that he solicited parties to vote for him after the protest, and that one voter voted for him thereafter at his request.

6. The Relator's own affidavit mentions that there were nine votes remaining in the ward unpolled. The Returning Officer thinks there were only seven votes that did not come forward. Relator does not give the name of a single voter that would have supported him who did not come forward from any of the causes assigned; whilst Defendant endeavours to shew that four out of the seven or nine, as it may be, of unpolled votes, would have been cast for him. I do not think the facts stated in the affidavits would at all warrant setting aside the election on this ground.

The names of David Long and Thomas Riley are mentioned in the affidavits, and I will see what is said about them. First, as to David Long. He states in his affidavit that he is a duly qualified voter in the ward, and came to record his vote. That when he took the oath of qualification, the Returning Officer turned away his head and refused to record his vote; that he told the Returning Officer, if he was going to vote for Defendant his vote would not be refused. Nicholas Willoughby states that he saw David Long, a duly qualified voter, take the oath of qualification; that the Returning Officer asked him if he understood the nature of an oath. He replied, he did. The Returning Officer refused to record his vote. He came up as he believes to vote for Relator. The Returning Officer states that David Long offered to vote, but his name not appearing on the copy of the assessment roll furnished him, as a freeholder or householder, he refused to allow him to vote, and Long did not say for whom he intended to vote. George B. Lamont states that Long presented himself as a voter, but refused to take the oath, and left the poll. John Malcolm states that Long came to the poll to vote, as he thought. He refused to take the oath, saying he did not reside on his own place, but was hired with one Nelson. William Leggett states he saw Walker and others trying to induce David Long to take the oath. Benjamin Leggett states that Long was urged by a number of persons to take the oath, but he did not see him do so. When Long first came to the poll he appeared to decline taking the oath, and turned away from the poll and commenced talking with some of Walker's supporters. James Leggett says that Long came forward to vote, but went off without doing so. Relator's party strongly urged him to take the oath, the not taking of which appeared to be the reason why he had not voted when he first came to the poll. George Simpson states that David Long, Wm. Muir, and Thomas Riley, refused to take the necessary oaths. William McNally states that when David Long came forward to vote, as he supposed, William Hall (the Defendant) requested the Returning Officer to administer the oath to Long, which he refused to take, and turned away from the poll. David Keeth states that he saw Long come forward to vote, but he refused to take the oath. The Returning Officer asked him if he had been a householder for a month preceding the election, he answered he had not. After which he declined taking the oath. Robert Carmon saw Long refuse to take the oath. David Carmon saw David Long refuse to take the oath and leave the poll and go and converse with Relator.

The Returning Officer himself does not say that Long refused to take the oath, but mentions that he was not returned on the list as rated on the assessment roll as a freeholder or householder, which of course would be such an objection as would justify the rejection of his vote. One of the Deponents states that the Defendant required Long to take the oath of qualification. It would indeed be singular if the Returning Officer had administered the oath to him when his name is omitted from the list handed to him, if he considered that a fatal objection to his vote, and still more singular that after administering the oath to him he should refuse to take the vote.

It is not stated by Relator, as a ground of complaint against the Returning Officer, that after having administered the oath to Long he refused to allow him to vote, and in that way shewing partialiaty and calling for an explicit answer. It is sworn in the affidavits, (and there are many affidavits,) that Long refused to take the oath. It is possible he may have refused at one time, and afterwards did take it. There is nothing to

shew such to be the case, and if it was not so there is a plain denial by many witnesses of the fact of his taking the oath. The ground stated by the Returning Officer would be sufficient to reject this vote, and if it were allowed it would not effect the result.

As to Thomas Riley, he refused to take the oath, as he admits himself, but says the Returning Officer refused to record his vote unless he was sworn, as he believes out of spite or some other improper motive, as he well knew his vote was good. If this had been stated as a specific charge against the Returning Officer, as shewing him to have been partial and a partizan of Defendant, and that he had of his own mere motion, without being required so to do by the Defendant, insisted on the voter taking the oath to annoy and vex him and perhaps prevent his voting for Relator, when he knew he had a good vote, I might have required an explicit answer from the Returning Officer on this point. But the charge has not been so made; and in reference to the voters unpolled who have good votes, the Returning Officer states that two refused to take the necessary oath as required by Hall, which may include this voter. Now if the candidate required the Returning Officer to administer the oath to a voter, and he refused to take it, the refusal to record such a vote could never be properly urged as indicating partiality on the part of the Returning Officer. If the charge had been in express terms that the Returning Officer, without being required so to do by either of the candidates, or their agents, and with a view of favoring the return of Defendant, and for purposes of annoyance, had required a person (naming him) whom he knew to be a qualified voter to take the qualification oath, then he ought to answer explicitly. It would be the duty of the officer to refuse to record the vote if a candidate insisted on the voter taking the oath, and he declined doing so, and he might then well insist, even if he knew he had a good vote, on his taking the oath, before he would record the vote.

The Relator fails to make out a case to warrant me in coming to the conclusion that the election should be set aside. He fails to shew that the result of which he complains was caused by the conduct of the officer, and therefore it is only of importance to consider the other grounds as to the Returning Officer, so far as the costs are concerned.

The general rule is to assume that the officer acts properly and honestly until the contrary is shewn, and when it is intended to charge the officer with unfairness and partiality the case should be plainly stated and clearly made out. In this case the charges made are general, are met as broadly as they are made, and as to the specific grounds, considering all the affidavits filed, I think the Relator fails to make out his case.

In conclusion, I may say I have arrived at the following results. 1. That Relator fails to shew that any named duly qualified voter was induced to refrain from voting for him by the conduct of the Returning Officer or the Constables. 2. That even if it be admitted that the votes of Long, Armstrong and Riley, should have been recorded for Relator, he would still be in a minority. The votes at the close being for Relator 33, and for Defendant 39; deducting one vote from the latter and adding three to the former, the result would be 38 for Defendant and 36 for Relator, leaving the Relator in a minority of two; and so his case fails.

As to the costs, I think I cannot under the circumstances vary the general rule that the unsuccessful party must pay the costs, and therefore decide as to costs against Relator; but must not refrain from drawing the attention of the taxing officer to the great number of affidavits filed on behalf of the Defendant and the Returning Officer, and the extraordinary manner in which they are framed, the larger part of them being filled with a statement of the time and place of holding the election, the names of the Candidates and the Returning Officer.

It will be well for the Master to consider, in taxing the costs, whether it was necessary to have so many affidavits and so diffuse, and whether a great many of the Deponents could not have joined in one affidavit, particularly those who swear generally as to the fairness of the conduct of the Returning Officer.

Judgment for defendant with costs.

STEPHEN CLOSSON v. JORDAN POST ALEXANDER THOMPSON AND THOMAS ADAMS.

Administration Bond—Costs of assignment.

The costs of an application under sec. 82 of the Surrogate Courts Act (Con. Stat. U. C. p. 112), for an assignment of a probate bond in order to an action thereon at Common Law, cannot be taxed as costs in the action but should be recovered as damages consequent on default.

(Chambers, May 15, 1860.)

It is provided by sec. 82 of the Surrogate Courts Act (Con. Stat. U. C., p. 112) that the Court of Chancery may order all bonds taken in the Court of Probate on the grant of administration, and inforce on 1st September, 1858, to be assigned and that the same may be enforced in the name of the assignee under the authority of the Court of Chancery, in the same way as provided for in the case of assignment of bonds in the Surrogate Court.

As to the latter, it is by sec. 65 of the same Act (p. 108) provided that the judge of every Surrogate Court on application made or on a petition in a summary way, and on being satisfied that the condition of any such bond has been broken, may order the Registrar of the Court to assign the same, to some person to be named in such order, and that such person, his executors or administrators, shall thereupon be entitled to sue on the said bond in his own name, both at Law and in Equity, as if the same had been originally given to him instead of to the Judge of the Court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of the condition of the said bond.

Letters of administration were granted by the Court of Probate for Upper Canada as to the estate of Calvin Carnell, deceased, during the minority of his son, who was then a minor, to the defendant Jordan Post. The usual bond was given by defendant Post and the remaining defendants Thompson and Adams. It having afterwards been shewn by the plaintiff to the satisfaction of the Court of Chancery, that defendant Post had committed a breach of the condition of the bond, that Court ordered the bond to be assigned to the plaintiff.

Plaintiff then commenced an action upon the bond in the Court of Queen's Bench, and recovered a verdict for the penalty with damages assessed at £61.

At the taxation of costs, plaintiff included in his bill against the defendants, the costs of the application to the Court of Chancery for the assignment of the bond, and the master disallowed them.

R. A. Harrison, appealed against the master's decision.

W. H. Burns, contra.

DRAPER, C. J.—In my opinion, the costs of the application to the Court of Chancery, cannot be taxed as costs in this cause. I think they might have been recovered as damages consequent on the default of the defendant.

CHANCERY.

(Reported by THOMAS HODGINS, Esq., LL. B., Barrister-at-Law.)

JAMES CALDWELL v. HEZEKIAH J. HALL AND JOHN MAXWELL.

Mortgagor and Mortgagee—Dormant Equities Act 18 Vic., ch. 124.

Held, 1. That the Dormant Equities Act, 18 Vic., ch. 124, (Con. Stat. U. C., p. 58, ch. 12 secs. 59 & 60) does not apply to cases of an express trust. 2. That clearly it does not extend to cases of mortgage; these cases being amply provided for by the Chancery Act, (*Wragg* v. *Jarvis* in appeal, 7 Grant. 220,) commented upon.

(May 16, 1860.)

In 1855, Robert Caldwell, the father of the plaintiff, was the owner of Lot No. 104 in the town of Guelph, containing by admeasurement one quarter of an acre, with a house and other buildings thereon erected.

On 10th March, in the same year, he mortgaged the lot and premises to the defendant John Maxwell, as security for the payment of £45, and interest on or before 4th February, 1837.

Robert Caldwell continued in possession up to the time of his death, which happened during the month of May, 1838. He died intestate, leaving a widow and the plaintiff, his only son and heir at law, his survivors.

The plaintiff, at the time of his father's death, was an infant under the age of 2 years.

The defendant John Maxwell, having in 1839, about a year after the death of plaintiff's father, threatened proceedings at law

to recover possession of the mortgaged premises, which up to that time had continued in possession of the widow of the deceased and of plaintiff, was allowed to take quiet possession and continued in receipt of the rents and profits until 1842.

In the last mentioned year defendant Maxwell by writing transferred all his interest in the lot to the defendant Hezekiah J. Hall, which was in express terms made subject to the equity of redemption of Robert Caldwell, and those claiming under him.

Defendant Hall having entered into possession, has hitherto continued in possession, and it was alleged that the defendants Maxwell and Hall, received from the rents and profits of the lot, more than sufficient to discharge the mortgage money and interest.

It was also alleged that at the time defendant Hall entered into possession there was a good and valuable house on the lot, which was destroyed by fire during his possession, and not re-built.

Plaintiff attained the age of 21 years on 24th November, 1857, and filed his bill to redeem, praying for an account of the rent and profits; and that defendant Hall, might be ordered to account for the insurance upon the house destroyed by fire, if insured, and if not insured, that he should be made to account for the value of it.

The defendants demurred for want of equity, and relied upon the statute of limitations and the Dormant Equities Act, 18 Vic., ch. 124, as disentitling the plaintiff to the prayer of his bill.

Adam Crooks for the demurrer.

R. A. Harrison contra.

Silcox v. *Sells*, 6 Grant 237, and *Wragg* v. *Becket*, 7 Grant 220, were referred to in the course of the judgment.

The judgment of the court was delivered by ESTEN, V. C.

ESTEN, V. C.—I have come to the conclusion that this demurrer should be overruled.

Much diversity of opinion has arisen with respect to the true construction of the 18 Vic., ch. 124. I gave my opinion as to its construction in the case of *Silcox* v. *Sells*, in a very few words. I confess that it did not appear to me that its meaning admitted of any doubt. It appeared to me that the preamble indicated very clearly the two-fold object of restricting the strict application of the rules of law to cases of actual fraud, and of conferring a discretionary jurisdiction in all other cases; and it appeared to me also very clear that the enacting clauses although not expressed so clearly as they might have been, were according to the proper construction calculated to carry out this two-fold object. The first clause restricting the application of the strict rules of law to cases of express fraud—the second clause conferring discretionary jurisdiction to all other cases. I thought the words according to the strict rules of law were necessarily to be understood in the first clause were so intended by the framer of the Act and naturally occurred to the reader of it.

So far as the case of *Wragg* v. *Becket*, is a decision, I am bound to follow it: the extra judicial opinions expressed in it are entitled to full respect, but they are of course not binding. I consider the only point decided by that case to be that relief cannot be given so as to disturb the legal title in any cases within the act except cases of actual fraud. It was not perhaps strictly necessary to decide this point, for it is manifest that if the Court had considered that in other cases than cases of actual fraud, they possessed a discretionary jurisdiction to disturb the legal title they would not have exercised it in that particular case. However they did not consider the question, and intended to decide, I think, that relief against the legal title was to be confined to cases of actual fraud. It was unnecessary to decide, and it was not decided that express trusts were within the Act: because it was considered that the case under adjudication was a case of constructive, not of express trust. The only members of the Court who expressed opinions on the point were the two learned Chief Justices and my brother Spragge. The learned Chief Justice of the Queen's Bench did not express a decided opinion on it. I am not sure that he did not incline against express trusts being introduced in the Act: it is well known that the Chancellor and my brother Spragge, hold that opinion strongly: the learned Chief Justice of the Common Pleas considered that express trusts were within the Act. Under these circumstances, I am at liberty to adhere to the opinion that I have always entertained, that the Act does not extend to cases of express trust. In any event, however, I should not consider that it extended to cases of mortgage. These cases were already amply provided for by the well known clause of the Chancery Act, which has been so commended for its wisdom.

The object of the 18 Vic., was to extend this provision to *other* cases. The only respect in which these provisions differ, is, that the 18 Vic., limits the exercise of the discretionary jurisdiction conferred by it to within a period of 20 years. But under the 11th clause of the Chancery Act, the Court has power to deny redemption even within 20 years, and also to extend it beyond that period; and it could not have been the intention of the legislature to deprive the court of these powers which may be so usefully and justly exercised according to the circumstances of each individual case. Moreover the 18 Vic. would operate only against the mortgagor and would not affect the mortgagee at all, whereas under the 11th clause of the Chancery Act, these rights and remedies are reciprocal. To hold that the 18th Vic., applied to mortgages, would be to repeal the 11th clause of the Chancery Act altogether. The cases contemplated by the two provisions are the same supposing the 18 Vic., to comprise cases of mortgages—that is to say, cases where the estate has become absolute before the 4th March, 1837. According to the construction which has been put upon the 18 Vic., no relief could, under that Act, supposing it to comprise cases of mortgage, be given to a mortgagor in any such case, whatever its circumstances might be, however just it might be to decree redemption; whereas under the 11th clause of the Chancery Act, the amplest discretion is given to the Court to deal with every case according to its circumstances and upon principles of perfect justice, holding therefore that this Act of Parliament does not affect cases of mortgage which continue to be governed by the provision introduced into the Chancery Act expressly for them.

I must overrule this demurrer, for the statute of limitations obviously interposes no bar to the present case, possession not having been taken until 1839, less than 20 years before the commencement of the suit, and as to the demurrer for want of equity, it being of course clear that a mortgagee is entitled to redeem the estate at any time within the period allowed by law for that purpose.

Demurrer overruled.

GRIMSHAWE V. PARKS.

Practice—Evidence—Parties—Accounts—Appeal from Master's Report.

On an appeal from the Master's Report, setting out certain grounds of appeal, it was

Held, 1st. That where one defendant obtains an order and examines one of his co-defendants, and the other parties to the suit cross-examine such co-defendant, he is thereby made a good witness in the cause.

2nd. That the heirs of a deceased mortgagee of an equity of redemption, are not necessary parties to a suit of foreclosure by the prior mortgagee—the proper party being the personal representative of such mortgagee.

3rd. That where evidence affecting the amount represented as due by the second mortgage, is taken in the absence of such personal representative, it cannot be read against the equitable holder of such mortgage, although such equitable holder was a party to the suit when the evidence was taken, and cross-examined the co-defendant whose evidence affected the mortgage.

4th. That it is sufficient in appealing from the Master's Report, that notice of such appeal be served within fourteen days from the signing of such report.

This was a motion by way of appeal from the Master's Report. A decree had been made referring to the Master to enquire as to incumberances and to take the account. During the inquiry, the mortgagor contended that a second mortgage given by him to the late E. F. Whittemore, and now held by Messrs. Gladstone was without consideration, and that it was given for the accommodation of the said Whittemore. The Master made the Gladstones and the heirs of Whittemore parties—no administration having at that time been taken out for Whittemore's estate. The morgagor, Parks, had been examined by a co-defendant, a judgment creditor under an order obtained for that purpose, and had given evidence as to the accommodation mortgage, and of there being nothing due on it, also evidence affecting the amount due on the first mortgage held by the plaintiff, and had been cross-examined by the plaintiff and other parties. After the evidence had been taken, administration of the estate of Whittemore was taken out, and the Master made the administrator a party, and then rejected the evidence as against all parties to the suit, and took the account giving the full amount of each mortgage due. From this the mortgagor and a judgment creditor appealed.

Hodgins for the appeal cited, as to evidence, *Triston* v. *Hardy*, (14 Beav. 21) and *Rice* v. *Wilson*, (in this court)—as to parties,

Whitla v. *Haliday* (4 D. & W. 267), as to account that the assignee of the mortgage took subject to the state of the account between the mortgagor and mortgagee, *Mathews* v. *Wallwyn* (4 Ves. 119), and *Moffatt* v. *Bank of Upper Canada* (5 Grant. 377).

Roaf, for Messrs. Gladstone, contended that the mortgage having been given to assist Whittemore in raising money, must be held good against the mortgagor, and that, at all events, the evidence could not be read as against them, owing to the absence of the personal representative at the examination.

Taylor, for the plaintiff, contended that the evidence was insufficient to affect his claim, and that it ought not to be read in the absence of the personal representative, because the plaintiff would have the right to fall back upon the estate of Whittemore for any deficency, as the mortgage he held had been also assigned by Whittemore.

S. H. Blake, for the personal representative, objected to the notice of appeal, the appeal should have been within the fourteen days. As he was no party to the suit when the evidence was taken, it could not be read against him or the Gladstones.

P. Cameron, for the infants, submitted to the judgment of the Court.

Esten, V. C., considered the evidence insufficient to reduce the plaintiff's claim, but held that the Master should have received the evidence as against the parties who had cross-examined the defendant, as they had thereby made him a good witness as against themselves. He also held, that the infant defendants, the heirs of the second mortgagee, were not necessary parties to the suit; that the proper party was the personal representative of his estate. That in regard to the amount due upon the second mortgage, as the evidence seeking to reduce it had been taken in the absence of the personal representative of the late Mr. Whittemore, the Master was right in reporting the whole amount as due, and in rejecting the evidence as taken. The appeal he considered was in time, notice having been served within the fourteen days, but as it had failed on the main points, viz., reducing the amounts due on the mortgages, he dismissed it with costs.

Martin v. Reid.

Practice—Demurrer—Amending Bill—Costs.

When a bill is demurred to, the usual order to amend without costs is irregular. If the demurrer is set down immediately after filing, the defendant waives his right to taxed costs, But otherwise a plaintiff may submit to a demurrer on payment of 20s. costs.

In this case, the plaintiff's bill had been answered and demurred to, and immediately after, the usual order to amend had been taken out and the bill amended in one particular, not affecting the principal ground of demurrer; a motion was made to discharge the order for irregularity.

Esten, V. C., granted the motion, discharging the order. When a bill is demurred to, it cannot be amended without the plaintiff submitting to the demurrer. If the defendant sets down the demurrer for argument, he waives his right to taxed costs, but if not set down the plaintiff may submit to the demurrer on payment of 20s. costs.

Crandell v. Moon.

Practice—Evidence—Master's Office.

The Master is bound equally with the court, to allow a witness to be cross-examined on the whole case, without regard to his examination in chief. But in some cases the Master may exercise a discretion as to who should pay the fees of the examination.

On a motion made against a decision of the Master, that the cross-examination of a witness, should be confined to matters arising out of the examination in chief,

Esten, V. C., held, that the Master was equally bound with the court, to allow cross-examination of each witness on the whole case, without regard to the limits of the examination in chief. He also remarked that an extraordinary case might occur, as where a witness is called to prove a single point, and the cross-examination extends over the whole case, which might justify the Master in exercising a discretion as to the party to whom to charge his own fees.

Russel v. Robertson.

Foreclosure—Accounts—Insurance moneys.

Held, that in the absence of an agreement between the parties, the receipt of insurance moneys by the mortgagee during the currency of the six months allowed for redemption, does not necessitate the taking of a subsequent account; that the mortgagee is not in all cases bound to apply such moneys in reduction of the mortgage debt; and conversely, that the mortgagee is not entitled, in all cases, to charge the Mortgagor with the amounts of the premiums.

In moving for a final order, in was admitted on the part of the plaintiff, that she had received a sum of £500 for the loss occasioned by fire to the mortgaged premises, and *W. Davis*, for the defendant Robertson (the mortgagor), contended that a subsequent account should be ordered, and that the £500 should be deducted from the amount payable under the decree.

Cattanach, for the plaintiff, shewed that the insurance had been effected by her as mortgagee, without any privity or arrangement with the mortgagor; that she had not attempted to charge him with the amount of the premiums, and that, in fact, she had insured merely for her own protection and by way of further security.

Spragge, V. C., after consideration, sustained the motion and held, that in the absence of any agreement between the parties, where a mortgagee for his own benefit and security insured the mortgaged premises, and received the amount of the policy, that amount should not be taken into the account and allowed to the mortgagor; agreeing with *White* v. *Brown* (2 Cush. Mass. Rep. 412). The English cases referred to were, *Dobson* v. *Land* (8 Hare 216), *Ex parte Lancaster* (4 Deg. & S. 524), *Gottlieb* v. *Cranch* (4 Deg. M. & G. 440), *Lea* v. *Hinton* (19 Beav. 324), and *Henson* v. *Blackwell* (4 Hare 434).

GENERAL CORRESPONDENCE.

Assessments—Non Residents—Statute Labor—Commutation.

To the Editors of the Law Journal.

Gentlemen,—I would respectfully submit the following questions for your consideration trusting that you will be kind enough to give your opinion in the next number of the *Law Journal*.

1st. Has any Non-Resident, or only such as are admitted under the 87th section of the Assessment Act to perform statute labor, the privilege of paying commutation statute labor upon the aggregate valuation of his lands, (if paid before the first of May), under the 88th clause of the said act?

2nd. Whether do the words "returned as such" in the 88 clause, refer to "defaulter" or "non-resident."

3rd. If all non-residents have the privilege of paying commutation statute labor upon the aggregate valuation (if paid before the first of May), how is the proper amount to be ascertained if not entered on the roll by the Clerk against the non-resident; the Treasurer who is the collector of non-resident rates, being required to furnish the owner of non-resident lands with a statement of the amount of arrears only against each lot, (see 114 section.)

I remain, Gentlemen,

yours very respectfully, A.

1st. As at present advised we think the privilege is restricted to such non-residents as are admitted to perform statute labor in respect of lands owned by them.

2nd. "Defaulters" in our opinion.

3rd. The answer No. 1 renders our answer to this, unnecessary.

MONTHLY REPERTORY.

CHANCERY.

V. C. W. JACKSON v. OGG. *Aug.* 1.

Statute of Limitations—Accumulation of interest—Trustees—Cestui trust.

Money was advanced by A., in 1845, to a partnership firm, with an agreement that interest was to be allowed at 10 per cent., and left to accumulate at compound interest. Interest at this amount was created from time to time in the partnership books, and accumulated, according to the arrangement, until the dissolution of the firm in 1852, but no payment was ever made to A., nor any acknowledgment signed by any of the partners after the original advance.

Held, that no trust had been created in favor of A., and that the defendant was, under the circumstances, barred by the Statute of Limitations.

L.J. RE THE M. & S. A. COMPANY *ex parte* GREENWOOD ET AL.

Contributory transfer.

In a company, the shares of which passed by delivery, a shareholder, desiring to get rid of his responsibility, sold his shares at a nominal price to his clerk a few days before an order was made for winding up the company;

Held, that as the sale was absolute and unconditional, the transfer was valid, and the vendor's name was removed from the list of contributions.

V. C. K. LORD v. COLVIN. *Suly* 18.

Scotch law—Necessary parties—Possibility of issue.

Where the decision of the question in a cause depends upon foreign law, that is a question of fact, and must be determined by the preponderance of opinion of juris-consults of the country, the law of which is involved in the question.

The court will not take upon itself to determine the effect of decisions upon the law of a foreign country.

Where a claim is made to property, the court requires all persons or classes of persons to be before it, interested in opposing such claim, and will not part with the property unless the claimant, if successful, would be entitled to immediate possession; and the rights of parties or classes of persons interested in resisting the claim are protected.

Where the claim to a property depends upon a female having a child who is in her fifty-second year, who has been married for thirty years, the court cannot assume that all possibility of her having a child is at an end.

S. J. HODGKINSON v. NATIONAL LIVE STOCK INS. CO. *June* 14.

Joint Stock Company—Purchase and cancellation of shares by directors—Parties—Demurrer—Allegations in bill.

A bill filed by some shareholders, on behalf of themselves and all others, except the defendants, who were the directors, alleged that the directors had subscribed for a large number of shares, but only paid the deposit on a small number; and had by a resolution of the board cancelled the shares on which no deposit had been paid; and had also misapplied the funds in purchasing the shares of one of their co-directors, who wished to retire; and also that they had made an improper call; and that these transactions had been confirmed at a general meeting by those shareholders who had paid the call, all others being excluded. The bill alleged that those transactions were fraudulent, and contrary to the deed of settlement; and also that the plaintiffs were ignorant of the names of the shareholders who had paid the call, but that they were known to the directors.

Held, on a demurrer by the directors, that the allegations of illegality in these transactions were sufficient, and the demurrer was overruled. *Held* also, that the allegation of ignorance of the names of the shareholders who had paid the call, was sufficient to excuse the defendants from making them parties.

V. C. W. RE HORNBY. *July* 29.

Will—Construction—Contingent gift.

Testators gave £300 to A., if living; and if dead, the £300 to become part of the residue. The will contained a gift of the residue to B. C. D., and A. if living. A. was dead at the date of the will.

Held, that the gift to A. had not lapsed, but was contingent upon his being alive; so that the other residuary legatees, and not the next of kin, took the share to which he would have been entitled.

M. R. BROOKE v. PEARSON. *July* 5.

Settlement—Gift over on alienation or bankruptcy.

By the settlement on A's. marriage, he, in consideration of £1,000 paid to him, and of the future property of the wife, assigned to him, settled his real property on himself till mortgage, alienation, or bankruptcy, and then upon trust as to £300 a year for the wife's separate use. A. first mortgaged his interest, and afterwards became bankrupt.

Held, that the wife of was entitled to the £300 a year, from the date of the mortage.

V. C. S. GARDNER v. GARDNER.

Married woman—Separate estate in husband's hands—Gift to husband.

In 1838 a legacy of £1000, bequeathed to a married woman for her separate use, was paid to her; and shortly afterwards, with her assent, came into her husband's hands; was paid by him to his bankers, mixed with his own money, and employed partly in business and partly in family expenditure. There was no evidence to show whether the wife intended that it should be a gift to her husband or not. The husband died in 1858, intestate, leaving his wife surviving.

Held, that she could not claim the sum out of her husband's estate.

M. R. NOBLE v. STOW. *July* 19.

Practice—Separate account—Erroneous order—Bill of review—Joint tenancy.

An order to carry a fund to the separate account of A. is not equivalent to a decree that A. is absolutely entitled, and if erroneous may be corrected without bill of review.

Where a person complains of orders of the court, who has not been an original party to the suit by a permanent right, he ought to bring an original bill, and not a bill of review.

When property is left to a class of children *simpliciter*, they take as joint tenants, and not as tenants in common.

M. R. COLLINS v. STUTELEY. *July* 21.

Specific performance—Sub-leases.

A plaintiff will not be entitled to damages in equity for the non-performance of an act for which *prima facie* he might have obtained specific performance, after he himself has done some act which disentitles him to specific performance.

A person who agrees to take a sub-lease, impliedly stipulates to take subject to the same covenants as the lessee.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

JOHN H. RIDDEL, Esquire, M.D., Associate Coroner, United Counties of York and Peel.—(Gazetted May 5, 1860.)

JOHN H. RIDDEL, Esquire, M.D., and JOHN H. ROSS, Esquire, Associate Coroners, County of Simcoe.—(Gazetted May 5th, 1860.)

TO CORRESPONDENTS.

W. H. LANDON—Under "Division Courts."

A.—Under "General Correspondence."

JAMES STANTON—LAW STUDENT—J. C.—Too late for this number.

DIARY FOR JULY.

1. SUNDAY..... *4th Sunday after Trinity.* Long Vacation commences.
2. Monday..... County Court and Surrogate Court Terms begin. Recorder's Court begins. Heir and Devisee Sittings commence.
7. Saturday..... Co. Court and Surrogate Court Term ends.
8. SUNDAY..... *5th Sunday after Trinity.*
14. Saturday..... Heir and Devise Sittings end. Last day for Judges of Co. Courts to make ret. of appeals from Assessment.
15. SUNDAY..... *6th Sunday after Trinity.*
22. SUNDAY..... *7th Sunday after Trinity.*
29. SUNDAY..... *8th Sunday after Trinity.*
31. Tuesday..... Last day for Clerks of County Courts to certify County Rate to Municipalities in County.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JULY, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60." *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The* "60" *has reference to the year, and not to the amount represented as due.*

JURISDICTION OF COUNTY COURTS AS TO LANDS.

It is enacted, by the County Courts Act, that the said courts shall not have cognizance of any action "where the title to land is brought in question." (Con. Stat. U. C., cap. 15, sec. 16, sub-sec. 1, p. 78.)

This is in terms nearly similar to sec. 58 of the English County Courts Act (9 & 10 Vic. cap. 95), which provides that the English County Courts "shall not have any cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or franchise, shall be in question."

Our statute, instead of using the words "any corporeal or incorporeal hereditaments," &c., makes use simply of the word "land." This word, in law, comprehends any ground, soil or earth whatsoever. It includes houses and buildings of all kinds; for the ownership of the land carries with it everything both above and below the surface. A pond of water is therefore described as land covered with water, and a grant of lands includes all rivers and minerals under the surface.—(Williams' Real Property, 13.)

It would seem that the word "land," as used in our statute, is of the most extensive signification. This opinion is strengthened by a reference to sec. 20 of the act (Con. Stat. U. C. p. 79), which enacts that "No plea, replication or other pleading, whereby the title to any land, or to any annual or other rent, duty or other custom or thing, *relating to or issuing out of lands or tenements*, is brought in question, shall be received by any County Court, without an affidavit thereto annexed, that the same is not pleaded vexatiously, nor for the mere purpose of excluding the Court from jurisdiction, but that the same does contain matters which the deponent believes to be necessary for the party pleading, to enable him to go into the merits of the case."

The object of the act is to exclude County Courts from having jurisdiction in any action where the title to land is *bona fide* brought in question, but not to enable a defendant vexatiously to set up that defence in order to oust the Court of jurisdiction.

One marked difference between our County Courts and the Courts of the same name in England, is, that while here actions brought in a County Court are conducted by written pleadings, as in the Superior Courts, there the actions are conducted *viva voce*. This distinction must be borne in mind, when reading English decisions as applicable to the provisions of our act.

In Upper Canada the title to land may be brought in question either on the face of the pleadings, or in some cases be suggested in evidence. Where the title is raised upon the pleadings, the judge can go no further. Thus, where defendant in replevin made cognizance, as bailiff, of A., alleging that the *locus in quo* was the freehold of A., and that he as bailiff took the cattle, &c., damage feasant, although plaintiff did not take issue on the plea of *liberum tenementum*, but on the allegation that defendant did, as bailiff of A., take the cattle, &c., it was held that the County Court was ousted of jurisdiction. (*Tenniswood* v. *Pattison*, 3 C. B. 243; see also *Powley* v. *Whitehead*, 16 U. C. Q. B. 589, 5 U. C. L. J. 15) So a plea of not possessed in an action of trespass in a County Court. (*Timothy* v. *Farmer*, 7 C. B. 814; but see *Latham* v. *Spedding*, 15 Jur. 576; 20 L. J. Q. B. 302.) So where plaintiff declared against defendant, his lessee, for removing a tenement, &c., and for converting the materials thereof to his own use, and defendant pleaded, first, that before removal

he acquired the freehold of the tenement by purchase secondly, that before removal he acquired the soil on which the tenement was erected, &c.; and, thirdly, that the building was not plaintiff's, as alleged. (*Reynolds* v. *Offett*, *coram* Chewett, Co. J., 3 U. C. L. J. 169.)

After the defendant has, under our statute, sworn that his plea is not pleaded vexatiously, the judge is not at liberty to entertain the surmise that it means nothing. The defendant pleads it at his peril, and the County Court is without jurisdiction to inquire into the truth of it. (*Powley* v. *Whitehead*, 16 U. C. Q. B. 592, 5 U. C. L. J. 15.) If the plea be not accompanied by such an affidavit, the court may order it to be taken off the file, because of its irregularity; but when the defendant swears that it is necessary for his defence upon the merits to have the title brought in question, then the jurisdiction ceases. (*Ib.* per Burns, J.)

If the title be not raised on the pleadings, but suggested by defendant in evidence, it is for the judge to inquire into the case, in order to satisfy himself that the action will bring title to land in question. (*Cowen* v. *Pierce*, 1 C. C. Chron. 282; Cox & Lloyd's County Courts, 254.)

It is certainly not enough for defendant merely to assert that he disputes title, in order to withdraw an action from the cognizance of a County Court. The judge must be satisfied, not that the claim is a good one, but that it is preferred with *bona fides*, and is sufficiently substantial to have an existence, however dubious may be its value, (but see *Marsh* v. *Dewes*, 7 Jur. 558.) For this purpose he may hear the objection and investigate the claim of title, so as to ascertain whether it be *bona fide* and substantial. It is plain that the court cannot ascertain whether title is really in dispute in the action, so as to be unable to decide the action without deciding upon the disputed title, unless it institutes an inquiry into the fact. (*Lilley* v. *Harvey*, 5 D. & L. 648; *Lloyd* v. *Jones*, 6 C. B. 81; Cox & Lloyd's County Courts, 253.) The court must be satisfied that the title is in dispute *in the action*, so that the action cannot be tried *without trying the title*. (*Ib.*)

If title be not a material ingredient in the action; if the real merits of the case can be tried without any reference whatever to title, the Court is not ousted of jurisdiction. Thus, where an action was brought to recover damages for an injury caused to the plaintiff's premises by the negligent conduct of the defendants' servants, whereby canal water was suffered to overflow, and at the trial the defendants disputed the title to certain embankments, and went into evidence to show that under their private act they were not bound to repair them when wharves were erected contiguous to the canal, and that such wharves had been erected and were out of repair, and caused the damage complained of the plaintiff gave evidence that the damage was caused by the *negligence* of the defendants' servants, in not opening certain sluices; the Court of Queen's Bench held, that the County Court was not ousted of jurisdiction. (*Morton* v. *Grand Junction Canal Company*, 6 W. R. 543.) But where, in trover for the conversion of grain, &c., the pleas were "not guilty," and not "possessed," and under these pleas it appeared in evidence that the real dispute was whether the grain, &c., which defendant had caused to be seized in execution, as being the property of one Barman, his debtor, was the goods of Barman or of the plaintiff—and that depended upon whether a deed which Barman had made in May 1848, of the land on which the grain, &c., was raised in 1849, was a *bona fide* conveyance, or fraudulent, with intent to defeat creditors—it was held, that although the title to land was only brought into question *incidentally*, still the Court was ousted of jurisdiction. (*Trainor* v. *Holcombe*, 7 U. C. Q. B. 548.)

If a party be sued for a nuisance on land, and set up as a defence that he is not the owner of the land, title to land clearly comes in question. (*The Queen* v. *Harden*, 2 El. & B. 188.) So where, in an action for a trespass, committed by breaking the doors of certain rooms in a cottage belonging to the plaintiff: the plaintiff's case was, that he had let the defendant a portion only of the cottage, and had reserved to himself the rooms in which the trespass was committed, which defendant denied. (*In re Chew* v. *Holroyd et al*, 8 Ex. 249.)

Title, however, does not necessarily come in question because the subject of dispute is a freehold, or something that forms part of a freehold. Every case must rest on its own peculiar circumstances, the test being, not the nature of the subject matter, but the nature of the *claim*. (Cox & Lloyd's County Courts, 256). Thus, where an action was brought for seizing a horse, and the defence was that the defendant was lord of the manor, and had seized it for a heriot; to which it was replied, that the horse was the joint property of the plaintiffs, and that one of them only was tenant of the manor, it being admitted that the defendant was the lord of the manor; the only question for trial was whether the horse was the joint property of the plaintiffs, and that one of them only was tenant of the manor. (*Penfold et al.* v. *Newland*, 1 C. C. Chron. 123; see also *Jenkins* v. *Evans*, *Ib.* 196.) So an action for taking sand and gravel from Hounslow-heath, was held not to involve a question of title. (*White* v. *Smith*, Cox & Lloyd, 256.)

Besides, defendant may be in such a position that he cannot set up title to land. Where the relation of landlord and tenant exists, the tenant cannot dispute his landlord's title. Nor, if the tenant voluntarily allow another in possession, can the latter dispute the landlord's title. But if

the tenant be evicted by compulsion, then the defendant is not so estopped—title comes in question, and the jurisdiction of the County Court is at an end. (*Mountnoy* v. *Collier*, 1 El. & B. 630; *Emery* v. *Barnet*, 4 U. C. L. J. 212; 27 L. J. C. P. 212; 22 Jur. 634.)

In England, but not in Upper Canada, it is provided, "that in any action in the County Court, in which the title to any corporeal or incorporeal hereditament, &c., shall *incidentally* come in question, the judge shall have power to decide the *claim* which it is the immediate object of the action to enforce, if both parties at the hearing shall *consent in any writing*, signed by them or their attorneys, to the judge having such power." (19 & 20 Vic. cap. 108, sec. 25.) But it is by the same section provided, "that the judgment of the court shall not be evidence of *title* between the parties or their privies in any other action in that court, or in any proceeding in any other court." (*Ib.*)

Where a County Court judge, owing to mistaken views as to jurisdiction, refuses to try an action over which he has jurisdiction, the proper remedy is by mandamus. *Trainor* v. *Holcombe*, 7 U.C. Q.B. 548; *Emery* v. *Barnett*, *ubi supra*.) So if he insist upon trying an action over which he has no jurisdiction, the remedy is the opposite one of prohibition. (*Lilley* v. *Harvey*, 5 D. & L. 648.) The one writ issues, as its name (mandamus) imports, to command the *performance*, the other (prohibition) to command the *forbearance* of some act. (Smith on Action, 53.)

The writs of mandamus and prohibition are in such cases, when they arise in England, dispensed with. Instead thereof, the party aggrieved is enabled to obtain all necessary relief by rule or order, either in term or vacation. (19 & 20 Vic. cap. 108, secs. 42, 43.)

If want of jurisdiction be established, the judge has no power *to go further*. He cannot either nonsuit plaintiff or award costs to defendant. (*Penfold et al.* v. *Newland*, 1 C. C. Chron. 123; *Lawford* v. *Partidge*, 1 H. & N. 621, 3 Jur. N.S. 271; *Powley* v. *Whitehead*, 5 U.C.L.J. 15, 16, U.C. Q.B. 589.) But defendant, if able to satisfy a superior court of want of jurisdiction, is not bound to wait a trial in the inferior court: he may at any time during the action move for a prohibition. (*Sewell* v. *Jones*, 18 Jur. 153, 19 L. J. Q. B. 372.)

It now remains for us to notice the Act of last session, extending the jurisdiction of County Courts as to lands. The extension is only to cases as between landlord and tenant, where the yearly value of the premises, or the rent payable in respect thereof, does not exceed $200.

If the term and interest of the tenant is expired, or is determined by a legal notice to quit, or if rent is in arrear for sixty days, and the landlord has a right by law to re-enter for nonpayment thereof; in any such case, where the yearly value of the premises, or the rent payable in respect thereof, does not exceed $200, the landlord may maintain ejectment in a County Court for the recovery thereof. (24 Vic. cap. 63.) In some respects this act resembles secs. 50, 51 & 52 of the English act 19 & 20 Vic. cap. 198; but the jurisdiction exercisable under the English act is much more summary than under ours.

One good effect of our act will be to abridge the term during which refractory tenants may set their landlords at defiance. Before the act, if a landlord were driven to ejectment, the tenant had only to enter an appearance, and defy his landlord for about six months, occupying and perhaps destroying his property without compensation or hope of compensation. In outer counties the assizes were held only twice a year (spring and autumn); and where an appearance was entered, a verdict could not be obtained until one or other of these assizes. County Courts, on the other hand, held their sittings four times a year. So that where the yearly value of the premises sought to be recovered does not exceed $200, the landlord, in the cases for which provision is made by the new act, cannot be longer delayed than three months; and is enabled, where the tenant is worthless, to obtain possession, upon payment of County, instead of Superior, Court costs, as formerly.

LAW REFORMS OF LAST SESSION.

In the June number we published a few important Acts of the last session of the Legislature. In this number we publish some more, in addition to those already published.

Among the Acts now published, our readers will be surprised to notice the Act respecting foreign judgments, the subject of remarks in the last number of the *Journal*. The bill was introduced at a very late stage of the session, and we did not believe it possible for it to become law in the short time that remained. That belief was strengthened by the fact of a communication which we received from Quebec, informing us that it would stand over till next session.

We now find that we were in error, and have to congratulate our readers that the bill became law twelve months sooner than we anticipated. It is in the main a really good measure, and the fact that it was placed on the statute book within a few weeks after its introduction to Parliament by the Government, shows how much the necessity for it was felt.

Let us not, however, be understood as being advocates for hasty legislation. It is too much the fashion to delay important measures till the heel of a session, and then rattle them through as if the destiny of empires depended on their fate. Legislation ought to be a work of deliberation. The

proper discharge of the functions of law-givers is vital to the welfare of a people; and when we witness reckless legislation, we tremble for the consequences.

The work of the session, as regards civil procedure and civil rights, is by no means devoid of interest. In other columns we publish an extract from the recent address of his Honor Judge Mackenzie, of Kingston, to the Grand Jury of General Quarter Sessions, on the occasion of the opening of that court, on the 12th June, as giving in comprehensive form a review of the changes effected in the law, so far as material to be known to the legal practitioner. Most if not all of the Acts to which the learned Judge makes reference, will be found in the pages of the *Law Journal.*

THE "LAW MAGAZINE AND LAW REVIEW."

Our readers will peruse with interest an article which we publish in this number of the *Law Journal,* taken from the *Law Magazine and Review,* and headed "The Law and Lawyers in the British Colonies." It gives us great pleasure to find, in a legal periodical so influential, good opinions expressed of the status of our bar, and that pleasure is not by any means diminished when we find in the same article a complimentary reference to the *Upper Canada Law Journal.*

We are sensible of the differences that exist between the bar of this colony and that of the mother country; and feel proud to acknowledge that our endeavour is to emulate our brethren on the other side of the Atlantic. Though our local laws may and no doubt do, in some respects, differ from the laws of the mother country, yet the great body of the law in the two countries is identical. It is the old common law of England,—the germ of all that is noble and great,—a law which is the safeguard and the pride of a people among whom real liberty flourishes in real security.

The beauty of English law is, that, while it adds stability to the throne it equally protects the roof of the most humble cotter. It extends the ægis of its protection to all persons without regard to creed, colour, or standing. It inspires liberty and enobles its devotees. It is impossible that our laws can be in their purity administered by a venal bar. The proper understanding of our laws elevates the mind of man, and so dignifies the profession to whom its administration is especially entrusted.

AUTHORITY OF COUNSEL.

The English Court of Exchequer has at length given judgment in the celebrated case of *Swinfen* v. *Lord Chelmsford.* The judgment is in favor of the defendant. It is in effect decided that a barrister acting in good faith and with a single view to the interests of his client, is not responsible for any mistake, indiscretion, or error of judgment. The case is to be appealed.

23 VIC.—CHAP. XXIV.

An Act respecting Foreign Judgments and Decrees.

[Assented to 19th May, 1860.]

Whereas it is expedient to amend the laws of Upper and Lower Canada respecting Foreign Judgments and Decrees and to assimilate the same: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enact as follows:

1. In any suit brought in either section of the Province upon a Foreign Judgment or Decree (that is to say, upon any Judgment or Decree not obtained in either of the said sections, except as hereinafter mentioned) any defence set up or that might have been set up to the original suit may be pleaded to the suit on the Judgment or Decree.

2. In any suit brought in either section on a Judgment or Decree obtained in the other section in a suit in which the service of process on the defendant or party sued has been personal, no defence that might have been set up to the original suit can be pleaded to that brought upon the Judgment or Decree.

3. In case of a suit against a Corporation, service of process on the officer or officers thereof named in the Act incorporating such Corporation, or in case there be no officer named in the said Act, then service of process according to the law of the section of the Province where the process is served, shall be held to be personal service under this Act.

4. In any suit brought in either section on a Judgment or decree obtained in the other section in a suit in which personal service was not obtained and in which no defence was made, any defence that might have been set up to the original suit may be made to the suit on such judgment or decree.

23 VIC.—CHAP. XLIV.

An Act to regulate the removal of causes from County Courts.

[Assented to 19th May, 1860.]

Her Majesty by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. No cause or suit instituted in any County Court in Upper Canada shall be removed or removable from such County Court, by writ of *certiorari* or otherwise, into either of the Superior Courts of Common Law, unless the debt or damages claimed amount to upwards of one hundred dollars, and then only on affidavit and by leave of a Judge of one of the said Superior Courts, in cases which shall appear to the Judge fit to be tried in one of the Superior Courts, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit.

23 VIC.—CHAP. LXIII.

An Act to extend the Jurisdiction of the County Courts.

[Assented to 19th May, 1860.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. The several County Courts in Upper Canade shall have jurisdiction, and hold plea in actions of ejectment for the recovery of corporeal hereditaments, (where the yearly value of the premises, or the rent payable in respect thereof, does not exceed two hundred dollars) in the following cases, namely:

1. Where the term and interest of the tenant of any such corporeal hereditament shall have expired, or been determined by the landlord or the tenant, by a legal notice to quit;

2. Where the rent of any such corporeal hereditament shall be sixty days in arrear, and the landlord shall have right by law to re-enter for non-payment thereof.

II. The fifteenth chapter of the Consolidated Statutes for Upper Canada and this Act shall be read as one Act, as if the provisions of this Act had been incorporated with the said chapter fifteen.

III. The provisions of the Act chapter twenty-seven of the Consolidated Statutes for Upper Canada shall, so far as applicable, extend and apply to actions and proceedings under this Act, and to the said County Courts, in reference to such actions and proceedings.

IV. The several County Courts in the exercise of the jurisdiction given by this Act, shall have and exercise the same powers as belong to, and may be exercised by, the Superior Courts of Common Law, in and in respect to actions of ejectment.

V. The Judges of the Superior Courts of Common Law, acting under the three hundred and thirty-ninth section of "The Common Law Procedure Act," may alter the mode of procedure prescribed by the said Act chapter twenty-seven, so far as relates to actions of ejectment in the County Courts under this Act.

VI. The term "landlord" as used in this Act shall be understood to mean the person entitled to the immediate reversion of the lands. or if the property be holden in joint tenancy, coparcenary or tenancy in common, shall be understood to mean any one of the persons entitled to such reversion.

VII. Every action under this Act must be brought in the County Court of the County in which the premises sought to be recovered lie.

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23 VIC.—CHAP. LXV.

An Act to amend the Law of Replevin in Upper Canada.

[Assented to 10th May, 1860.]

Whereas it is expedient to amend the law relating to Replevin, so as to prevent the same being perverted to purposes of injustice: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. No Writ of Replevin shall issue,—

1. Unless an order is granted for the Writ, on an affidavit by the person claiming the property, or some other person, showing to the satisfaction of the Court or Judge the facts of the wrongful taking or detention which is complained of, as well as the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be);

2. Or unless the affidavit for the Writ states, in addition to what is required by the fourth section of the Act relating to Replevin, that the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession, within two calendar months next before the making of the affidavit, and that the deponent is advised and believes that the claimant is entitled to an order for the Writ, and that there is good reason to apprehend that unless the Writ is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect to the property;

3. Or, in case the property was distrained for rent or damage feasant, the Writ of Replevin may issue without an order, if the affidavit states, in addition to what is required by the fourth section of the Act relating to Replevin, that the property was distrained and taken under color of a distress for rent or damage feasant, and in such case the Writ shall state that the defendant hath taken and unjustly detains the property, under color of a distress for rent or damage feasant (as the case may be).

II. In case the Writ issues without an order, the Sheriff shall take and detain the property, and shall not replevy the same to the claimant without the order of a Judge, or a rule of the Court in that behalf; but may, within fourteen days from the time of his taking the same, re-deliver it to the defendant, unless in the meantime the claimant obtains and serves on the Sheriff a rule or order directing a different disposition of the property; but this section shall not apply in case of a distress for rent or damage feasant, under the third sub-section of the first section of this Act.

III. When an application for an order is made, the Court or Judge may proceed on the *ex parte* application of the claimant, or may grant a rule or order on the defendant to show cause why the Writ should not issue; and may, on the *ex parte* application, or on the return of the rule or order to show cause, grant or refuse the writ, or direct the Sheriff to take a bond in less or more than treble the value of the property, or may direct him to take and detain the property until the further order of the Court, instead of at once replevying the same to the plaintiff: or may impose any terms or conditions in granting the Writ, or in refusing the same, (on the return of a rule or order to show cause,) as under the circumstances in evidence, appear just.

IV. In case a Writ of Replevin is issued, whether with or without an order, or in case any rule or order is made under the preceding section, the defendant may, at any time, or from time to time, apply to the Court or Judge, on affidavit or otherwise, for a rule or order on the plaintiff to show cause why the writ, or why the rule or order respecting the same, should not be discharged or why the same should not be varied or modified in whole or in part, as therein specified, or why all further proceedings under the Writ should not be stayed, or why any other relief, to be referred to in the rule or order so applied applied for, should not be granted to the defendant, with respect to the return, safety or sale of the property or any part thereof, or otherwise; and the Court or Judge may make such rule or order thereon, as, under all the circumstances, best consists with justice between the parties.

V. Before the Sheriff acts on any Writ of Replevin, he shall take a bond, conditioned not only to the effect mentioned in form B, appended to the above cited Act, but also that the plaintiff do pay such damages as the defendant shall sustain by the issuing of the Writ of Replevin, if the plaintiff fails to recover judgment on the suit; and further, that the plaintiff do observe, keep, and perform all rules and orders made by the Court in the suit.

VI. In case the value of goods or other property or effects distrained, taken or detained, does not exceed the sum of forty dollars, the Writ may issue from the Division Court for the Division within which the defendant, or one of the defendants resides, or carries on business, or where the goods or other property or effects, have been distrained, taken, or detained.

VII. But the matter shall be disposed of without formal proceedings, and the powers of the Courts and Officers, and the proceedings generally in the suit shall be, as nearly as may be, the same as in other cases which are within the jurisdiction of Division Courts; and this Act and the Act relating to Replevin, shall, so far as any such suit is concerned, be read as if they formed part of the Act respecting Division Courts. (Consolidated Statutes for Upper Canada, chapter nineteen.)

VIII. The Act relating to Replevin shall not hereafter authorize the replevying or taking out of the custody of any bailiff any personal property seized by him under any process issued out of a Division Court in Upper Canada.

IX. So far as relates to proceedings in the Superior Courts of Law and in the County Courts, the sections of the Common

Law Procedure Act, numbered respectively from three hundred and thirty-three to three hundred and forty-one, shall be deemed to apply to this Act, as if this Act had been incorporated with the said Common Law Procedure Act, but it shall not be necessary to lay before Parliament the rules, orders, or regulations made by the Judges for the purposes of this Act.

X. This Act applies to Upper Canada only.

23 VIC.—CHAP. XXVII.

An Act respecting Trade-Marks.

[Assented to 19th May, 1860.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. It shall be a misdemeanor, to mark any goods with the known and accustomed trade-mark, name or device of any manufacturer, or to pack any goods in any package bearing the known and accustomed trade-mark, name or device of any manufacturer, or in any package which has been used for packing goods manufactured by him,—or knowingly to sell or offer for sale goods so marked or packed,—unless such goods were really manufactured by such manufacturer, or his express consent to use such trade-mark, name, device or package was first obtained,—provided such trade-mark, name, package or device be so used with intent to deceive, and so as to induce persons to believe that such goods were manufactured by such manufacturer, and the goods are sold as being manufactured by him.

II. For the purpose of this Act the use of any trade-mark, name, package or device, either identical with that of any manufacturer or so closely resembling it as to be calculated to be taken for it by ordinary purchasers, shall be held to be a use of the trade-mark, name, package or device of such manufacturer.

III. A suit may be maintained by any manufacturer against any person using his trade-mark, name, package or device, or any imitation thereof,—or selling goods bearing such trade-mark, name or device, or any imitation thereof, or packed in packages being or purporting to be his, contrary to the provisions of this Act; and in such suit any special damages sustained by such manufacturer by reason of any such act as aforesaid may be recovered,—and if no special damages be proved the plaintiff shall recover nominal damages and costs.

IV. Nothing in this Act shall be construed as a declaration that any act hereby made a misdemeanor, was or was not a misdemeanor before its passing,—or that any such suit as aforesaid could or could not heretofore be maintained in either section of the Province;—nor shall any thing herein prevent any offence being dealt with as forgery, or as a fraud or other offence, if without this Act it could be so dealt with.

23 VIC.—CHAP. XXXVIII.

An Act to amend the ninth chapter of the Consolidated Statutes of Canada, intituled: "An Act respecting Civilisation and Enfranchisement of certain Indians."

[Assented to 19th May, 1860.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assemby of Canada, enacts as follows;

I. The third Section of the ninth chapter of the Consolidated Statutes of Canada, intituled: "An Act respecting civilization and enfranchisement of certain Indians," is hereby repealed.

II. The following Section shall be substituted for the repealed third Section of the said Act, and shall, in lieu thereof, be read as the third Section of the said Act: "No person shall sell, barter, exchange, or give to any Indian man, woman or child, within Canada, any kind of spirituous liquors, in any manner or way, or cause or procure the same to be done for any purpose whatsoever; and if any person so sells, barters, exchanges, or gives any such spirituous liquors to any Indian man, woman, or child, as aforesaid, or causes the same to be done, he shall, on conviction thereof, by a Justice of the Peace, upon the evidence of any one credible witness, other than the informer or prosecutor, be fined, not exceeding twenty dollars for every such offence, one moiety of every such sum to go to the informer or prosecutor, and the other moiety thereof, to be paid to Her Majesty, and to be part of the Consolidated Revenue Fund of this Province; but no such penalty shall be incurred by the furnishing to any Indian in case of sickness, any spirituous liquor, either by a medical man, or under the direction of any such medical man.

EASTER TERM JUDGMENTS.

QUEEN'S BENCH.

Present: ROBINSON, C. J.; MCLEAN, J.; BURNS, J.

June 16, 1860.

Provincial Insurance Company v. *Shaw.*—Rule *nisi* to enter a nonsuit discharged.

Prov. Insurance Company v. *McDonald.*—Rule *nisi* discharged.

Beaty v. *Ross.*—Rule absolute.

Wittrock v. *Wilson.*—Rule *nisi* discharged.

Wilson v. *Wittrock.*—Postea to plaintiff.

Pullen v. *Curry.*—Rule absolute. Costs to abide the event.

Essex Building Society v. *Beeman.*—Rule discharged, with costs.

Reed et ux v. *Weer.*—Rule absolute.

Corporation of Brant v. *County of Waterloo.*—Rule *nisi* discharged, without costs.

Donovan v. *Cummings.*—New trial, on payment of costs.

Kerr v. *Cameron.*—Rule discharged.

Toole v. *Ashford.*—New trial, on payment of costs.

Boulton v. *Ball et al.*—New trial, on payment of costs. Plaintiff may apply to amend, on payment of costs by first of next term.

Fraser v. *Bank of Toronto.*—Rule *nisi* discharged.

Smeaton v. *Caspar.*—New trial, on payment of costs. Costs to be paid by next term.

McMullen v. *Wardoff.*—Rule discharged.

Cameron v. *McDougall.*—Judgment for defendant on demurrer, with leave to apply to amend within one month.

June 23, 1860.

Moffatt et al. v. *Robertson & Beamish.*—Action on promissory note, against one defendant as maker and the other as indorser. Plea by both defendants, showing want of consideration. Indorser offered to call maker to prove plea. Evidence rejected. Held, properly rejected. Burns, J., *dissentiente.* Rule discharged.

Day v. *Robertson.*—Judgment for defendant.

Meaghar v. *Ætna Insurance Company.*—Judgment for plaintiff on 2nd and 5th pleas, and for defendant on 3rd and 4th pleas; with leave to either party, by first day of next term, to apply for leave to plead or reply.

Feehan v. *Bank of Toronto.*—Appeal from County Court of York and Peel. Assignment to creditors, made on the 12th of a month, and filed on the 15th of same month. Execution on the 13th of same month. Held, that the filing had relation back to its date. Judgment of court below reversed. (Court of Common Pleas, in a case between same parties, decided differently. See also Shaw *v.* Gault, C. P. *infra.*

Brown v. *Garden & Gibson.*—Replevin. Avowry and cognizance by defendants as landlord and bailiff. Special plea. Held, that plea amounts to *nil habuit in tenementes*, and judgment for defen-

dants. Leave to plaintiff to amend, on the usual terms, within a fortnight, by alleging an eviction.

Vanburen v. *Bull et al.*—A school case. Judgment deferred till next term, till court has an opportunity of seeing recent School Act.

Kendra v. *Moffatt.*—Action on a covenant in a mortgage for purchase money of land sold. Equitable plea, claiming an abatement of a proportion of purchase money, in respect of a piece of the land sold, to which plaintiff had no title, and payment into court of balance. Held, plea bad.

Small v. *Moylan.*—Information for libel. Special plea of justification. Demurrer. Held, plea bad.

Lamb v. *Teeter.*—Trespass to land and to goods. Stands till next term, with leave to either party in meantime to apply to amend. Both declaration and pleas require to be amended.

McArthur v. *Cool.*—Action on a covenant given by a Division Court bailiff. Held, declaration insufficient. McLean, J., *dissentiente.* Plea good.

Scott v. *Corporation of Peterboro'.*—Held: 2nd plea sufficient bar to the action; 3rd plea also good. Judgment for defendant.

Vankleek v. *Stuart.*—Replevin for saw logs seized by Indian lands agent, from a person to whom Indians sold the same. The timber was sold after it was cut. Rule *nisi* discharged.

Holmstock v. *Palmer.*—Judgment for defendant on record.

The Queen v. *Bullock.*—Indictment for embezzlement. Verdict, guilty. Rule *nisi* for a new trial, on the ground of insufficiency of evidence. Rule absolute.

Bank of Upper Canada v. *Tarrant.*—Appeal from decision of judge of the County Court of Hastings. Appeal dismissed, with costs.

In re Quinlan and Morrison.—Rule for certiorari to remove an order to arrest, issued by the judge of the County Court of the County of Welland. Rule granted.

Henderson v. *Dickson.*—Motion to rescind a judge's order. Order not before the court, and therefore application stands over till next term.

COMMON PLEAS.

Present: Draper, C. J.; Richards, J.; Hagarty, J.

June 16, 1860.

Hodgkiss v. *Hedley.*—Rule discharged.

Robson v. *Buffalo and Lake Huron Railroad Company.*—Judgment for plaintiff, on whole record, for $152 85.

Pierce v. *Small.*—Rule discharged. Hagarty, J., *dissentiente.*

Grasset v. *Hutchinson.*—Per Draper, C. J.: Plaintiff entitled to recover. Richards, J., dissents. Hagarty, J.: No judgment. Rule drops.

Park v. *Davis.*—Action against County Court judge, for permitting a Division Court clerk to act in the discharge of the duties of his office without first requiring him to give the requisite security. Action lies. First count good. Judgment for plaintiff, on demurrer to first count; for defendant on other counts.

Dance v. *Burrowes.*—Judgment for defendant, on demurrer.

Coates v. *Bullock.*—Judgment for defendant.

Regina v. *Hill.*—Application for a writ of mandamus to township clerk, to admit relator to the office of township councillor, where office filled by an election *de facto* if not *de jure.* Rule discharged, without costs. Held, that relator should have proceeded to contest the office by writ of *quo warranto.*

Wilkinson v. *Conklin.*—Ejectment. Rule discharged.

White v. *Nelson.*—Rule discharged.

Gough v. *McBride.*—Ejectment. Held, that a memorial executed by a grantee, when not accompanied by possession of the land affected, is not secondary evidence of the deed as against the grantor. Rule discharged.

Shanks v. *Coates.*—Dower. Rule *nisi* to increase the damages. Rule absolute, no cause being shown.

Ball v. *Goodman.*—(Two cases.) Seduction. Suggestion by administrator, entered by order of Mr. Justice McLean. Demurrer to suggestion, and rule *nisi* to set aside order of Mr. Justice McLean. Judgment for defendant on demurrer, and order set aside. Held, that action did not survive.

The Queen v. *The Corporation of Port Hope.*—Application for a mandamus. Rule absolute.

Craig v. *Rankin.*—Defendant entitled to judgment on the demurrer. Held, that a tax imposed by school trustees on the parents or guardians of persons sending children to school, not legal.

Haggart v. *Wintermote.*—Ejectment. Rule *nisi* for new trial discharged.

Merrick v. *L'Esperance.*—Action on a guarantee. Rule *nisi* to enter a nonsuit discharged.

Read v. *Ranks.*—Dower. Rule *nisi* discharged.

Hill v. *Small.*—Rule discharged.

McCallum v. *Snyder.*—Rule discharged.

Smith v. *Birnie.*—Judgment for plaintiff on first plea, for defendant on second. Rule absolute as to so much as asks amount of note to be deducted from verdict, and discharged as to residue.

Owens v. *Davidson.*—Action as to a disputed boundary. Postea to defendant.

Winter v. *Stewart.*—Rule discharged.

Johnston v. *Smith.*—Action against sheriff for neglect to levy and false return. Verdict for plaintiff. Rule *nisi* for new trial discharged.

Russel v. *Carscallan.*—Ejectment. Rule absolute.

June 23, 1860.

Hodge v. *The State Insurance Company.*—Rule *nisi* for a new trial refused.

Ferris v. *Chesterfield.*—Appeal dismissed, with costs.

Annis v. *Dormon.*—(Two cases.) Judgment for plaintiff, on demurrer; and rule *nisi* for new trial absolute. Costs to abide the event.

Howes v. *Mills.*—(Two cases.) Judgment for plaintiff on demurrer, and rule *nisi* discharged.

Cuthbert v. *Street.*—Rule *nisi* to enter verdict for plaintiff made absolute.

Buell v. *Ford.*—Plaintiff entitled to judgment on the demurrer, with leave to defendant to amend his special pleading. Only one special plea to the whole declaration. Richards, J.: No judgment.

Shaw v. *Gault.*—Appeal from the decision of the County Court of the United Counties of Stormont, Dundas and Glengarry. Held, that there are five days, and five only, allowed to file a bill of sale; and that if not filed within that time, it is void. Held also, that if an execution be placed in the sheriff's hands, between the date of the bill of sale and its filing, though within five days, it is entitled to prevail. Judgment of court below reversed.

Township of Beverley v. *Barlow.*—(Two cases.) Postea to plaintiff.

Randal v. *Fullarton.*—Rule discharged.

Neale v. *Winter.*—Rule to reduce amount endorsed on writ of *fi. fa.* made absolute, without costs.

Brown v. *Wythers.*—Rule discharged, with costs.

Campbell v. *Grier.*—Rule *nisi* for new trial. Costs to abide the event.

PRACTICE COURT.

Present: Richards, J.

June 16, 1860.

VanEvery v. *Drake.*—If defendant pay costs taxed on former rule, and costs of this application, within one month from this date, *then* rule discharged; otherwise, absolute.

In re Thomas v. *Brooks.*—Held, that the power of issuing execution on a rule is confined to cases where money is made payable

by the rule. Where, therefore, an order to enforce an award, though the submission was made a rule of court, and the award did not direct the payment of money, a rule to set aside execution issued on such a rule was made absolute, with costs.

Niagara and Detroit Rivers Railway Company v. *Burkholder.*—Rule *nisi* discharged, without costs. Point decided same as in last case.

ADDRESS

OF HIS HONOR, JUDGE McKENZIE, TO THE GRAND JURY OF UNITED COUNTIES OF FRONTENAC, LENNOX AND ADDINGTON.

On former occasions I directed the attention of the Grand Inquest and of the public, to any changes or alterations effected in the criminal law, and in the administration of justice in general in Sessions of Parliament immediately preceding sittings of the Court. I do not find that any material alteration has been made in the criminal law of the country in the Session of Parliament which recently closed, but changes have been made in the law in reference to civil rights and the authority of the courts of law in Upper Canada. The law which authorized the bringing of suits within the competence of the County Courts in what was termed the "Inferior jurisdiction" of the Superior Courts, has been unconditionally repealed; and very properly so. The consequence of the abrogation of this law is that all suits and actions within the competence of the County Court will require to be brought and prosecuted in that Court itself; and no causes or suits instituted in the County Court shall be removed from such County Court by writ of *certiorari* or otherwise into the Superior Courts of Common Law, unless the debt or damages claimed amount to upwards of one hundred dollars, and then only on affidavit and by leave of a Judge of one of the Superior Courts in cases which shall appear to the Judge fit to be tried in one of the Superior Courts, and upon such terms as to payment of costs. giving security for debt and costs, or such other terms as he shall think fit.

And for the future, in any action depending in any of Her Majesty's Superior Courts of Common Law in Upper Canada, in which the amount of the demand is ascertained by the signature of the party, and in any action for any debt in which a Judge of either of the Superior Courts shall be satisfied that the case may safely be tried in the County Court, any Judge of the Superior Courts may order that such case may be tried in the County Court of the County where such action was commenced, and such action shall be tried there accordingly, and the record shall be made up as in other cases, and the trial shall take place in such County Court in the same way as ordinary cases are tried therein.

The jurisdiction of the County Courts has also been extended to actions of ejectment in certain cases. The several County Courts in Upper Conada shall have jurisdiction to try actions of ejectment for the recovery of the possession of property where the yearly value of the premises, or the rent payable in respect thereof, does not exceed two hundred dollars, in cases where the term and interest of the tenant of such property shall have expired, or been determined by the landlord or tenant by a legal notice to quit, and where rent shall be sixty days in arrear, and the landlord shall have right by law to re-enter for non-payment thereof.

The law of Replevin has also been amended and materially improved. For the future no writ of Replevin shall issue unless an order is granted for the writ, on an affidavit, by the person claiming the property, or some other person showing to the satisfaction of the Court or Judge, the facts of the wrongful taking or detention which is complained of, as well as the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be).

Or unless the affidavit for the writ states in addition to what is required by the fourth section of the former Act relating to Replevin, that the property was wrongfully taken out of the possession of the claimant, or was fraudently got out of his possession within two calendar months next before the making of the affidavit, and that the deponent is advised and believes that the claimant is entitled to an order for the writ, and that there is good reason to apprehend that unless the writ is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect to the property.

Or in case the property was distrained for rent or damage feasant the writ of Replevin may issue without an order if the affidavit states in addition to what is required by the former law, that the property was distrained and taken under color of a distress for rent or damage feasant.

In case the writ issue without an order from the Judge, the Sheriff shall take and detain the property, and not replevy the same to the claimant without an order from the Judge of the Court, but may, within fourteen days of taking the same, re-deliver it to the defendant, unless in the meantime the claimant obtains and serves on the Sheriff a rule or order directing a different disposition of the property. When the application for an order is made the Court or Judge may proceed on the *ex parte* application of the claimant, or may grant a rule or order on the defendant to show cause against the issuing of the writ.

In case the writ of Replevin is issued whether with or without an order, the defendant may at any time apply to the Court or Judge on affidavit or otherwise, for the discharge of the writ and order, and for such other relief, with respect to the return, safety, or sale of the property or any part of it; or, otherwise, as under all the circumstances in evidence appears just.

When the value of the property taken, or detained, does not exceed the sum of forty dollars, the writ of Replevin may issue from the Division Court, for the division within which the defendant resides, or, where the property has been distrained, taken or detained; and, for the future, it shall not be lawful to replevy or take out of the custody of any Bailiff, any personal property, seized by him, under any process issued out of a Division Court in Upper Canada.

Another law of a very curious character, was passed in the last Session of Parliament—namely, the Act passed to exempt certain articles from seizure in satisfaction of Debts. The following chattels are, for the future, exempt from seizure, under any writ, issued out of any Court whatever in this Province, namely:—The bed, bedding and bedsteads in ordinary use by the debtor and his family; the necessary and ordinary wearing apparel of the debtor and his family; one stove and pipes, one crane and its appendages, one pair of and-irons, one set of cooking utensils, one pair of tongs and shovel, one table, six chairs, six knives, six forks, six plates, six tea cups, six saucers, one sugar basin, one milk jug, one tea pot, six spoons, all spinning wheels and weaving looms in domestic use., and ten volumes of books, one axe, on saw, one gun, six traps and such fishing nets and seines as are in common use, all necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value forty dollars, one cow, four sheep, two hogs, and food thereof for thirty days, tools and implements of, or chattels ordinarily used in the debtors occupation, to the value of sixty dollars. The Debtor, under this Act, may select, out of any large number, the several chattels exempt from seizure.

The law, respecting Foreign Judgments and Decrees, has been amended, and placed upon a sensible footing. In any suit which may, hereafter be brought upon a Foreign Judgment or Decree, any defence set up, or that might have been set up, to the original suit, may be pleaded to the suit on the

Judgment or Decree. But in any suit brought in either section of this Province, on a Judgment or Decree obtained in the other section of it, in a suit in which the service of process on the defendant, or party sued, has been personal, no defence that might have been set up to the original suit can be pleaded to that brought on the Judgment or Decree; but on such suit, in which personal service was not obtained and in which no defence was made, any defence that might have been set up to the original suit, may be made to the suit on such Judment or Decree.

An Act was also passed, in relation to Insurance Companies not incorporated within the limits of this Province. For the future, Foreign Insurance Companies cannot carry on business in this Province, without license from the Finance Minister of the Province, after investing $50,000 in government debentures or municipal loan funds, or in the stocks of one or more of the chartered banks of the Province. An Act was also passed to diminish the number of licenses to be issued for the sale of intoxicating liquors, by retail, with a view of circumscribing, if possible, the intolerable nuisance of drunkenness. I am afraid the provisions of this law will effect but little good under present circumstances. If the Legislature really wish to enact laws to retard the march of intemperance it must do something more than to pass such a milk-and-water enactment as this Act contains.—However, it is something gained, and let us hope that it my prove a stepping-stone for better things—a precursor of a wiser, a more enlightened and more extensive measure, bearing upon the sale and traffic of intoxicating liquors generally.

THE CASE OF THE REV. MR. HATCH.

The following letter was addressed to the Editor of the *Times*.

"Sir,—The indictment of Eugenia Plummer for perjury, which has just terminated in her conviction, has been rightly characterised by Mr. Baron Channell as one of the most extraordinary cases ever heard in an English court of justice. With the general merits of this trial I do not propose to deal; but as the case, when duly considered, affords a striking illustration of a serious defect in our criminal jurisprudence, I am anxious, in the language of the Clapham school of divines, to "improve the occasion."

"The defect to which I allude is the rule of law which prohibits every person, and the wife of every person, who stands as a defendant at a criminal bar from giving evidence on oath. Let us see how that rule has operated in the case in question. In December last the Rev. Henry Hatch was indicted at the Old Bailey for the very serious offence of indecently assaulting Miss Plummer, a little girl twelve years of age, who was one of his pupils. Such deeds are *κατ' ἐξοχήν*, deeds of darkness; and the very nature of the charge almost precluded the possibility of any disinterested eye-witness being present to confirm or contradict the statement made by the prosecutrix. One would imagine that in such a case, if in no other, the proper course to pursue would be to hear all that could be said, first by the accuser, and next by the accused, and then to decide from the conflict of testimony on which side the truth lay. This seems to be the natural mode of procedure which common sense would suggest, and which justice would sanction. But, the law of England takes a different view of the subject; and while pretending to reverence the maxim, *audi alteram partem* it doggedly compels the jury to hear only one side. It opens the mouth of the prosecutor, but it closes the mouth of the defendant. Nay, it does more, for it closes also the mouth of the defendant's wife. However material the facts may be to which the defendant or his wife can depose, they will not be permitted under any circumstances to divulge what they know. In the case of Mr. Hatch this rule operated with twofold injustice. Eugenia Plummer, in describing the assaults which she alleged had been committed upon her, laid the scene of one of them—contrary to all that might have been expected—in the very room occupied by Mrs. Hatch. Here was an opportunity for testing the truth of her story. Let the jury hear what the husband and wife have to say on this part of the case. Examine them separately, cross examine them astutely, and compare their statements with each other, and with the child's. O dear no—that will never do! They may state what is not true—they may mislead the weak jury. They must not be examined at all. The two best witnesses, next to the prosecutrix herself, are inadmissible to testify. The result was what might have been anticipated in such a state of the law. The uncontradicted testimony of Miss Plummer was believed, and the rev. defendant was a ruined man. One only course was open to him, as affording a possible chance of re-establishing his innocence. He resolves to indict his accuser for perjury. Here the tables are turned. He and his wife can state what they know, and the girl's evidence cannot be heard. The trial comes on, and the verdict of the second jury is diametrically opposed to that pronounced by the first. No man can blame either of the juries, but every man must feel that both of them have been placed in an unfair position Each has been forced by law to decide on what was practically an *ex parte* statement. There have been two trials, and at neither has an opportunity been afforded for hearing "the whole truth." I do not mean to suggest for one moment that the last verdict may have been erroneous. I believe that verdict to have been a righteous judgment, but still I cannot disguise the fact that it would have been more satisfactory both to the public and to the jurors themselves had the law permitted, as I venture to contend that it ought to have permitted, the examination and cross-examination of Eugenia Plummer. It was a grave defect in the law which made the second trial necessary; the same defect in the law has made the second trial inconclusive.

"I remain, yours faithfully,

"Athenæum, May 15." J. Pitt Taylor."

JURIDICAL SOCIETY.

(*From the Solicitor's Journal.*)

A paper, by Walker Marshall, Esq., Barrister-at-Law, on "The Common Law Courts and Equitable Jurisdiction," was read at the meeting of this Society, on Monday, the 7th May, It was as follows:

The society will doubtless remember that some eighteen months ago a discussion took place here, upon what is popularly called the fusion of law and equity. Previously to that the Attorney-General, in the inaugural address delivered by him, as first president of this society, upon the 12th of March, 1855, had struck the key-note of reform, and in indicating the history of the division of the two jurisdictions suggested the means of their union. The subject on which I shall have the honour of reading this evening is not, therefore, invested, in this room, with the attraction of novelty. But, considering that since the occasions to which I have referred the Common Law Commissioners have presented their third report, in which they recommend, that the common law courts should be invested with all equitable powers necessary to enable them to deal completely and finally with every suit properly initiated in these tribunals, so as to supersede in every case the necessity of the intervention of a court of equity, either before or after judgment; seeing, further, that a Bill carrying out these recommendations to their full extent has been presented to the Legislature, and has undergone an interesting discussion in the House of Lords, where it has been read a second time, and been referred to a select committee; it can scarcely, I think, be considered superflous or ill-timed, if this question is

brought before the society, now that it has entered upon a new phase, and that a practical issue has been raised regarding it.

I believe the greatest difficulty connected with the subject and that which offers the most obstinate resistance to the efforts of those who desire to see the law and equity administered by one tribunal, lies in the use of the word "equity." The primary meaning of this word differs widely from the technical sense. Indeed, I apprehend that neither in the initiation of the jurisdiction of the Chancellor, nor in the principles pursued after the jurisdiction was established will there be found much trace of that most vicious of all judicial modes of action, namely, the adjudicating according to the mere moral sense of the judge respecting which it has been sarcastically observed that under such a system the equity of each different Chancellor would vary like to the measure of his foot. If such a state of things ever existed in this country it has long ceased to exist. On the contrary, the equity administered by our tribunals seems in exact accordance with the definition given by Grotius. "De Æquitate," § 3:—"Æquitas est virtus voluntatis, corrrctrix ejus in quo lex propter universalitatem deficit." Further, Courts of equity admit that the foundation of both jurisdictions is the same by their maxim *æquitas sequitur legem*.

It was not, in fact, from any defect of the common law, nor from any incapacity in the Legislature to deal with all the rights arising out of the complex relations and dealings of mankind, that the equitable jurisdiction among us was established. The chief reason, I suspect, is rather to be found in the inflexible determination of the common law tribunals to adhere to established writs, forms, processes; and that the equity tribunal, when it possessed itself of the litigated matter, dealt and deals with it very much in the same way that the common law tribunals would have done, if it had arrogated or been invested with, an appropriate process. As said by the Attorney General in the address to which I have already referred, "It was justly observed by one of the judges in the reign of Henry VI., that if actions on the case had been allowed by courts of law as often as occasion required, the writ of subpœna would have been unnecessary; or, in other words, there would be no distinction between courts of law and courts of equity, and the whole of the present jurisdiction of the Court of Chancery would have been part of the ordinary jurisdiction of courts of law. But, unfortunately, the spirit of the statute of Westminster the second was not carried out by the judges of the courts of common law; and in the time of Edward III. they declined to act upon writs to which the existing formulæ of pleading, or counting as it was then called, were inapplicable."

Let us test this by examining a few of the most familiar heads of equitable jurisdiction. Inquiring as to each, whether there is anything in principle antagonistic to the rules of law, or anything with which a court of common law could not deal on the ground that it is to be judged of only by applying natural reason, or, if you please, equitable considerations—for if there is not, it may fairly be assumed that it was only the defect of *process* which brought it within the jurisdiction of the Court of Chancery.

Take, for example, a very common head of equitable jurisdiction—specific performance. Is there anything about that which is not quite as much legal as equitable? The obligation to deliver goods or an estate which the defendant has sold is an obligation quite as perfect as the obligation to pay money for which he has given his bond. It is obviously only by reason of the want of adequate process that the common law tribunals did not grant this relief. If they had chosen to create a new writ, although, as in the old action of ejectment, a fictitious one, they might have compelled specific performance by delivery of an estate sold, and the making of a title to it, just as by ejectment they put the owner in possession of his land; and they might have compelled the delivery of goods sold, by a similar ratification of process, just as they compelled the delivery up of goods to the owner, by the action of detinue, where his chattels were wrongfully detained.

Specific performance suggests injunction; for as the one compels the performance of a private obligation, the other restrains the party bound to perform such obligation from committing a breach. Surely this is strictly as much a legal right, as the title to damages after the breach is committed.

So far as an argument in favour of investing common law courts with powers to grant relief at present afforded exclusively by the courts of equity, may be derived from the fact that such relief has been granted by these courts, such examples are not wanting. Not many years have elapsed, since the common law courts had jurisdiction, in at least two instances, to protect a person against a threatened injury, and to enforce specific performance of a private obligation. In both these instances this protection and relief were afforded before any damage had been sustained, and before any cause of action had arisen. So that it would be difficult to cite any instance, in which, according to the prevalent technical distinction, the case would be one more distinctively equitable. One of these instances is afforded by the writ *curia claudenda*, by which the owner of land was protected against an apprehended damage likely to result from the neglect of an adjoining owner to fence his land. As said by Fitzherbert in his "Natura Brevium," p. 127, "A man shall have this writ *quia timet*." This writ was abolished by the statute 3 & 4 Will. IV. c 27. The other instance in which the common law courts granted specific relief against a threatened invasion of a right, is afforded by the writ called *warrantia chartæ* abolished by the same statute. by this writ the feoffee of lands by deed with warranty, could compel his feoffor or his heir to warrant the lands to him. Although this relief was granted for the purpose of protecting the feoffee in cases where he was impleaded in assize or other action in which he could not vouch or call to warranty; yet it is laid down by Fitzherbert in his same work on Writs, p. 134, that "A man may sue forth this writ of *warrantia chartæ* before he be impleaded in any action." Therefore, by these two writs not only was specific relief given by courts of law; but that relief was extended before any invasion of the right thus protected and enforced.

It is, perhaps, not unworthy of notice that in the practice thus established of granting the writ *warrantia chartæ* before the feoffee was sued, there may be discovered a trace of that kind of relief which consists in the declaration of a right not attacked, at present a matter of purely equitable jurisdiction. How it was that this principle never germinated into that wide field of relief which obtains, I believe, in all systems founded on the civil law, of declaring the *status* of individuals, and the right to property, and thus guarding against the infirmity and casualties of human testimony, is perhaps one of many examples of the manner in which our system came to be built up. Some exigencies were met and others neglected.

I entertain no doubt that a deeper investigation into the modes and principles of action of the common law courts would bring out other instances in which they acted not merely in analogy with, but exactly in the same way in which the courts of equity act, and according to the principles by which they are governed. I will mention only one other case, in which, as it appears to me, the common law courts act according to a rule as "equitable" as any laid down or applied by the Court of Chancery. A plea showing that in case the plaintiff recovered the defendant would have a cause of action to recover back the same sum, is admitted as a good defence to avoid what is called "circuity of action." In other words, the court of common law modifies the strict legal rights of the parties, in order to avert the inconvenience of a multiplicity of suits; or of two actions being brought, the judgments in which would neutralize each other. In this rule we find

something not unlike the principle acted upon in the equity courts, in requiring that all the persons materially interested in the subject of the suit should be made parties to the suit, in order that a decree may be made once for all decisive on the subject matter. Lord Redesdale, in his Treatise on Pleadings, p. 164, states the object of this rule of courts of equity to be "to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation."

But it was not only the want of adequate writs, and the obstinate adherence of the common law tribunals to the ancient forms, which occasioned the necessary interference of the Court of Chancery. Another cause was the want of officers, and of appropriate machinery for investigating complicated transactions. The most striking example of a transfer of jurisdiction through this cause is afforded by the action of account, a common law remedy, but which to all practical intents has become transferred to the Court of Chancery, avowedly and solely on the ground of defective machinery in the courts of common law.

There is yet another reason for the Court of Chancery having assumed jurisdiction arising out of the rigid adherence of the law courts to certain conventional rules, notwithstanding, in particular cases, such adherence was against strict right. Upon this head there is a greater apparent foundation for calling the jurisdiction of the Court of Chancery equitable than upon either of the others already mentioned. But inasmuch as the law tribunals acted upon the same principles as the Court of Chancery, when the matter presented itself in a shape which did not infringe these rules, the reason, I apprehend, is rather to be found in the attachment to the rules themselves, than in the nature of the subject matter. Thus, the common law courts would enforce a deed or written contract according to its letter, notwithstanding, by mistake, it expressed that which was not the intention of the parties, and the invariable adherence to this rule induced the Court of Chancery to reform the contract. Yet, at the same time the court of law would open an account stated, and balance mutually settled between the parties, on the ground of mistake.

It may, perhaps, admit of question, whether the abnegation of the rights of *cestui que trusts* at common law is not, as regards personalty, referable to a technical rule. With respect to lands, it arose probably from reasons connected with the incidents of tenure under the feudal system. But with reference to personalty, what is there, it may be asked, in the duty of a trustee less positive or absolute than that of a bailee; and why could he not be called to an account in a court of law? The reason, perhaps, was because there was no privity; that is, because the trustee did not promise *to him* to stand possessed of the fund for his benefit; it was to another he made the promise, and on this ground the *cestui que trust* was not regarded as a person having any rights whatever. If this was the reason for the rule, surely the rule was a technical one. Should it be said that courts of equity came to have jurisdiction in these cases by reason of their faculty of sifting the conscience of trustees, then that merely shows that there was the further ground of the defect of adequate machinery, namely, the administering of interrogatories in courts of common law to the defendant. But my only object at present is, to show that it was not by reason of any inherent equity in the subject matter; but on account of defective process, a rigid adherence to forms, and an inflexible attachment to rules that the Court of Chancery came to the aid of the law courts, and averted some measure of the injustice which would otherwise have ensued.

These observations or surmises have, of course, no application to that jurisdiction exercised by the Court of Chancery over the persons and properties of infants and lunatics, or to any matter in which it discharges the functions of a guardian or protector, and acts rather in an administrative than judicial capacity; but only to that equity jurisdiction which is professedly in aid of the law.

An argument might be adduced in favour of the view here taken, founded on the mode in which the defective common law jurisdiction has been amended in our own day. Where it has been desired to give common law courts jurisdiction previously possessed by equity courts only, that object has been effected simply by arming those courts with an adequate process. Thus the common law tribunals have been invested with what is called equitable jurisdiction on the report of a commission to inquire into "the process, practice, and system of pleading" in the courts. The power to grant discovery is conferred by a provision that the Court shall have power to order a party to answer on affidavit, and that neglect or refusal to comply shall be a contempt. So of the supplemental relief by specific performance, given also by the second Common Law Procedure Act, that is conferred by simply providing that a plaintiff may claim, and the Court may grant a writ of *mandamus*. So of injunction it gives the writ merely. There is no provision that "it shall be lawful for courts of common law to enforce performance or restrain a breach"—the process is given, and that is all. Again, the same Act enables the Courts to entertain certain equitable defences, not by saying, that so and so shall be a legal answer to a claim; but merely by enabling the defendant to plead, and by empowering the courts to receive such defence.

But however artificial the distinction between the jurisdiction of different tribunals may be, unless some inconvenience ensues, the distinction may afford the increased accuracy and efficiency resulting from the division of labour. Upon examination, however, I believe it will be found that in the instances to which I have referred, and many others too numerous to mention the delay, embarrassment, uncertainty, expense, and surprise, due to this artificial distinction, very far outweighs any advantage from the division of labour.

In reviewing the evils arising out of the distinctive jurisdictions, I shall take the liberty of referring to the time when the distinction existed in all its integrity, that is, before the reforms of the last eight years. Happily, in speaking of many of these inconveniences, it is necessary to use the past tense.

It is now a principle which meets with tolerably general acceptance, that a tribunal should be invested with plenary powers to deal entire justice in any matter within its jurisdiction, without the aid or intervention of any other court whatever. When this principle is admitted, then it is acknowledged that the necessity for the intervention of a court of equity during the progress of a suit, or its interference with the judgment, arose from an allowed evil.

Now that the limits within which the Court of Chancery acts have been defined by some of the most subtle and exact minds that ever illustrated the law of any country, and has, in most instances at least, been set out, as it were, with metes and bounds, by a long series of precedents, the evils attaching at the commencement of a suit from this division of jurisdiction, are not very grave. But it is not necessary to revert to a very ancient period to arrive at a time when this was far otherwise—when the operation of the equity court was uncertain, and the dividing line indistinct. There is not now the same danger of mistaking the tribunal that there was previous to the time of Lord Hardwick. But the result of a mistake is still the same, that the complainant with his righteous cause is not only dismissed remediless, but is as much *in misericordia* as if he had no rights, and is compelled to make good his adversary's costs.

But, however astute and wary the plaintiff may have been in choosing his tribunal, and however right in the choice made the defendant might set up an answer which would put him all wrong in that court. The right was of legal cognisance, the remedy should be sought in a court of law, and to a court of law he has gone. But the defendant sets up an answer, which

in point of truth is no answer at all; but which, nevertheless, entirely defeats the plaintiff's rights in that court, and drives him in all haste to the abandonment of his suit, or sends him to a court of equity to pray for its intervention to avert the threatened wrong by restraining the defendant from availing himself of his legal defence. Thus by the operation of the rules of law, rigidly construed as they were, a man might offer a defence where none existed—because if the defence was one which according to the law of the land ought not to be allowed to prevail, then it was no defence. And the law administered in the Court of Chancery being applicable to the whole of England may properly be called the law of the land.

Not only might an inequitable defence be advanced as an unanswerable plea to a legal claim, but an inequitable demand might be enforced in a court of law. It is easy to give examples. Thus, in a court of law a guarantee might be enforced against a surety of a bond debtor, notwithstanding he was prejudiced by the giving of time to the principal; and a deed might be enforced, notwithstanding it expressed what the parties to it did not intend, or where it was vitiated by fraud which could, however, be proved only inferentially, &c.

Now, whether a court of equity set the matter right by shutting the mouth of the inequitable plaintiff or inequitable defendant, or by restraining him from enforcing the judgment he had obtained, founded upon such inequitable matter, the contrivance was equally clumsy. The concurrent existence of the two systems is an acknowledgment that the full measure of justice consists in the application of law modified by equity. How was this mingled action secured? The court of law acted in direct defiance of the rule of equity, and the court of equity applied the modifying principle, not by controlling or setting aside the acts of the legal tribunal, but by acting in an independent way upon the suitor. It said to the defendant with his inequitable legal defence, "It is true you have an answer to this claim, and if such your defence were brought before the court in which you are sued, you would have a determination in your favour; but that determination would not be in accordance with justice. Although we cannot control that court, we can you, and we hereby seal your lips against uttering this defence, and do it at your peril." Here you have a court solemnly administering the law which was to bind men's acts and another tribunal saying, "We will prevent facts being presented before it, because if they are it will certainly do a wrong." So a plaintiff obtains from a constituted tribunal an adjudication that he has a certain right as against his adversary. This judgment has been pronounced upon full knowledge of all the facts, because if the Court refused entirely to hear the answer, or, having heard, disregarded it as impertinent, it cannot be said the judgment was in ignorance of the facts. But another tribunal says:—"Those facts you treated as impertinent are the strong circumstances upon which the whole case turns—they show the rights of the parties to be the very reverse of what you have declared they are. We have no power to overrule or set aside your judgment, but if the plaintiff attempts to enforce it we shall send him to prison."

Not only did this division (and does still to the extent to which it now operates) aggravate the delay and increase the expense of litigation, but it acted in a way still more obstructive of justice—it increased the chances of surprise. A litigant party is in greater danger of losing the benefit of a defence or reply if he can only avail himself of it by application to another tribunal.

It frequently happens with moral agents that the effect operates back upon the cause, and increases its intensity. It would be difficult to say how much the distinction between the system administered in courts of law and that recognised in courts of equity, has been aggravated by the exclusive devotion of the professors of each to his own branch. Law and equity together form the art or science of ascertaining, protecting, and vindicating rights. But being divorced, each had its own professors, glorying in his half profession, ignoring the other part, even congratulating himself upon his ignorance of it, and indulging in open contempt of its rules and mode of procedure. A disadvantage connected with this, consists in the necessity in many cases of consulting two sets of legal advisers before a party's rights can be known, or his course of action precribed.

Then what are the advantages derived from the severance of law and equity to the extent that common law courts disregard those considerations upon which the equity courts proceed? I am able to suggest only two—first, that to which allusion has been made already, increased accuracy from the division of labour among the courts; secondly, certainty secured by having the stern rule of law inflexibly administered, and the modifying principle applied by a distinct tribunal.

As to the division of labour advantage, as a mere device for dividing jurisdiction, no worse principle could be adopted. In that view it has every possible vice, inasmuch as its limits are not clearly defined, there is a constant dovetailing and mingling of jurisdiction; neither jurisdiction can act independently of the other, yet they do not act in harmony, but rather in antagonism. Division of labour may, without any disadvantages of that sort, be secured to an almost unlimited extent by confining courts to one particular subject of relief, as bankruptcy, marriage, shipping, contracts, torts, &c. Therefore as a mere means of procuring this end, it is an impolite contrivance, being attended with inconveniences, all of which might be avoided, and the same object attained.

Then as to the supposed advantage of certainty, it may be asked why a rule should be considered certain, merely because it cannot be dispensed with or modified by the court in which the suit is brought, when it may be by the intervention of another court, which will certainly interfere if asked to do so. I confess I do not see the difference in this respect between the application of legal and equitable principles by one tribunal, and their application by different tribunals to the same suit. Nay, there is more uncertainty in the latter case, because there is less calculation as to whether and how the modifying principle will be applied, and at what stage of the suit, and in what manner the equitable court will intervene.

The recent changes which have been effected, in the courts of law and equity, upon the recommendation of the respective commissions, have had for their object assimilation to the extent to which each of those courts is impotent by reason of the want of the powers of the other. If, as a result, we have, in some cases, courts of law and equity each having jurisdiction to dispose finally of the same suit, so that the suitor may elect his tribunal, and obtain the same relief from either. I see no inconvenience or anomaly from that. The requirement is that each should apply the same rules, and adjudicate the same way; not that either should have a monopoly of causes.

So far as regards the defective jurisdiction of the common law courts arising from the want of adequate process, it has been remedied to a great extent by the reforms already effected. Others are in contemplation, and are now before the Legislature. But in respect of that owing to the want of competent machinery, or, in other words, of necessary officers, little if anything remedial has been done. The common law courts have no officers or powers regularly constituted for the purpose of taking accounts of investigating title. It is true that matters of account are frequently in practice referred to one of the Masters, but in these cases the Master acts as any other arbitrator does, by disposing as judge and jury of the case, and entering the verdict for the one party or the other. There are no powers for taking accounts collateral to the suit, and for a report being made to the Court on which the Bourt may act. Until this defect is remedied it is difficult to see how the jurisdiction proposed by the Bill now in Parliament to be given to common law courts can be exercised to its legitimate extent. One of the provisions of the Law and Equity Bill proposes to give specific performance of every contract for the breach

of which damages might be recovered. The case of most ordinary occurences perhaps, will be a suit for the conveyance of land contracted to be sold. In that the necessity of investigating title is in many cases immediately involved—a process which cannot be performed by a jury or other tribunal sitting *in jndicio*. There is, however no provision in the Bill for conducting these investigations. The same Bill proposes to allow the recognition of equitable interests in questions of title raised by interpleader. That also may require the investigation of matters not convenient, or perhaps, possible to be determined by a jury, or even by the Court, without the assistance of an officer, who may inquire and report. Indeed, as matters now stand, considerable hardship, and certainly no little cost, and frequently great delay is occasioned to suitors by the want of machinery, for the taking of accounts. Rarely a day passes at Nisi Prius without the discovery being made at some stage of a cause that *a jury* is incompetent to deal with the matter. The consequence is, that the case must go to arbitration. The parties are compelled to accept a tribunal they did not choose—a tribunal from which there is no appeal. They did not desire arbitration, if they had desired it they would not come to the Court for it. They wished the adjudication of the Courts of the land, and not the award of the arbitrator, whose motives of action it is impossible to scrutinize, the grounds of whose decision remain unrevealed in his own breast, and whose fiat is irreversable. The entire expense of the trial is thrown away, and an indefinite prospect of adjourned meetings is opened up.

The question to what extent the law courts are to be clothed with equitable jurisdiction is now presented before the Legislature in a definite shape by the Law and Equity Bill. Upon its various provisions there is a very great diversity of opinion among the profession. Few, I believe, dissent from *all* the proposed changes; many, no doubt, entertain very strong objections, to *some*. It is, indeed somewhat curious that although three of the equity judges, the Master of the Rolls, and the Lord Justices, have offered a solemn protest against the measure, all of the common law judges have, according to the Lord Chancellor's statement in the House of Lords, signified their approval of it.

The Bill has two aspects or phases, and it is with reference to these, as I apprehend, that a difference of opinion will be entertained. Such as are of opinion that wherever, according to the established law, a case is properly iniitated in a common law court, the court should have jurisdiction to apply equitable principles; but who object to any transfer from courts of equity of suits which at present are commenced in these tribunals, will approve of one set of provisions of the Bill and object to others. But such as go further in the direction of fusion will approve also of the other set of clauses, which seek to invest the courts with the power of administerieg every kind of relief applicable to legal rights. The Bill then appears to me to have two objects—first, to enable courts of law to deal finally with all suits which may now be instituted in these courts; secondly, to enable courts of law to protect, vindicate, and enforce legal rights by granting the same kind of remedy and redress which at present can be obtained only by application to a court equty. The first of those objects is sought to be attained by empowering courts of law to restrain by injunction the defendant in ejectment, and in all actions for the recovery of lands or goods, from injuring or making away with the land or goods (section 9) by enabling the court to grant to a defendant either before or after judgment, the conditional or final relief for which he is now to go to a court of equity (section 10 & 11), by extending to common law courts the relief obtainable in courts of equity in cases of ejectment for a forfeiture for non-payment of rent, or to insure against fire (sections 21 & 22), and by prohibiting the interference of the courts of equity in any suit where the relief therein sough t might have been obtained by plea or otherwise (section 30). This I believe to be a summary of the provisions of the Bill directed to the abolition of the necessity of courts of equity intervening before or after judgment in suits cognizable at law. The other class of provisions, namely, those directed to enable common law courts, in cases where no action has been brought to afford relief of a character at present granted only by courts of equity, will be found in the first, twenty-fourth, thirty-second, and thirty-third sections. By the first section it is enacted that "in all cases of threatened breach of contract or other injury of such a nature that an action at law for damages might be maintained for the same, if committed, application may be made either *ex parte*, or by rule or summons, to the Court, or a judge, for a writ of injunction." By the twenty-fourth section a new action is given for the delivery up of documents; by the thirty-second and thirty-third sections interpleader is allowed in the case of equitable claims. These are all the equitable powers proposed to be given by this Bill.

The alteration sought to be effected by the Law and Equity Bill, I believe to be the most important which has ever been introduced by any measure affecting the administration of justice in this country; and if carried into effect will inaugurate, as I believe, a brighter era, in which Law will be arrayed in a simpler robe, and bear the sword of justice in a firmer because a surer grasp.

THE LAW AND LAWYERS IN THE BRITISH COLONIES.

(From *The Law Magazine and Law Review*.)

A London lawyer, when he hears of "the legal profession," has brought before his mental vision so much of the world of lawyers as is described in a considerable portion of a neat red book, which, published annually by that respectable firm Stevens & Norton, calls itself "The Law List:" for the significance of terms depends upon the limits and exactitude of a man's knowledge, and by far the greater number of barristers and solicitors in England, have rarely any thing to do with either their foreign or colonial brethren. In this busy bustling world, the inhabitants, both of the old country and the younger one, find it essential to concentrate their attention on their own affairs; and, having no direct occasion to meditate upon systems and practices foreign to their own, they do not make the opportunity.

Of course there are exceptions to this exclusive attention of lawyers to their own local interests and pursuits; but, owing to the incurious character, the speculative inactivity, and the narrowed and practical quality of the national mind, we certainly maintain an extensive ignorance of the national mind, we certainly maintain an extensive ignorance of the law and lawyers of those mighty colonial provinces, which either have created their own systems of jurisprudence, or exercise their jurisdiction under the authority of the British crown.

It would, indeed, form a somewhat heterogeneous body of law, if all the colonial procedures and statutory enactments were collected. But we believe we may safely affirm that there are, in the administration of the law throughout our colonies, two general distinguishing characteristics; the one the unimpeachable integrity of the Bench, and the other the independence of the advocates. Wherever the English people have emigrated, they have carried with them an invincible love of judicial impartiality. No name in the annals of English history is so hated as that of Jefferies. A venal, corrupt, or partial judge, who is open to suggestions off the Bench, or who exhibits partisanship or courtier-like subserviency on it, is certainly the most detested character among us. We believe the impress of integrity has been stamped universally on the character of our judicial officers; nor can there be any doubt that this is of more importance than the possession of the most perfect code, or a staff of the most perfectly taught

lawyers in the world. In some civilized countries the private suitor has no chance against the government; while, in others, the characters of judge and prosecutor are combined in one person: and we read occasionally of the court of justice being transformed into a scene at a theatre, where the judge is only one of the *corps dramatique*.

When, however, there is a free exercise of the profession of the advocate, whether he unites the characters of barrister and solicitor, or they remain distinct, the effect mutually on judge and advocate is necessarily favourable to the administration of justice; and it is this exercise of the profession of the law in open court which is the great safeguard for the community. The mere forms of court practice are of little worth in comparison with the open administration of justice, with the aid of independent advocates, in the presence of the public. In the back woods or young settlements the forms may be rude; but if tradition has maintained the spirit of the English administration of the law in this respect, the essential part of its character will have been preserved.

The etiquette of the profession, as well as the forms of justice, depends upon the *accidents* of society, where its members flourish. Modern refinement, for example, in relation to *honoraria*, in which the fiction is affected to be believed, that counsel are not paid as an apothecary or turnpike-man, and where a mysterious silence pervades the whole money part of the transaction, does not hold in new and old world settlements. A good fellow who kept terms with us, migrated to a young colony which shall here be nameless, and there alternately pursued his profession and the beasts of the field and wood; but he felt some difficulty in getting such endorsements on his brief as would be acceptable in the Temple. The doctrine that "the fee should always be put outside," was indeed strictly enforcible in many cases with him; for the hides and horns, &c. (which represented in his case the "guas"), were, *odoris causâ*, necessarily left external to his hut. Although here all forms of *honoraria*, and often in kind, were tendered, and obliged to be accepted, our friend was never the worse lawyer, or less respectable as an advocate. Happy would it be for the legal professors in the "old country" if clients always paid as regularly, and barristers always dealt as honourably, as our successful, skilful, and learned colonial friend, whose fee-book would be a curiosity of the greatest magnitude in Lincoln's Inn.

It is always with pleasure that we see the *Upper Canada Law Journal* (conducted by Messrs. Ardagh and R. A. Harrison), for it affords evidence that the science of jurisprudence flourishes, and that the legal press is well represented in that province. The matter it contains is, so far as we have seen, excellently selected for the use of lawyers, while in literary character it takes a high standing; and, as regards printing and office preparation, is superior to much which emanates from the press of the mother country, and affords satisfactory evidence of the talent of the legal profession in Upper Canada.

The advertising sheet of the periodical in question might, perhaps, shock the sensitive feelings of the stuck-up mother-country practitioner, for barrister and solicitor advertise in it as a matter of course. We confess we like to see their straightforward announcements, like the following:—

"PATERSON, HARRISON, and HODGINS, Barristers, Solicitors in Chancery, &c. Office, Toronto Street, (two doors south of the Post Office), Toronto, C.W."

"SHERWOOD, STEELE, and SCHOFIELD, Barristers and Solicitors, &c., MacLaughin Buildings, Sparke Street, Central Ottawa.
"Hon. G. SHERWOOD. R. F. STEELE. F. SCHOFIELD."

ROBERT K. A. NICHOL, Barrister and Attorney-at-Law, Conveyancer, Solicitor in Chancery, Notary Public, &c., Vienna, C.W."

In England, we advertise in a different way in the newspapers, thus—

"The Lands Draining Act, 1859, with copious Notes and Index. Edited by Job Briefless, Esq., Barrister-at-law;" or, "The Metropolitan Housemaids' Window-cleaning Protection Act, 1860; with an Introduction and Notes, by Jeremiah Hopeful, Barrister-at-law." On the whole, the Canada principle of advertising is at least as admirable as our own. Besides the popular form of advertising in London, some members of our liberal profession, we have heard, adopt other modes of preventing their dips being hid under bushels; but we need not further advert to their ingenious efforts.

In Upper Canada, it will be seen, the same men practise both as solicitors and barristers, and form themselves into firms. The practice is recommended by good sense and reason. The state of society no doubt favours the combination, and much might be said for the system in England, were it *openly* adopted with us. A paper issued by the Law Amendment Society, published in 1852, on the relation between the Bar, the Attorney, and the Client, affords ample evidence of what is the opinion amongst liberal-minded men in the profession on this subject.

Before we close these brief observations upon our colonial brethren, we will refer to one point which presents itself to our minds; and that is legal education. England furnishes some of the judges and other officers for the colonies, and from home are drafted not a few lawyers who practise in our dependencies. There ought to be ample provision made here for a liberal education in the *principles* of jurisprudence, apart from practice and technical knowledge, such as are gained in counsel's chambers. Without these principles a man goes to a new system or variation of the English procedure at a great disadvantage, and when put to apply Law to a new procedure, he feels how deficient his studies and how misdirected his labours have been. It is the opprobrium of the English advocate that he is unacquainted with the science of jurisprudence, for which any amount of mere technical knowledge is no compensation. When he is called on to comprehend a foreign juridical system, he will find that Chitty's Archbold, and Smith's Chancery Practice, are not the only works worth his mastering.

DIVISION COURTS.

OFFICERS AND SUITORS.

SECURITIES TO BE GIVEN BY OFFICERS—ADVICE TO COUNTY JUDGES.

It is all-important to the due working of the Division Courts Act, that its provisions with regard to securities to be given for the due performance of office by Division Court officers, should be observed.

Division Court Bailiffs, as well as Clerks, are entrusted with the performance of duties which greatly affect the public, and the public have a right to be well secured as against misconduct by these officers.

The Legislature, alive to the necessity of proper security, has enacted some wise and stringent provisions, and to some extent made County Judges responsible for the carrying them into effect.

Neither by the subject of these remarks, nor by the remarks themselves, do we intend to bring any charge of misconduct against Division Court Clerks and Bailiffs as a class; far from it. We know them as a body to be intelligent and trustworthy. But in every body of men there are some of less merit than others, some less honest than others, and some more unfortunate than others.

Men who mean well and do well, have nothing to fear from the giving of proper securities; but as the law regulating such securities must be a general one, all must be equally bound by it, and equally called upon to observe its provisions.

Every Division Court Clerk and Bailiff is bound by law to enter into a bond and a covenant. The bond is to be made to

Her Majesty, with as many sureties, in such sums, and in such form, as the Governor directs. It is to be conditioned for the due accounting for and payment of all fees, fines and moneys received by the officer by virtue of his office, and also for the due performance of his several duties. The covenant is to be in the form given by the statute (Con. Stat. U.C. c. 19, p. 176), or in words to the same effect. It is to be with so many sureties—being freeholders and householders within the county—and in such sums *as the County Judge may direct, and shall under his hand approve and declare sufficient.* (Con. Stat. U.C. p. 139, sec. 25.)

The covenant, approved as above, must be filed in the office of the Clerk of the Peace, in the county in which the Division Court is situate, "*before any such Clerk or Bailiff enters upon the duties of his office.*" (*Ib.* sec. 29.)

If any surety in any such covenant, 1st, dies; 2nd, becomes resident out of Upper Canada; or, 3rd, insolvent, the County Judge is to notify the Clerk or Bailiff for whom such person became surety, of the death, departure, or insolvency (sec. 29).

The Clerk or Bailiff, *within* one month after being notified, is to give anew the like security, and in the same manner as already mentioned. *The penalty for neglect is forfeiture of office.* (*Ib.*)

The covenant is to be available to and may be sued upon in any court of competent jurisdiction, by any person suffering damage by the default, breach of duty, or misconduct of the officer (sec. 27).

The undertaking of the sureties is threefold: 1st, That the officer (Clerk or Bailiff) shall duly pay over to such person or persons entitled to the same, *all such money as he shall receive by virtue of his office.* 2nd, That he shall and will well and faithfully do and perform the duties *imposed upon him by law.* 3rd, That he shall not misconduct himself in his office, to the damage of *any person being a party in any legal proceeding.* (See Form, Con. Stat. U. C. p. 176.)

The following appear to be the duties of a County Judge in respect to the covenant:

1. To direct the number of sureties, and the sums in which each shall be bound.

2. To approve and declare, under his hand, the covenant to be sufficient.

3. To see that before any Clerk or Bailiff enters on the duties of his office, that the covenant of himself and sureties, approved as above, shall be filed, as the act directs.

4. To notify the Clerk or Bailiff of the death, departure or insolvency of any surety, with a view to the renewal of the security.

If a County Judge were wilfully to refuse or neglect to perform any one of these duties, he would in all probability render himself liable to an action at the suit of a party aggrieved. The duties prescribed are ministerial, and not judicial; and for the wilful non-performance of them, we apprehend an action would lie. Indeed it has been expressly held that if a County Judge neglect to see that a Clerk or Bailiff files his covenant, approved as directed, before entering on the duties of his office, that an action is sustainable. (*Park* v. *Davis*, C. P. Easter Term, 1860.) The Judge should satisfy himself as to the sufficiency of the sureties offered. This probably he may do upon an affidavit of justification. We think that if a Judge were to approve of persons as sufficient, known to him to be otherwise, an action would lie. But at the same time we entertain the clear opinion, that if sureties deemed sufficient and regularly approved by him as sufficient, afterwards are discovered not to be so, there can be no remedy against the Judge. (*Ib.*)

The fact that a County Judge may be sued for the nonperformance of any duty imposed by the Division Courts Act, ought to be known to all concerned.

U. C. REPORTS.

CHAMBERS.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*)

John Scott v. Robert Crosthwaite.

Rule for costs of the day—Each party equally to blame—Setting aside.

Where a cause in the absence of plaintiff's counsel was struck out of the docket and afterwards upon his application restored, and then defendant's counsel obtained leave to add further pleas, and the cause at the close of the assize was not tried, a rule obtained by defendant for costs of the day, and all proceedings thereunder, was, on application of plaintiff, set aside.

The *nisi prius* record in this cause, was entered for trial at the last assize for the county of Wentworth. It having been called on for trial, and no one appearing for the plaintiff, though the counsel for defendant was present, it was struck out of the docket.

Subsequently, upon the application of the counsel for the plaintiff, it was restored to the docket, and afterwards plaintiff was allowed to amend by striking out the name of a defendant, and at same time leave to amend was granted to defendant by the addition of further pleas.

The cause was not afterwards tried. Defendant having issued a rule for costs of the day, and taxed them at £24 14s. 6d.: plaintiff obtained a summons on the defendant to show cause why that rule and all proceedings had thereon should not be set aside, on the grounds that, at the time the record was struck out of the docket the counsel for the defendant was present, and did not move for a non-suit, or state that he was ready, or take any other action whatever, and on the ground that the record was restored to the docket after its having been struck out, and that the counsel for the defendant had notice of the application to restore the record, and was present and allowed the record to be restored without objection; and that afterwards, although plaintiff was ready and willing to try the cause, there was no opportunity of doing so before the close of the assize.

In support of the summons, among other affidavits, an affidavit of Charles A. Sadlier, Esq., counsel for the plaintiff was filed. In it he swore that he entered the Court House very soon after the record was struck out the docket, and informed S. B. Freeman, Esq., counsel for defendant, that he, Mr. Sadlier, was about to apply to the learned Judge, (Burns) to have the record restored to the docket, and requested him (Mr. Freeman) to be present: That Mr. Freeman was present when the application was made and neither consented nor objected to the application: That the application succeeded: that the record was neither marked as a remanet, nor again struck out; but that the plaintiff was at all times after the same was restored to the docket, ready and desirous of trying the cause.

Jackson, for the plaintiff, cited *Morgan* v. *Ferneyhaugh*, 25 L. T. Rep. 219 S. C. 33, Eng. L. & Eg. 453. *Sleeman et al.* v. *The Copper Miners of England*, 5 D. & L. 457. *Archd. Prac.* 9, Edn. 1399—1401.

On the part of the defendant, an affidavit of S. B. Freeman, Esq., was filed in showing cause. He swore that a person named Jones was also a defendant in this cause at the time the record was entered for trial: That he (Mr. Freeman) did not consent to the record being entered after it had been struck out: That Mr. Sadlier informed him, that he intended to apply to have the record restored to the docket, and afterwards told him that it had been restored, but that he, Mr. Freeman, was not informed of the time when it had been intended to make the application, until he told him that it was restored: That Mr. Sadlier afterwards told him (Mr. Freeman) that he intended to strike out of the record the name of Jones: That on the following morning he applied to do so, and the application succeeded on the terms that he, Mr. Freeman, should have leave to plead additional pleas on behalf of the defendant, Crosthwaite, and that the additional pleas were accordingly added.

Allott v. *Bearcroft*, 4 D. & L. 327, was cited for defendant.

Richards, J.—The case having been restored to the docket by the learned Judge who struck it off, and the defendant having been made aware of the case having been restored to the docket, and having had his pleadings afterwards amended, I must consider it precisely in the same position as if it had not been struck off the list.

The rule laid down by the learned Judge, as I understand it was, that the causes were called over, if the plaintiff was ready the cause went on, if not, and the defendant did not insist on the cause proceeding, it was passed over, and when the Crown business of the assize was closed, the Judge declined taking any more business.

If the cause had not been restored to the docket, *Allott* v. *Bearcroft*, 4 D. & L. 327, would be an authority in favor of defendant; but *Morgan* v. *Ferneyhaugh*, 25 L. T. Rep. 20, might be considered as making it doubtful. The cause having been restored to the docket, I must consider it as passed over, and that both parties are equally to blame for its not having been disposed of at that assize, and in that event, both parties would lose their costs. There is a case in 1 L. T. Rep. N. S. 374, which seems to decide that in such a case the costs would be costs in the case.

As at present advised, I think the rule allowing defendant the costs of the day and all subsequent proceedings thereunder, must be set aside.

Summons absolute.

CHANCERY.

Reported by ALEXANDER GRANT, Esq., Barrister-at-Law.

MCMASTER V. CLARE

Fraudulent assignment.

A trader being in insolvent circumstances, at a meeting of his creditors entered into a written agreement that he would execute an assignment, to trustees, for the benefit of creditors, of all his real and personal estate and effects, (except certain policies of life insurance,) and on the second day afterwards he did execute the deed agreed upon, which the trustees accepted, and several of his creditors joined in and executed the same. Afterwards it was discovered that on the day intervening between the day of agreement to assign, and the execution of the deed of assignment, the debtor had sold a valuable portion of his stock in trade at a credit running over three years, and had accepted as security the promissory notes of the purchaser. Thereupon the trustees filed a bill seeking to have this sale set aside as fraudulent, and void as against them.

Held, that the trustees being in the position of purchasers, could claim only such rights as the debtor was legally entitled to at the date of the execution of the deed of trust, and that the sale being binding upon the debtor, and those claiming under him, the trustees were not entitled to the relief prayed. But, *semble*, that this sale would not have been sustained as against a judgment creditor who had sued out execution.

The bill in this suit was filed by William McMaster, Samuel Benjamin, and Duncan Bell, against John K. Clare and Thomas Hutchinson, and set forth that Huchinson, in July, 1859, who was then carrying on business in Toronto, Hamilton, London, and Guelph, as dry goods merchant, having became greatly involved, was desirous of effecting an arrangement with his creditors, for which purpose he sent an agent to England, but it being found impossible to effect any arrangement, he did on the 4th of August, call a meeting of his creditors at Toronto, for the 6th of September, at which meeting such of his creditors as then attended requested Hutchinson to execute an assignment of his property and effects for their general benefit, which after considerable difficulty, he consented to do, and on the 8th of the month, the greater part of his creditors having agreed to give him a release in full of their respective debts, he by an instrument under his hand and seal, agreed to execute such assignment, in the form, and according to the draft then submitted, to the plaintiffs, as trustees for his creditors. That in pursuance of such agreement, Hutchinson, on the 10th of September, by indenture bearing date that day, and made between the defendant Thomas Hutchinson, of the first part, his wife of the second part, who joined therein for the purpose of barring dower, and the plaintiffs of the third part; and such of the creditors of Hutchinson as should come in and execute such assignment, of the fourth part, granted, bargained, sold, and assigned to the plaintiffs, all and singular the lands, tenements, and premises, particularly specified in the schedule thereto annexed; and also all and singular the stock in trade of him the said Hutchinson, in his shop in Toronto; and all the household goods, &c., in his dwelling house; also, the stock in trade, goods and chattels in the shop at Hamilton, and all book debts, accounts, credits, judgments, bonds, bills, notes, and securities for money, and all other the real and personal estate of Hutchinson, (excepting certain policies of insurances effected upon his life,) and all reversions, remainders, yearly and other rents, issues, and profits thereof, upon the trusts stated in such indenture, namely, to pay the costs, charges, and expenses attending the execution of the trusts, and apply the proceeds of the trust property and effects towards the payment and satisfaction of all the creditors of Hutchinson ratably, and in proportion to their claims, without any preference or priority, and to pay the surplus, if any, to Hutchinson. The assignment also contained a stipulation that any creditor might execute the indenture, and add to his signature "without release," and that creditors so executing should not have been taken to have discharged or released Hutchinson from any part of the debt remaining unpaid after the receipt of the dividend. And by the indenture Hutchinson covenanted with the plaintiffs for the further assurance of the lands and premises, and that he would execute all such *deeds, conveyances*, &c., as might be requisite to convey to the plaintiffs any lands, tenements, goods, chattels, rights, credits, or other assets, (except the life policies,) omitted from the said indenture, or which were intended, or which should have been included therein; and that he made a true and faithful discovery and assignment of all and singular his real and personal estate and effects to the best of his knowledge and belief. That this indenture was on the 10th of September accepted by the plaintiffs, and on the same day was executed by several of the creditors of Hutchinson, who thereby released him according to the stipulation of the deed, and amongst others the plaintiff Benjamin. That the business carried on by Hutchinson in London was carried on in the name of the defendant Clare, but the business, in reality was that of the defendant Hutchinson.

The bill further stated, that after calling the meeting of his creditors, before referred to, and when his difficulties and insolvency were notorious to the public at large, and well-known to Clare, and after Hutchinson had executed the agreement for transfer, (of the 8th of September,) and in the interval between that day and the execution of the assignment, he had concerted and agreed with Clare to make a private sale to him of all the stock in trade, merchandize, and other effects of the said business, so carried on in London, for the price of $7,943 80, and to accept therefor thirty-five promissory notes of the said Clare, payable in monthly instalments, beginning at three months, and ending at thirty-six months from the 9th day of September, 1859, and without any further or other security for the payment thereof; and that at this time Hutchinson was then indebted to the ptaintiff Benjamin, and several other persons, and was in fact insolvent. The bill charged that the sale so made to Clare was not *bona fide*, or in the ordinary course of trade, and was made with intent to delay and defeat the creditors of Hutchinson; and that the same was contrary to the statute 13 Elizabeth, chapter 5, and also contrary to the provisions in that behalf contained in the act of the legislature of this province, passed in the 22nd year of her Majesty's reign, chapter 96, and entitled an "act for abolishing arrest in civil actions in certain cases, and for the better prevention and more effectual punishment for fraud," and that the same should be set aside as fraudulent as against the plaintiffs and the creditors of Hutchinson. That the notes given by Clare had been delivered by Hutchinson to plaintiffs after the execution of the assignment; but they offered to return them to Clare, upon the sale being declared void; that Clare was a person of no capital or means, and being in possession of the stock and effects, might at any time dispose thereof, and thus defeat the equitable claims of the plaintiffs, unless restrained by injunction from so doing. The prayer of the bill was, that the sale might be declared fraudulent, and null and void as against the plaintiffs, and the creditors of Hutchinson; that the defendant Clare might be ordered to deliver up the goods, &c., to the plaintiffs, and to account for such as has been sold since the execution of the assignment of the 10th of September; that an injunction might be granted restraining Clare from selling or disposing of the goods, a receiver for the estate appointed, and for further and other relief.

Affidavits were filed verifying in all important particulars in the statements of the bill; and thereupon an injunction had been granted *ex parte*, restraining Clare, as prayed, and a motion was afterwards made to extend the injunction so issued.

Mowat, Q. C., and *Blake*, for the plaintiffs.

McDonald and *Fitzgerald*, contra.

In support of the application it was contended that it was not necessary for the plaintiffs to shew that Hutchinson's intention

was to delay his creditors, but it was sufficient if that were the natural consequence of what had been done; that the sale was by an insolvent trader at a credit; the natural effect of such an act would be to delay creditors in enforcing their debts. If the sale had been *bona fide* and for value the creditors would not have been injured; but here there is only a promise to pay at a future day, extending over a period of three years; this, no one could say was such a sale as any dealer would make in the usual course of his trade.

The word "transfers" used in the statute 22 Vic., ch. 96, embraces sales; this sale must, under all circumstances, be deemed to have been fraudulent as against these trustees, as it would clearly be void as against creditors.

[The Chancellor.—It is said the assignment to the plaintiffs does not cover these goods; if that be so, how can they complain of the sale?]

As between the plaintiffs and Clare, the goods must be deemed to be the property of Hutchinson, although as between Hutchinson and Clare they may not be so considered; besides, at the time of the sale to Clare, Hutchinson had, the day preceding, agreed to make the assignment; and equity, considering that which is agreed to be done as done, will treat these goods as actually belonging to the trustees.

It is now desired to uphold this sale as having been made in compliance with a previous agreement to that effect; but such an agreement, if ever entered into at all, was not binding on either party, it being alleged to have been by parol only, and not to be performed within a year.

On the other side, it was contended that the assignment did not embrace the goods in question; the general words being applicable only to the goods of the assignor in Toronto and Hamilton.—*Harris* v. *The Commercial Bank*, 16 U. C. Q. B. 437. The general words carry nothing.

Trustees for the benefit of creditors are not in the same position as assignees in bankruptcy and insolvency. These goods did not pass, and the plaintiffs have no *locus standi* in this court. The statute under which this suit is instituted is mainly a re-enactment of the 13th Elizabeth, which does not apply to any sale made for value, as this was, and was also a very advantageous one. A creditor cannot be said to be delayed within the meaning of the words of the statute, because his debtor chooses to sell his effects at a long credit.

As to the agreement for sale with Clare, it may be void in law for want of writing; but if it be void, it takes away from it any taint of fraudulent dealing.

Ex parte Bushell 3 M. D. & DeG. 615 *Leak* v. *Young*, 5 Ell. & B. 955, *Cook* v. *Caldecott*, 1 M. & M. 522, *Smith* v. *Harris*, 1 Ell. & B. 35, *Baxter* v. *Hill*, 1 Ad. & Ell. 456, *Butcher* v. *Harrison*, 4 B. & Ad. 129, *Grimsby* v. *Ball*, 11 M. & W. 531, *Norcutt* v. *Dodd*, Cr. & Ph. 100, *Stone* v. *Van Heythusen*, 11 Hare, 126, *Leister* v. *Turner*, 5 Hare, 281, *Withall* v. *Tuckwell*, 5 Jur. N. S. 925, *French* v. *French*, 6 DeG. M. & G. 95, *Goodwin* v. *Williams*, Ante vol. v., p. 539, *Holmes* v. *Penney*, 3 K. & J. 90, were referred to by the counsel.

The Chancellor.—This is an application for an injunction to restrain the defendant Clare from selling certain goods purchased by him from his co-defendant Hutchinson, upon the ground that the sale is fraudulent under the statute 22 Vic., ch. 96, sec. 18 & 19.

The plaintiffs, are the assignees of the estate and effects of Hutchinson, for the benefit of his creditors, under a deed which bears date the 10th of September, 1859. Clare purchashed the goods in question on the 9th of September. The reality of the sale to Clare is not questioned. The allegation is that it was void under the statute.

Mr. Mowat, for the plaintiffs, contends that Hutchinson was in insolvent circumstances, at the time of the sale to Clare, within the meaning of the statute; that all sales made by traders under such circumstances are avoided, except sales in the ordinary course of business to innocent purchasers; that this sale, at all events, which was upon long credit, was a sale to delay, if not also to defeat, creditors, and is therefore void under the statute.

Mr. McDonald, on the other hand, contends that Hutchinson was not in insolvent circumstances at the time of the sale to Clare, on the contrary, he asserts that Hutchinson's estate, if properly managed, would pay his debts in full and leave a surplus. He contends further, that sales are not within the recent statute, as they are not within the statute of Elizabeth, and as the sale in question was a *bona fide* sale for valuable consideration not calculated to defraud creditors, but, on the contrary, highly beneficial for them, he contends that the motion should be refused.

In the view which we take of this case it is unnecessary to decide several important points upon the construction of the statute, which have been very ably discussed in the argument; but as the questions are of great public importance, we think it right to say that our present opinion is in favor of the plaintiffs.

We have no doubt that Hutchinson was insolvent, within the meaning of this act of parliament, at the time he made the sale to Clare. His embarrassments were confessedly very great in the month of July. He sent an agent to England in that month to effect a loan, with instructions, if he failed, to call a meeting of his creditors. In the month of August he called a meeting of his creditors for the 6th of September. Before that day arrived, namely, on the 1st of Septemeer, all his goods, chattels, and effects, including of course his stock in trade, were taken in execution for upwards of £20,000. Actions to the number of 12 or 14 had been commenced against him. His real estate was heavily mortgaged, and the judgments registered against him amounted to forty thousand pounds. Lastily, he had agreed, on the 8th of September, to assign for the benefit of his creditors.

We think it clear upon these facts, admitted by Hutchinson himself, that he was insolvent, within the meaning of the act, at the time he sold the property in question to Clare, and that Clare must be taken, under the circumstances, to have known it.

We agree with Mr. McDonald, that the language of the recent statute, so far as it deals with transfers intended to defeat or delay creditors, is not more extensive than the language of the statute of Elizabeth; but we have no doubt that both statutes embrace sales as well as voluntary transfers. The 6th section of the statute Eiizabeth is in these words: "Provided, &c., that the act, &c., shall not extend to any estate, &c., had made, &c., which estate is or shall be upon good consideration, and *bona fide* lawfully conveyed or assured to any person, &c., not having at the time of such conveyance, &c., any manner of notice or knowledge of such covin, fraud, or collusion as aforesaid." Now looking at the statute apart from the authorities, that clause appears to us to remove every shadow of doubt. The first section is quite wide enough to embrace sales, and the exception in the 6th section proves conclusively the rule which the legislature intended to lay down.

It is said, however, that *Wood* v. *Dixie*, 7 Q. B. 892, which has been followed both in England and here, lays down a different rule, namely, that where the sale is made *bona fide*, and with a full intention that the property should pass, it is not void, though made with the intent to defeat or delay creditors. The language of the court in *Wood* v. *Dixie*, is certainly broad; but as applied to the circumstances of that case, the rule there laid down appears to us to be perfectly sound, and in accordance with the received interpretation of the statute. *Wood* v. *Dixie* was not the case of a sale to a stranger. It was a transfer to a creditor in payment of a pre-existent debt. Now it has always been held that it is competent to a debtor, according to the law of this country, apart from the bankrupt and insolvent acts, to prefer one creditor to another. There is nothing in the statute of Elizabeth which prohibits that. Now when a debtor in insolvent circumstances sells his property, to a portion of his property, to one of his creditors, in payment of a pre-existent debt, the necessary consequence of such a transfer is to defeat and delay his other creditors. And the parties must be held to have intended that which was the necessary and obvious consequence of their acts; but to hold such a transfer void upon that ground, would be to hold that a debtor is prohibited by the statute of Elizabeth from preferring one creditor to another, which would be contrary to the settled rule of law.

We must not be understood as meaning that a transfer to a creditor may not be void, under the statute of Elizabeth, as well as a transfer to a stranger. No doubt it may. The transfer in

Twyne's case was a transfer to a creditor, and the reality of the debt was not questioned, but the transfer was held to be colourable, and therefore void under the statute. But what we mean to assert is, that a transfer of his property made by a debtor in insolvent circumstances, to a *bona fide* creditor, with a full intention that the property should pass, is not void under the statute of Elizabeth, because of an intention in the minds of one or both of the parties to defeat or delay the other creditors. Now *Wood* v. *Dixie* decides nothing more than that; and it will be found upon examination that the decisions referred to in the argument of that case were all of the same class. In *Riches* v. *Evans*, 6 C. & P. 640, the transfer was an assignment for the benefit of creditors generally. In *Holdbird* v. *Anderson*, 5 T. R. 235, it was a confession to a *bona fide* creditor after action brought; and in *Pickstock* v. *Lyster*, 3 M. & Sel. 371; *Bott* v. *Smith*, 21 Beav. 511; *Graham* v. *Furber*, 14 C. B. 410; *Harman* v. *Richards*, 10 Hare, 81; *Holmes* v. *Penney*, 3 K. & J. 91, it was an assignment for the benefit of creditors.

But a sale to a stranger would seem in reason and upon authority to stand on a different footing. Recent decisions seem to establish that such a sale, though *bona fide*, and upon valuable consideration, may be void under the statute, if made with intent to defeat creditors.

But, while we hold that sales are within the 22 Vic., ch. 96, as they were within the 13th Elizabeth, we do not accede to the argument that the recent statute has the effect of invalidating all sales made by an insolvent debtor, except sales to innocent purchasers, in the ordinary course of business. Such a construction would create a material discrepancy between the 18th and 19th sections, and would, moreover, interfere with the transactions of traders in this province, in a way not contemplated, as it seems to us, by the legislature. We hold it to be clear that the 18th section has not the effect of avoiding confessions of judgment given, not voluntarily, but upon pressure to a *bona fide* creditor. And if a confession given upon pressure to an importunate creditor, or perhaps as a security for money to be advanced, would be valid under the 18th section—we are strongly disposed to hold that a transfer of property made under the like circumstances, and for the same purpose, would be valid under the subsequent clause. In other words, we think that the transfers which are declared to be void under the 19th section are transfers made with intent to defeat or delay the creditors of the transferor, or to give one or more of his creditors a preference over the others.

It is not necessary in our view of this case to determine whether the sale to Clare, which was, it will be remembered, a sale not to a creditor, but to a stranger, was a sale made with intent to defeat or delay creditors, within the meaning of the act, because assuming in the plaintiffs' favour, and for the purpose of the argument that it was so, we do not think them entitled to the relief which they seek.

The plaintiffs come here either as creditors of Hutchinson, or as purchasers from him under the deed of the 10th of September, 1859. If they come as creditors, then it is clear upon the authority of several cases, of which I need only mention *Smith* v. *Hurst*, 10 Hare, 30, which was followed by *Knapman* v. *Crawford*, in this court, that a creditor has no right to impeach a sale of goods as being fraudulent and void under the statute of Elizabeth, until he has obtained judgment, and issued out execution. And if the plaintiffs could not have filed their bill under the statute of Elizabeth, without having first obtained judgment, and issued out execution, neither can they, in our opinion, under the recent act. Until execution has issued the creditor's title is incomplete, and therefore he has no right to file such a bill.

Then if they come as purchasers under the assignment of the 10th of September, it is equally clear that they cannot succeed. It is clear that the conveyances and transfers which are declared to be covinous by the Statute of Elizabeth, are not made void as to subsequent purchasers, but as to creditors only. The 27th of Elizabeth was framed for the protection of purchasers, but the 13th of Elizabeth was not so. To hold that a conveyance or transfer which would be void, under the 13th of Elizabeth, as against creditors, because made to defeat or delay them, is therefore void as against subsequent purchasers, would be obviously unreasonable and unjust. I have no doubt that such a conveyance would be perfectly valid as against the debtor himself and those claiming under him, and I do not apprehend that the recent statute makes any change in that respect. *Stone* v. *Van Heythusen* (11 Hare, 126), which was cited in argument, is an authority precisely in point. But the principle upon which the Vice Chancellor proceeded appears to have been settled previous to Tayn's case.

The plaintiffs fail, therefore, on both grounds. As creditors their title is incomplete, because they have neither obtained judgment nor sued out execution; and as purchasers they have no right to set aside the previous sale to Clare.

There is another ground also upon which the plaintiffs case appears to us to fail. The deed of the 10th of September does not pass, or profess to pass, the goods in question. By that deed Hutchinson assigns his stock of goods at Toronto and Hamilton; but nothing is said as to the stock at London; and although the deed goes on to assign all his other real and personal estate, yet it is all other real and personal estate now belonging to the debtor; but at that time the stock at London had been sold to Clare, and therefore did not belong to Hutchinson, or pass by the deed.

It is said, however, that the contract of the 8th of September bound the goods, and that as the sale to Clare was in fraud of that contract, it is void as against the plaintiff.

It is enough to say that no such case is made by the bill. The sale to Clare is not impeached on any such ground.

But had it been, a very important question would have arisen upon the 29 Vic. ch 3. Under that statute all sales of goods, not accompanied by possession, are required to be in writing. The goods and chattels must be so described that they may be readily and easily known and distinguished. There must be an affidavit of the *bona fides* of the transaction, and the due execution of the conveyance; and the conveyance must be, moreover, registered; and in default, it is declared to be void against subsequent purchasers as well as creditors. Now the only words either in the agreement of the 8th or the assignment of the 10th which would comprehend the goods in question, are the words: "all my real and personal estate," and it is quite clear that such a description is not sufficient within the statute. (*Harris* v. *Commercial Bank.*) Then if the contract of the 8th would be void against Clare, who purchased on the 9th, as a sale, can it be a biding contract in equity? whenever that question may arise it will require much consideration, but for the reasons already given, it does not arise here.

ESTEN, V. C.—I think on looking to the circumstances under which the sale to Clare took place, and the nature of the sale, it must be deemed to have been made with intent to delay creditors, and that Clare had notice, and that the sale was not in the ordinary course of business, and took place when Hutchinson was insolvent, or in expectation of insolvency, and would therefore be void as against the creditors of Hutchinson, but that he cannot defeat it by any act of his own, even by an assignment for the benefit of creditors; and therefore that the trustees stand in his place, and are bound by this sale, in the same manner that he was. The question then arises, whether the plaintiffs are entitled to relief on the ground of the agreement made of the 8th. I think that an agreement of this nature, if founded on valuable consideration, is such an one as this court should enforce specifically. If, by the agreement, the creditors are to release the debtor, there would be a valuable consideration; and even if it contain no such stipulation, it necessarily arises, from the nature of the transaction, that the creditors will not be free to act in the same manner as if no such agreement had been made; must forego, to some extent, their remedies; are led in fact to forbear suit; and this circumstance, combined with the effect of the existing debt, is sufficient, in my judgment to constitute such a valuable consideration as will attract the jurisdiction of the court. In the cases of *Siggers* v *Evans*, (5 Ell. & Bl. 367.) and *Harland* v. *Binckes*, (16 Q. B. 655,) it was held that a deed of trust for creditors, originally revocable, became in consequence of communication to creditors, and their presumable forbearance, not voluntary or void against creditors. But the objection is, that no such case is presented by this bill, and I am of opinion, that the injunction which has been granted must be dissolved: costs to be costs in the cause.

SPRAGGE, V. C., concurred.

COUNTY COURTS.

(*Reported by* THOMAS HODGINS, Esq., *Barrister-at-Law.*)

(Before His Honor Judge BOSWELL, Judge of the County Court of the United Counties of Northumberland and Durham.)

THOMAS FERRIS, v. STEPHEN CHESTERFIELD, ARCHIBALD VIRTUE, AND JOHN H. MORLEY,

Common School Act—Annual School Report—Dissatisfaction—Arbitration—Award—Power of County Judge.

It is by sub. s. 21 of 27 of "the Upper Canada School Act," (Consol. Stat. U. C. p. 735), made the duty of the *trustees* of such school section to cause to be prepared and read at the annual meeting of their section, their annual school report for the year then terminating, which report shall contain, among other things, a full and detailed account of the receipts and expenditure of all school money, &c., and by s. 29 of the same act, it is provided, that "in case the account, &c., is not satisfactory to a majority of the freeholders and householders present at such meeting, then a *majority of the said freeholders and householders* shall appoint one arbitrator, and the *trustees* shall appoint another, and the two arbitrators thus appointed shall examine the said account, and their decision concerning it shall be final, &c.; and the sum or sums awarded by them against *any person*, shall be collected by such arbitrators, &c.

Held, that under a reference pursuant to this section, the arbitrators were justified in making an award against a secretary treasurer of a school section, who was also one of three school trustees, who were parties in the reference; and that the reference intended by the act, is not a reference by the trustees in their corporate capacity but as individuals.

Held, also that the jurisdiction of a county judge under s. 130, 131, 133, &c., of the Upper Canada Common School Act, is not necessarily co-extensive with the authority of arbitrators appointed under s. 29; and that were a pleading set up a proceeding had before the county judge, under s. 133, as a bar to proceedings taken under an award made pursuant to s. 29, but did not show in specific terms that the matters decided by the arbitrators were not only identical, but that the county judge had competent jurisdiction respecting them, the pleading was held bad.

This was an action of replevin. The plaintiff declared that the defendants, on the 24th March, 1858, in the township of Darlington, in the county of Durham, took and detained the Goods and Chattels of the plaintiff, to wit, two horses, &c.; and unjustly detained the same against sureties and pledges, until, &c.

The defendant pleaded—First, *Non Cepit;* Second, That the Goods and Chattels, &c., were not the property of the plaintiff; and, Third, a special plea as follows:

And for a third plea the defendants say, that the plaintiff, one John Irwin and one William Irwin, were duly elected trustees of School section, number sixteen, in the township of Darlington, for the year of our Lord, one thousand eight hundred and fifty-seven: That the annual meeting of the said school section was duly held according to law on the second Wednesday in January, in the year of our Lord, one thousand eight hundred and fifty-eight: That it was the duty of the said trustees to cause to be prepared and read at the said annual school meeting of the said school section their annual school report, for the year terminating on the thirty-first day of December, in the year of our Lord, one thousand eight hundred and fifty-seven, which report was to include among other things prescribed by law, a full and detailed account of the receipts and expeditures of all school monies received and expended on behalf of the said section, for any purpose, whatever, during the said year, terminating as aforesaid: That at the said school meeting, it was the duty of the freeholders or householders of the said section, present at the said meeting, or a majority of them, amongst other things, to receive and decide upon the said report of the said trustees: That the said trustees did cause to be prepared and read at the said annual school meeting of the said section so held as aforesaid, their annual report for the year terminating as aforesaid: That the account included in the said report and furnished by the said trustees, was at the said annual school meeting, duly decided not to be satisfactory to a majority of the freeholders or householders present at such meeting: That a majority of the said freeholders or householders thereupon duly appointed one person, to wit, one William H. Rogers, and the said trustees then duly appointed another person, to wit, one Donald H. McLeod: And the said William H. Rogers and the said Donald H. McLeod, the said two arbitrators thus duly appointed thereupon, duly examined the said account: And, thereupon, to wit, on the nineteenth day of February, in the year of our Lord, one thousand, eight hundred and fifty-eight, duly made and published their award in writing, of and concerning the same, and thereby duly awarded, that the said plaintiff was indebted to the said school section, in the sum of thirty-three pounds, two shillings and four-pence, and thereby authorize the collector of taxes for the said section, such collector being then the defendant, Archibald Virtue, to collect the said sum so awarded against the said plaintiff, within one month from the date of the said award, together with interest unless the same should be sooner paid: That the same being unpaid, and the said month having elapsed, the said defendant, Archibald Virtue, and the said defendant, Stephen Chesterfield, as his servant, bailiff and agent, thereupon duly distrained the said goods, chattels and personal property of the plaintiff, for the said sum so awarded, as aforesaid, as they lawfully might for the causes aforesaid, and put the same into the possession of the said defendant, John H. Morley, a public inn-keeper, to be kept until the same could be lawfully sold, which is the taking and detaining in the declaration alleged.

To this plea the plaintiff demurred.

The following were the alleged grounds of demurrer.

Because the corporation of said school section are not properly described therein; and, because it is not shown in what capacity the award therein set forth is made against said plaintiff: Nor is it shown that the said arbitrator had authority to make an award against an individual member of a trustee corporation: And because such arbitration and award are remedies between freeholders and householders of a school section, and the school corporation of such section, and not between said freeholders and householders, and a trustee or secretary, treasurer of said section.

The plaintiff also replied specially to the third plea of defendant, that on or about the thirtieth day of January in said year, one thousand, eight hundred and fifty-eight, the plaintiff was ordered to appear before the judge of this honorable court in pursuance of and under the provisions of the Upper Canada School Act of 1850, to answer certain charges preferred against him as secretary treasurer of said school section, by John Irwin and William Irwin, trustees as aforesaid, in regard to his alleged indebtedness to said school section, as set out in said supposed award, and concerning which, the said supposed award was made. And that the judge of this honorable court after having heard and fully considered the complaint of said John Irwin and William Irwin, and the evidence and proof adduced in support of such alleged indebtedness, and the allegations of the plaintiff and of the said John Irwin and William Irwin, and the argument of counsel for both parties, ordered the said plaintiff to be discharged, and decided that the said plaintiff was not in any manner indebted to said school section, nor bound to pay over any monies, nor to deliver any books, papers, or chattels, belonging to said school section; and that the plaintiff was thereby totally discharged and released of and from all liability for and on account of the said school section. And the plaintiff further says, that the making of said supposed award was vexatious, and that it included all or a part of the expenditures of money made by the plaintiff on behalf of said school section, and monies for which said plaintiff was not responsible, which had been previously investigated and allowed to the plaintiff, aforesaid, by the judge of this honorable court.

To this replication the defendant demurred.

The following were his causes of demurrer:

Because the proceedings therein alleged to have been had before the county court judge, was a proceeding taken by the trustees against the secretary-treasurer, while the proceeding set-out in the third plea of the defendants, is a proceeding between the freeholders and householders of the school section, and the trustees, and the proceedings by the trustees against the secretary-treasurer, is no bar to the proceeding and award set-out in the defendants' plea; and because the said county court judge had no power that the said secretary-treasurer was not indebted as a trustee to the school section or otherwise, and because it is alleged that the said John and William Irwin were at the time of the said proceeding before the county court judge, trustees of the said school section.

Thos. Hodgins, for plaintiff.

J. D. Armour, for defendant.

BOSWELL, Co. J.—The first demurrer, which is replied by the plaintiff to the defendant's third plea, raises the question, whether an arbitration and award, as set forth in that plea, are authorized by the 29th clause of the Common School Act (Con. Stat. U.C. 737).

The 21st sub-section of the 27th clause requires the *trustees* to cause to be prepared, at their annual meeting, their annual report, "which shall include, among other things, a full and detailed account of the receipt and expenditure of all school moneys received and expended on behalf of such section, for any purpose whatever, during the year." By the 29th clause it is enacted that "in case the account mentioned in the sub-section just recited is not satisfactory to a majority of the freeholders and householders present at the annual meeting, then a majority of the said freeholders and householders shall appoint an arbitrator, and the *trustees* shall appoint another; and the two arbitrators thus appointed shall examine the said account, and their decision respecting it shall be final, and the sum or sums awarded by them against any person shall be collected by such arbitrators," &c. It is contended, on behalf of the plaintiff, that an arbitration under this clause is given only as a remedy between the freeholders and householders of a school section on the one part, and the trustees in their corporate capacity on the other part; and therefore, that the award set forth in plea, which is against one of the trustees only, and in his individual capacity, is bad. The several cases decided by the superior courts, upon arbitrations between a teacher and the trustees, are relied upon as supporting this view. There is, however, a marked distinction between these cases and the present one. In their dealing with the teacher the trustees are not principals, but agents only, for the section. In this case, there is no third party. It is a question as between a trustee and his *cestui que trust*. To present a correct account of moneys entrusted to him, is as much a personal obligation on the part of a trustee, as of every other pereon. The law, indeed, is the more jealous of his conduct in this respect because he *is* a trustee. The fact that the trustees in this case have been created a corporation, certainly ought not, and in my opinion does not, make any difference. The language of the act clearly contemplates a personal responsibility, and I cannot perceive any objection in principle to an arbitration and award such as are set forth in this plea. It is not denied that the plaintiff, against whom the award was made, was a party to the arbitration, and the fact of his being secretary and treasurer would account for the award being against him and not the other trustees, who may reasonably be supposed to have less actual responsibility. It is true that the 130th and three succeeding clauses of the same statute give a remedy against a secretary-treasurer, but that remedy is of a limited nature, and difficulties may well arise between the section and the secretary-treasurer, which could not be settled by the proceedings contemplated in those clauses. Looking also at the pains obviously taken in the several enactments of the School Act, to bring all matters of controversy as much as possible within the remedy of arbitration, I cannot doubt its application in this instance. The clauses last referred to have to be more particularly considered in deciding the other demurrer, and the observations it will be necessary to make on them are applicable in some respects also to this portion of the case.

The second demurrer, which is rejoined by the defendants to the second replication of the plaintiff, varies the question whether the proceeding under the 130th and following clauses is necessarily a bar to a proceeding under the 29th section.

The replication sets forth that the plaintiff was ordered to appear before the judge of the County Court, in pursuance of the provisions of the School Act, to answer a certain charge preferred against him as secretary-treasurer by the other trustees, in regard to his said alleged indebtedness, as set out in the supposed award, and concerning which the said supposed award was made; and that the judge, after having heard and fully considered the complaint, and the evidence and proof adduced in support of said alleged indebtedness, and the allegations of the other trustees, and the agreement of counsel for both parties, ordered the plaintiff to be discharged, &c.

If the jurisdiction given to the county judge were co-extensive with the power given to arbitrators under the 21st clause of the act, and it were shown that the matter brought before him was identical with that disposed of by the arbitrators, then this replication would, I think, be a sufficient answer to the plea, although the parties using the remedy may not have been identical.

The identity of the *matter* investigated by the county judge with that decided by the arbitrators, is probably sufficiently alleged in the replication. The charge against him is stated to be "in regard to his alleged indebtedness, as set out in the award, and concerning which the award was made."

But the question then arises, Is the jurisdiction of the county judge co-extensive with the power of the arbitrators, so that the decision made by him would necessarily cover the whole matter of controversy left to arbitration? The 130th clause (the first of the penal clauses) enacts that "if any secretary-treasurer has in his possession any books, papers, chattels or moneys, which came into his possession as secretary-treasurer, and wrongfully withholds or refuses to deliver up or account for or pay over the same or any part thereof to the person and in the manner directed by a majority of the school trustees then in office, such withholding, &c., shall be a misdemeanor." Under the next clause, "the county judge, upon application by a majority of trustees, shall order the secretary-treasurer to appear before him; and by the 133d clause, at the time and place appointed, the judge shall, in a summary manner, hear the complaint; and if he is of opinion that it is well founded, he shall order the party to deliver up, account for, and pay over the books, papers, chattels and moneys, as aforesaid." Under these provisions of the act, it is quite clear that the judge has no jurisdiction, except where a secretary-treasurer "has in his possession books, moneys, &c., which came into his possession as secretary-treasurer, and which he wrongfully withholds or refuses to deliver up and account for and pay over to the person and in the manner directed by a majority of the school trustees." He must, in fact, have been guilty of the misdemeanor contemplated by the 130th clause, before the judge could be required to interfere. It is certainly possible, however, that a secretary-treasurer of a school section may be found to be indebted to the section otherwise than for money which came into his possession, which he wrongfully withholds or refuses to account for and pay over. He may be liable for some neglect, and in many ways disputes may arise respecting his accounts, which would be the fair subjects of an arbitration, and over which the summary power given to the county judge could exercise no control. I know nothing of this case, except from the pleadings. The proceedings alluded to were not had before me. It may have been possible, however, that they were taken for the purpose of enforcing the award. Supposing that to have been the case, then all that is said in the replication, with reference to the subject matter of the complaint, would be true; but the judge would not have been justified, in such a case, in interfering.

The mode of collecting money due on the award is specifically pointed out in the act, and the neglecting to pay the money awarded would clearly not come within the meaning of the 130th section of the School Act.

It is true, however, on the other hand, that the matter decided by the arbitrators might in this case have been one over which the county judge had jurisdiction; but as, in the view I take of the statute, his jurisdiction is a limited one, not co-extensive as respects the subject of enquiry with the power given to arbitrators, the replication should have shown in specific terms that the charge brought before the judge, and the matters decided by the arbitrators, were not only identical, but that the county judge had competent jurisdiction respecting them; and this, I think, it utterly fails to do. (*Kennedy* v. *Burness et al.*, 15 U. C. Q. B. 488, and the cases there cited by the C. J., viz., *Moravia* v. *Sloper et al.*, Willes, 30; *Mure* v. *Kaye*, 4 Taunt. 34.) I am of opinion, therefore, that the proceeding before the county judge, as stated in the replication, does not form a legal answer to the arbitrators' award and subsequent distress for the sum awarded, and therefore that, on the whole proceedings, judgment must be for the defendants.*

* From this judgment the plaintiff appealed, during last Easter Term, to the Court of Common Pleas, and the appeal was dismissed.

GENERAL CORRESPONDENCE.

Court of Revision—Powers—Proceedings.

Fort Erie, 30th May, 1860.

To the Editors of the Law Journal.

Gentlemen,—I desire to obtain your opinion, through the columns of the *Journal*, in your next issue, on the following case, which occurred in this village at the last meeting of the Court of Revision.

A rate-payer, being present at the meeting, gave notice, then and there, that he complained that the *unrented* property of the Corporation, on account of the greater and increased depression of the times, is valued 25 per cent. too much. Whereupon the Court of Revision forthwith unanimously resolved that a reduction of 25 per cent. be made on all such property.

Question: Has the Court of Revision, under the provisions of the Assessment Law, the power to make such reduction, upon a complaint made as above stated?

Nine cases of appeal, duly made, were tried and decided upon; but in no instance did one of the appellants complain that his real property was assessed too high. The members of the Court of Revision contend that they have the power to revise the assessment roll, even without a formal notice from a rate-payer.

I would also wish you to state, whether the County Council have not the power, in equalizing the assessment rolls, of increasing or diminishing *village* assessments as well as townships.

Yours, &c.,

James Stanton,
Village Clerk.

[1st. The jurisdiction of the Court of Revision is "to *try* all *complaints* in regard to persons being wrongfully placed upon or omitted from the roll, or being assessed at too high or too low a sum."—(Con. Stat. U. C. ch. 55, sec. 58, p. 660.)

2nd. If a municipal elector thinks that *any person* has been assessed too low or too high, &c., the Clerk is, *on his request in writing*, to give notice to such person, and to the assessor, of the time when the matter (*i. e.*, complaint) will be tried by the Court, and the matter is to be decided in the same manner as complaints by a person assessed.—(*Ib.* sec. 60, sub-sec. 2.)

3rd. The word "person" may be held to include any body, corporate or politic, and probably would be held, in the case put, to include the corporation of the village. (Con. Stat. U. C. p. 6, sec. 12.) But if so, the complaint, we think, could only be determined upon a request, in writing, such as pointed out by the statute; and the statute does not appear to have been complied with in the case put. We cannot subscribe to the doctrine that the Court of Revision has the power to revise the assessment roll, without the formalities of the statute having been previously complied with. The Court is the creature of the statute, and has no powers beyond those given by the statute; and those given by the statute must, in our opinion, be executed in the mode pointed out by the statute.

4th. The powers of a County Council to examine the assessment rolls of each local municipality within the county, for the purpose of ascertaining whether the valuation made by the assessors bears a just relation to the valuation made in *all* the local municipalities of the county, and, for the purpose of county rates, to increase or decrease the aggregate valuation of real property in any local municipality, extends as well to villages as to townships.—Eds. L. J.]

Affidavits—Sufficiency—Description of deponent.

To the Editors of the Law Journal.

London, C.W., 28th May, 1860.

Gentlemen,—Will you kindly inform me, in your next issue, whether an affidavit requires *all* the Christian names of the party making it, to be in full. Thus: would an affidavit made by one *John A. Smith* be read in court? By answering this, you would oblige greatly, J. F.

[In general, an affidavit should set forth the deponent's *names* in words at length. Our correspondent is referred to *Richardson* v. *Northrup*, Tuy. U. C. R. 452; and *Westover* v. *Burnham*, MS. R. & H. Dig. Arrest, I. 29. He will find the former a case in point. An affidavit containing the initial only of deponent's second Christian name, was there held insufficient.—Ed. L. J.]

Mortgagor and Mortgagee—Remedies—Power of Sale—Ejectment—Covenant.

To the Editors of the Law Journal.

Renfrew (C.W.), 4th June, 1860.

Gentlemen,—Having been advised by a subscriber to seek advice through the medium of your valuable and widely circulated journal, I beg to submit for your perusal a plain statement of facts, as they have occurred to me.

I arrived in this country, from England, in May, 1858, and was persuaded to purchase a farm, which I did, from a Mr. A., who had only been in possession eight months, he having paid £170, and sold it to me, with everything as it stood, on the 27th May, 1858, for £400;—terms of payment, £250 down, £50 on the 24th December, and £25 annually for four years, with interest at 6 per cent. Mr. A. being in want of cash one month after the first payment, requested me to favor him with the £50 due in December. Although five months before due, I accommodated him.

In the month of October of the same year (1858), I received a letter from Messrs. B. & C., solicitors, with one from a Mr. D., informing me that the mortgage held by Mr. A. on the farm for £100, had been transferred to Mr. D. of Ottawa, and that all future payments were to be made to Mr. D. The first year's interest became due on the 27th May, 1859, which I paid to Mr. D. personally, and hold his receipt for the same. Having been informed that Mr. A. had triumphantly said, in the front of a bar of a public hotel, that he had transferred the mortgage to a person who would "keep me to the hip," I men-

tioned the circumstance to Mr. D., who then told me he would not distress me, if the payments were made in reasonable time.

On the 2nd January of the present year, I received a notice from Mr. D., demanding immediate payment of £25, due on the 24th December, 1859. From what Mr. D. had previously told me, I wrote to him informing him that at the time I had not the means, but would pay him shortly. My request for time was disregarded, and by a letter dated 12th January, 1860, Mr. D. informed me that unless the £25 was immediately paid, he would have recourse to the law; and I was informed by notice dated the 17th, from Messrs. E. & F., solicitors, that instructions had been given them, that unless the instalment and interest was immediately paid, they would act according to instructions. Being led astray by the wording of the mortgage, that three months' grace would be allowed before I could be distressed, and being confident I could make the payment before that time, I wrote to those gentlemen, stating I would be sure to pay all demands before the 24th March.

On the 19th of that month, I forwarded, through a friend at Ottawa, £25, for payment to Messrs. E. & F. But Mr. F., who has acted all through this business, refused to take payment, as a summons had been taken out in the Inferior Court of Queen's Bench ten days previously. That summons was served upon me four days after the offer of payment had been made. The fact of the summons being served upon me by the sheriff's officer from Perth, when it could have been sent to Mr. Torney, the solicitor at Renfrew, showed plainly that the parties were determined to put me to every possible expense.

By the summons I perceived I was prosecuted by Mr. A., who claimed the instalment and interest from May 1858, although I had paid the interest to D. up to May 1859. I felt surprised that Mr. A. had any right of claim on me, after he had transferred his interest to Mr. D. Finding I had broken the covenant, through ignorance as well as want of means to pay at the time when due, I instructed my friend to wait on Mr. F. and ask him to stop proceedings, and I would pay all reasonable and lawful costs. The £25 was then received, and Mr. F. promised that no further expenses should be incurred. I requested that the bill of costs should be forwarded to me. In the interval I was informed that if the interest up to the 24th December, 1859, was not paid, proceedings would be gone on with. I considered the interest was not due till the 27th May, 1860, but, fearing expense, I forwarded the £3.

The bill of costs was forwarded to me, and to my surprise I found I was prosecuted by two parties for the same debt—by A., who had sold his interest, and by D., who bought it. The charges for costs were, for A. £3 19s. 11d., for D. £2 10s. 8d. Although I considered I was imposed upon, I forwarded the amount of £6 10s. 7d. to my son, who is now in Ottawa, to pay to Mr. F. the amount of his costs, as charged. That amount was refused, unless an additional 17s. 9d. was paid. No explanation was given for what the latter charge was made. My son paid the amount demanded.

My principal object in thus applying to you is to know if these people have both a right to make demands upon me. If so, I am in a fearful position, in the event of unforeseen difficulties, which I shall endeavour in future to avoid. Would it be advisable to tax the costs, although paid? I paid under protest that I would seek advice. Gentlemen, I have a large family depending on me. My all is sunk in endeavouring to make a home for them, and it is only by the strictest frugality that I can bear myself and family respectably. If I am to be persecuted by unprincipled men, better we had been engulfed in the Atlantic, where our troubles would have ceased. Your opinion will be looked for with interest, in your next publication of the *Law Journal*. Trusting you will pardon one who is almost distracted,

I remain, with gratitude, yours most respectfully,

FORTUNATUS HUGHES.

[We often receive communications such as the above. They display the amount of ignorance prevalent among laymen, as to the rights of mortgagor and mortgagee. All the difficulties into which our correspondent fell, arose from his ignorance of these rights. His case appears to be one of great hardship; and for his benefit, as well as for the information of those circumstanced in like manner, we propose to make some remarks.

1st. The three months' grace, about which our correspondent writes, are, we presume, not intended to be such. They are, we imagine, three months allowed by the mortgagee to the mortgagor, *before the mortgagee or his assignee can exercise a power of sale*. They are not intended for any other purpose, or to have any other effect. They do not dispense, so far as the covenants in the mortgage are concerned, with the necessity for payment of instalments and interest on the days limited in the mortgage for such payments. The mortgagee or his assignee was bound to wait three months before selling the mortgaged property, but not to wait one day before suing on the covenant for the payment of the mortgage money, or bringing an action of ejectment to get possession of the land.

2nd. The mortgage debt is what is termed in law a "chose in action." Although assigned, the assignee cannot sue the mortgagor for the debt or interest in his own name, but must make use of the name of the mortgagee for that purpose. But as the assignee, under a properly drawn assignment, acquires the legal estate in the land, he may maintain an action of ejectment in his own name, to recover possession of the land. These remedies are concurrent. The assignee in the case put, chose to exercise both, at one and the same time. He sued in the name of the mortgagee, but for his own benefit, for the amount of money alleged to be due on the mortgage, and he brought an action of ejectment in his own name to recover possession of the land mortgaged. His writs were served by by a sheriff's officer from Perth, and mileage was the result. He could not have sent them to Mr. Torney, unless Mr. Torney, under the express instructions of the mortgagor, had previously undertaken to accept service, and to appear to them in order if necessary to defend the actions.

3rd. If the costs were paid under protest, they are still liable to be taxed. If more than one-sixth should be disallowed on taxation, the attorneys would be in all probability compelled

not only to refund the excess, but to pay the costs of the application and of the taxation.

4th. A word of advice to our correspondent. Had he paid the instalment and interest on the days fixed by the mortgage for payment, he would not have been put to any trouble. He should have made every possible exertion to do so, rather than allow law costs to be heaped upon him. Were he not able to do such was his misfortune. The assignee of the mortgage, upon default, had a legal right to resort to his legal remedies. These remedies entailed expenses, which our correspondent was liable to pay.—Eds. L. J.

MONTHLY REPERTORY.

CHANCERY.

V.C.W. Charlton v. The N. & C. Railway Co. *Aug.* 1.

Railway company—Amalgamation—Illegal agreement.

A shareholder in a railway company is entitled to restrain the directors from carrying into effect an agreement with another railway company for the amalgamation of their lines, which has not received the sanction of Parliament,—such agreement containing clauses as to throwing the receipts into one common fund, and dividing the profit and loss in certain proportions, and also as to handing over the entire management and control of the one company to the other.

L. C. & L. L. J. Collard v. Roe. *July* 2.

Vendor and purchaser—Specific performance—Concurrence of dower trustee—Costs—Appeal.

Purchaser held to be entitled to concurrence of dower trustee, and objection, that he was not a necessary party to conveyance allowed; but a suit for the purpose deemed frivolous.

COMMON LAW.

Q.B. Newcombe v. De Ros. *Nov.* 5.

Prohibition—County Court Jurisdiction.

The defendant residing out of the jurisdiction, wrote and sent a letter giving an order to the plaintiff which order was received and executed by the plaintiff entirely within the jurisdiction of the County Court of L., by the leave of the registrar process was issued out of that Court and served upon the defendant out of the jurisdiction.

Held, that as the letter was no request until it reached its destination, the cause of action arose within the jurisdiction of the County Court of L., and that the process was rightly issued.

EX. Taylor v. Burgess. *Nov.* 8.

Pleading—Accommodation notes—Equitable plea.

A plea to equitable grounds to an action upon a joint and several promisory note, setting out that it was an accommodation note, and that the defendant gave and the plaintiff took the note as surety for B., was held to be a good answer to an action brought upon the note.

Q. B. Perrins v. Marine & G. T. Insurance Co. *Nov.* 11.

Policy of Assurance—False statement—Description of assured.

The proposal for a policy of assurance require the name residence occupation or profession of the intended assured, and was filled up "Isaac Thomas Perrins, Esq, Saltley Hall."—The policy contained a proviso that if any statements in the proposal should be untrue the policy should be void. The assured was an ironmonger as well as an esquire, but this fact was immaterial.

Held that the omission to state his trade did not avoid the policy.

C.P. Law. v. Parnell. *Nov.* 2.

Bill of Exchange—Indorsement in blank.

If the drawer of a bill of exchange indorse it in blank and hand it over to the manager of a company for the company, the manager may, with the authority of the company, sue on it in his own name and declare on it as having been indorsed to him by the drawer.

EX. Cornforth v. Smethurst. *Nov.* 4.

Statute of limitations—Debt—Acknowledgment.

The following words in a letter written by a debtor to his creditor in answer to an application for the debt before the statute had barred the remedy,

Held, to take the case out of the statute of limitations. "In reply to your statement of account, I am ashamed it should have stood so long. I must beg to trespass further on your kindness till a turn of trade takes place, as trade continues very dull."

Q.B. Haigh v. London & N. W. Railway Company. *Nov.* 5.

Negligence—Liability of Railway Company to fence.

The defendants Railway crossed the plaintiff's land on a level, and there was an accommodation road over the railway. Two descriptions of fastenings were provided by the defendants for the gates leading from the road to the railway, and it was arranged between the plaintiffs and defendants, that one should be used by day and the other by night. The former was insufficient, the latter sufficient. Complaints had been made to the defendants of the insufficiency of the day fastening, of which no notice was taken. The plaintiff's servants notwithstanding its insufficiency continued to use it. A pony strayed through one of the gates on the line and was killed, and in an action against the defendants to recover the value of the pony, the jury found that the defendants had not provided sufficient protection but that the plaintiff's servant had not used the precaution he ought.

Held, that upon this finding the verdict was rightly entered for the defendants.

C.P. Blackie v. Stainbridge.

Shipping—Liability of Captain for damages done to goods while being loaded, a "Stevedore" having been appointed by the Charterers.

Where the charterers of the vessel employed a "stevedore" who was to be under the orders of the Captain and to be paid by him.

Held in an action against the Captain by the Charterers for damage done to some of the goods while being loaded, that he was not liable, there being no contract between him and the charterers for making him answerable for any wrong done by him or his crew.

Q. B. Cox v. Mitchell. *Nov.* 2.

Staying proceedings—Action for same cause pending in foreign country.

The Court will not stay the proceedings in an action here because an action for the same cause is pending in a foreign country.

REVIEW.

The Upper Canada Law List for 1860–61, by J. Rordans; printed by Maclear & Co. Price, 75 cents.

This annual publication is now too well known to the profession for whose use it is intended, to need any recommendation from us. It is a careful compilation, and its arrangement almost perfect.

The copy before us opens with a very interesing dissertation on the Legal Profession of Upper Canada. Then follows the Judicary, Courts of Error and Appeal, Queen's Bench, Chancery, Common Pleas, Probate Court and Chambers, Heir and Devisee Commission, County Courts, Surrogate Courts, Courts of Quarter Sessions, Recorders Courts, Insolvent Debtors Courts, officers of the Courts, Circuits of the

Courts, County Court and Quarter Sessions Sittings; List of practising barristers throughout Upper Canada, with dates of call. Similar list as to Attorneys and Solicitors; List of Barristers and Attorneys in Toronto, with places of residence and business; List of practising Barristers and Attorneys in the different towns and cities throughout Upper Canada, with their agents in Toronto. List of Coroners; List of County and Judicial officers, &c,; List of Queen's Counsel; Commissioners for taking affidavits to be used in Lower Canada: Same for Upper Canada; Legal holidays; Law Society for Upper Canada benchers, &c; Rules of Law Society, as to Barristers and Attorneys, &c.

We would suggest to the compiler that in his future editions, he should prevent the *jumble* that exists in the present edition, as to Toronto, Common Law, and Chancery agents, of country practitioners. There should be two tables—the one giving the names of Common Law agents, the other the names of Chancery agents. Unless some such arrangement be made, great difficulty will be experienced in making a proper use of the information given.

THE NORTH BRITISH REVIEW, May 1860; Leonard Scott & Co., New York.

This number contains, as usual, several able papers. That on the origin of species, is one of the most difficult and the most able. The well known work of Professor Darwin is candidly and at at great length reviewed. Quakerism Past and Present, is also a paper of much interest. The remaining papers are Redding's Reminiscences, Sir Harry Lawrence, Australian Ethnology, Church and State, British Lighthouses, The State of Europe.

THE LONDON QUARTERLY, for April: Leonard Scott & Co., New York.

By far the most interesting paper in this number is that headed "Labourers Home." Its humanizing tendencies deserve all praise. The article is more suited to the older countries of Europe, where the population is excessive, and the comforts of the laborer little cared for. In new countries, like ours, where, in ordinary times, wages are high and land cheap, the comforts of the laboring class much exceed those of a similar class in older countries. The Souveniers and Correspondence of Madame Recamier will be found acceptable to those fond of literary reminiscences. A singular article is that headed "The Vicissitudes of Families." The references made to Irish families are almost fabulous. The whole article is not only entertaining but presents much food for the mind, in the shape of abundant materials for thought. Our legal friends will, no doubt, read "The Bar of Philadelphia," and though it is not equal to other papers in the same number, owing to its affinity to our profession, it deserves a perusal. The remaining papers do not require any special notice from us.

BLACKWOOD'S, for June: Leonard Scott & Co., New York.

As usual, "Old Maga" abounds with much to entertain. Not the least entertaining tit bit is "The Fight for the Belt." A vein of rich humour, but combined with a spirit of fair play, pervades this production. It begins with the departure of the Benicia Boy from the United States, and gives a full narrative of all that occurred up to the fight, and closes with a graphic description of the fight. We give the first verse as a specimen.

The fancy of America,
By all creation swore.
A British champion round his loins,
Should gird the belt no more.
With strange, great oaths they swore it,
And chose a man straightway,
And felt his arm, and saw him hit,
And loafed and chewed and cursed and spit.
And sent him to the fray.

THE ECLECTIC MAGAZINE, for July; W. H. Bidwell, No. 5, Beekman Street, New York.

The July number opens with a familiar face—that of Lord Elgin. We pronounce the likeness an excellent one. In every line and lineament we behold our former Governor General. The letter press is most instructive. An article on orators and oratory, selected from the *British Quarterly Review*, is truthful. It traces the progress of British oratory, with the struggles of liberty, and shows how close the relation of the one is to the other. Lord Macaulay and his writings, now that the great historian is no more, will be widely read. The sketch is an admirable one. A paper on the origin of species, a review of Professor Darwin's Work, is learned and instructive. This paper is selected from the *British Quarterly Review*. It is, however, we think, inferior to the article on the sume subject in the *North British Review*, to which we have already referred.

GODEY'S LADY'S BOOK, for July; Louis A. Godey, Philadelphia.

This is *the* Ladies Magazine of America. No expense is spared to make the *Magazine* all that it professes to be. We are never disappointed with Godey. Each number is, if possible, better than its predecessor. In the number now before us, we find an account of Modern Coaches, with which we are delighted. Coaches were first introduced into England by Guilliam Boonier, a Dutchman, in 1564. His coach was a ponderous structure. The gradual improvements effected in successive years are traced in the pages before us. It is strange to observe how indicative the coach of each century was of the manner and habits of the people. No mention is made of the 2-40 vehicles of Yankeedom. We presume the omission is intentional

APPOINTMENTS TO OFFICE, &c.

CORONERS.

JOHN RICHARD FLOCK, Esquire, M.D., Associate Coroner, County of Middlesex. (Gazetted 2nd June, 1860.)

ALEXANDER J. BULL, Esquire, M.D., Associate Coroner, City of London.—(Gazetted 2nd June, 1860.)

JOSEPH CARBERT, Esquire, M.D., Associate Coroner, County of Wellington.—(Gazetted 16th June, 1860.)

JOHN REEVE, Esquire, Associate Coroner, United Counties of York and Peel.—(Gazetted 16th June, 1860.)

ISAAC JOHN DALLAS, Esquire, M.D., Associate Coroner, City of Hamilton.—(Gazetted 16th June, 1860.)

PETER JOHNSON MUTER, Esquire, Associate Coroner, County of Perth.—(Gazetted 16th June, 1860.)

NOTARIES PUBLIC.

JOHN SOOTHERAN, of Cavanville, Esquire, to be Notary Public in Upper Canada.—Gazetted 2nd June, 1860.

JAMES DUNNE, of Hamilton, Esquire, Barrister-at-law, to be Notary Public in Upper Canada.—(Gazetted 9th June, 1860.)

WILLIAM JAFFRAY, of Waterloo, Esquire, to be Notary Public.—(Gazetted 16th June, 1860.

REGISTRAR.

SAMUEL SHERWOOD, Esquire, to be Registrar of the City of Toronto, in the room and stead of the Honorable Joseph C. Morrison, resigned.

TO CORRESPONDENTS.

JAMES STANTON—LAW STUDENT—F. HUGHES—Under "General Correspondence."

A DIVISION COURT CLERK—TREASURER OF A NEW TOWNSHIP—Too late for this number.

DIARY FOR AUGUST.

5. SUNDAY..... *9th Sunday after Trinity.*
11. Saturday..... Articles, &c., to be left with Secretary of Law Society.
12. SUNDAY..... *10th Sunday after Trinity.*
15. Wednesday ... Last day for service of Writ for County Court.
19. SUNDAY ..... *11th Sunday after Trinity.*
20. Monday..... Last day for notice of Ex. Chancery, Toronto.
21. Tuesday..... Long Vacation ends.
25. Saturday..... Last day for declar. for County Court.
26. SUNDAY ..... *12th Sunday after Trinity.*
27. Monday..... TRINITY TERM begins.
31. Friday..... Paper Day, Q. B.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

AUGUST, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60." *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The* "60" *has reference to the year, and not to the amount represented as due.*

THE LAW OF REGISTERED JUDGMENTS IN UPPER CANADA.

There are few branches of our law of real property so important, and, perhaps, so troublesome, as that which relates to the lien upon property created by registered judgments. The statutory enactments are by no means perfectly clear; and the consolidation of the various conflicting provisions in the Consolidated Statutes for Upper Canada, has only brought into greater relief their numerous inconsistencies.

In a former article upon this subject (vol. 5, p. 193), we treated of the lien of registered judgments, and under what circumstances it was, and was not, binding upon lands, and in the present article we propose to fulfil the promise then made, of referring to the interests in real estate which may be bound by such registered judgments.

By the Consolidated Statutes for Upper Canada (cap. 89, sec. 49—same as 13 & 14 Vic. cap. 63, sec. 2), it is provided that judgments, when registered, shall affect and bind all lands to which the debtor was or afterwards became seized, possessed, or entitled, for *any estate or interest* whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which he had or afterwards obtained any *disposing power;* and these provisions are amplified by the Consolidated Statute for Upper Canada (cap. 90, secs. 5 & 11), which provides that a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained; also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any land, shall be bound by judgments, and be liable to seizure and sale under execution the same as lands.

The words here used—"*any estate or interest in land*"—are certainly comprehensive enough to include all kinds of estates which can possibly exist at law or in equity. We shall therefore describe those estates which are more generally known, and then refer to those which the latter statute more particularly describes, on all of which judgments attach.

1. An *estate in fee simple* in land is the largest estate which can be held under our laws. It is the kind of estate most common in this Province, and possesses the advantage of descending not merely to the heirs of the body, but to collateral relatives, according to the canons of descent. Its most valuable quality, however, consists in the unfettered right of alienation which its owner enjoys. A sale of such an estate under a judgment is a complete alienation.

2. An *estate tail* may be considered as the next largest estate. It is an estate given a man and the heirs of his body generally, in a regular order of descent; and it will descend to his lawful posterity, without restriction; or to certain heirs of his body, as heirs male, heirs female, or heirs by a particular wife. Judgments registered against these estates are binding on the lands of the tenant in tail as "against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or any other interest in or out of said lands."

3. An *estate for life or years,* may be an estate to hold during life, and no longer, or a husband's tenancy by the curtesy of England, in his deceased wife's estate; or an estate for a limited number of years, or for the life of another. As the tenant for life or years of such estates has only a disposing power over whatever estate he pos-

sesses in the lands, a judgment can bind no more than this disposing power can control; and a sale of such an estate, under such a judgment, would only confer upon the purchaser the remainder of whatever estate the debtor had in the lands at the time of the sale.

The preceding may be termed estates in possession, such estates being those of which the tenant is in actual receipt of the profits.

4. An *estate in reversion* may be defined to be that interest in an estate which remains in a tenant in fee simple or fee tail, who has parted with his estate for a term of years, or for the life of another, and in virtue of which he will have the full estate on the expiration of the term of years, or death of the tenant for life. The estate which he has granted is called, during its continuance, the *particular* estate, being only a part or *particula* of the estate in fee or tail; and that which is undisposed of and remains in the grantor, is the *estate in reversion*.

5. An *estate in remainder* is an estate arising out of an estate in reversion. If the tenant in fee should, after granting a *particular estate*, as above explained, also dispose of his *reversion* to another party, that which he disposes of is called a remainder. Thus: if a grant be made by A, the tenant in fee simple, to B for life, and, after his decease, then to C and his heirs, the whole fee simple is disposed of, and C's interest is an estate in remainder, expectant on the death of B. A remainder, therefore, always has its origin in *express grant*, and springs from the acts of the parties; a reversion merely *arises* incidentally, in consequence of the grant of a particular estate, and is created simply by the operation of law.

A further term is used by the statute—*estates in expectancy*, or estates where the right to receive the profits is postponed to some future time—of which there are two sorts, estates in remainder and estates in reversion, (2 Cruise's Dig. 202.) and which we have above described.

We shall now refer to the estates described in secs. 5 & 11 of cap. 90 of the Consolidated Statutes of Upper Canada.

6. A *contingent remainder* is that remnant of an estate which is limited to take effect on an event or condition which may never happen or be performed till after the determination of the preceding particular estate; in which case, such remainder can never take effect. Sir William Blackstone has clearly defined "contingent or executory remainders" (whereby no present interest passes) to be, "where the estate in remainder is limited to take effect either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*." (2 Bl. Com. 169.)

7. An *executory interest* is a future estate, which arises when its time comes, of its own inherent strength, and depends upon no prior estate, from which to take effect. By the old law, a feoffment or any other conveyance of a freehold made to-day to A, to hold from to-morrow, would be absolutely void, as involving a contradiction; for when the seisin is parted with, it must vest in some person immediately. There is no half-way place for estates to rest in, like that supposed to be occupied by Mahomet's coffin. But by means of *springing and shifting uses*, created under the Statute of Uses, the seisin of an estate shifts from one to another, until it vests in the party for whom it is intended. Thus: an estate may be conveyed to A and his heirs, to the use of the grantor and his heirs, until to-morrow, and then to the use of B and his heirs, and the courts would enforce the use in favor of B. A very common instance of such a shifting use occurs in an ordinary marriage settlement. A, the settlor, conveys, by the settlement executed a day or two before the marriage, to the trustees, to the use of A the settlor and his heirs, until the intended marriage shall be solemnized, and from and immediately after the solemnization thereof, to the use of B the husband, for his wife. Here the moment the marriage takes place, the seisin shifts away from A to B, without any further conveyance.

8. The other estates mentioned in the statute are, a "future interest," and a "possibility coupled with an interest." Of the former, a *vested remainder* may be given as an example, which is an estate in which the person entitled has an immediate, fixed right of future possession and enjoyment of the profits. A *possibility coupled with an interest*, is an estate which must depend upon a contingent event, which will be recognised by law; for Lord Coke says, "The law will never adjudge a grant good, by reason of a possibility or expectation of a thing which is against law." (3 Rep. 51 b.) As an example of such possibilities the following is given: If a lease be made to A. for life, remainder to the right heirs of J. S., this is good; but if at the time of the limitation of the remainder there be no such person as J. S., but during the lifetime of the tenant for life, J. S. be born and die, his heir shall at no time take, because the possibility on which the remainder is to take effect is too remote. This latter is called a possibility upon a possibility, which, as Lord Coke says, is never admitted by intendment of law. (2 Cruise's Dig. 231.)

These observations may be considered too elementary; but it must be recollected that these provisions of the statutes are seldom acted upon, and that as it is probable more attention will be given to the subject hereafter, it is a pardonable fault to be clear and explicit in treating of the provisions of a law which deals so minutely with interests in real estate.

It is not necessary to refer to authorities affecting the first class of estates declared by the statute to be bound by

judgments, as in regard to them the law is quite clear.

But in regard to entailed estates, it is clear that under the statute first referred to (cap. 89), the issue in tail and remainder-men will, where there is no protector, be bound by judgments entered up against the tenant in tail, inasmuch as he has, in the words of the section, a *disposing power*, which he may, without the assent of any other person, exercise for his own benefit, and also as such judgments are binding against the issue of his body, and all other persons whom he may, without the assent of any other person, cut off and debar from any remainder, &c. And where there is a protector, as the tenant in tail can create a base fee without his consent, the judgment can bind the land to that extent.

In *Moffat* v. *Grover* (4 U. C. C. P. 402), it was held that the interest of a husband in the freehold estate of his wife may be sold under a *fi. fa.* lands, as such might be extended on an *elegit*, and may therefore be sold under such *fi. fa.* by 5 Geo. II. cap. 7.

In *Doe dem. Cameron* v. *Robinson* (7 U.C. Q.B. 335), the interest of a reversioner was held liable to sale under a *fi. fa.* lands during the lifetime of the tenant for life.

Some of the advantages of these provisions are, that in cases of joint tenancy, the creditor need not be deprived of the benefit of his judgment by reason of the death of the debtor in the lifetime of the co-tenant (notwithstanding the *jus accrescendi*); but will be entitled to the same remedies against the share which has survived, as he would have had in the lifetime of the debtor.

So if a joint judgment be entered up against the joint donees of a general power of appointment, it would seem that, the joint power being considered a disposing power, would be bound.

In *McLean* v. *Fisher* (14 U. C. Q. B., 617), the testator, after giving certain lands to three of his children, devised all the residue to his wife for life; and after her death to be equally divided among all his then surviving children (except the three). A patent was afterwards issued to the executors to hold under the will. While the wife was alive, and therefore before the division to the surviving children, a *fi fa* lands issued against one of these children, and under it the sheriff seized and sold his interest in the property. The Court held, that the sheriff's deed was inoperative, as the defendant in the writ had no estate, or interest in the land which could be sold under execution. It was decided in this case, that while the Trustees held the legal estate, the residuary devisee (judgment debtor) had not such an equitable estate in the land which could be subject to execution as a trust interest liable to execution under the Statute of Frauds (29 Car. II. cap. 3, sec. 10). The judgment debtor could take no interest unless he survived his mother. Yet this case seems rather adverse to the effect of the term used in the statute of "a possibility coupled with an interest."

In *Keyland* v. *Belfast Corporation* (6 Ir. Ch. 161), the Lord Chancellor, in remarking upon the attempt of a judgment creditor to enforce his lien against the trust estate of his debtor, said: "It is one thing to establish the liability of a trustee; another, and a very different one, to determine that such liability is to be enforced against the trust property. In a court of law such property may be seized under a judgment against the person whom the law recognizes as the legal owner, but not in equity."

In *Arnold* v. *Gravesend* (2 Jur. N. S. 703), it was held that the word "person" includes a body corporate, and the words "for his own benefit" mean not as trustee; and in that case, property acquired by the new corporation, after succeeding to the old corporation, was held liable to be taken in execution for debts contracted by the old;—and thus in effect overruling *Arnold* v. *Ridge* (17 Jur. 896).

The other cases referring to trust estates are *Whitworth* v. *Gaugain* (1 Phil. 730), *Gore* v. *Bowser* (1 Jur. N. S. 392), *Pallister* v. *Gravesend* (25 L. J. Ch. 776), and *Kinnerley* v. *Jarvis* (25 L. J. Ch. 543).

It is clear that the object and scope of the statutes is to afford relief to the creditor to the extent of the debtor's interest, whether actual, beneficial, or attainable by the execution of a power, or otherwise; and therefore the enactments must extend to all cases where the debtor has a general uncontrolled power of appointment, not limited to particular objects or to specific purposes.

Hereafter we may continue the subject of this article by referring to the lien of Crown debts as they affect real estate, under the old statutes of England and our own Act respecting the registration of deeds and instruments creating debts to the Crown (Con. Stat. U. C. cap. 5).

PRIVILEGES OF ADVOCATES.

A case of some importance to the profession has recently been determined in England (we refer to *Mackay* v. *Ford*), which will be found transferred to our columns from the pages of the *Law Times*. It desides that an action will not lie against an attorney for words spoken by him as an advocate, in a matter before magistrates, when the language used by him is strictly relevant to the question before them. We confess we have always understood the law to be so, and would have been much astonished to find it differently determined.

LAW AND EQUITY BILL.

MEMORIAL OF THE COMMON LAW COMMISSIONERS RESPECTING THIS BILL.

In reply to the following letter of the Lord Chancellor, enclosing the "observations" of the equity judges on the Law and Equity Bill, a communication from the Common Law Commissioners has been presented to Parliament by her Majesty.

House of Lords, 24th April, 1860.

My lord,—I have the honour to submit to you a copy of a memorial from the Master of the Rolls and the three Vice-Chancellors upon a Bill framed with a view to carry into effect the last report of the Common Law Commission presided over by your lordship. I respectfully beg that this memorial may be considered by your lordship and the other commissioners, and that you would have the goodness to inform me how far you concur in its reasoning.

I ought to add, that as this memorial was laid before the House of Lords, I propose (with your permission) to lay before the House of Lords any observations you may be pleased to offer in answer to it.—I have, &c., CAMPBELL, C.

The Right Hon. the Lord Chief Justice Cockburn,
&c. &c. &c.

The Common Law Commissioners' communication is as follows:—

18th May, 1860.

My lord,—Our attention having been called by your lordship to the objections urged in the memorial of the equity judges against the Bill introduced into the Legislature on the recommendations contained in our last report, with a view to our offering such answer as our acquaintance with the subject might suggest, we beg to submit the following observations in reply.

We must begin by premising that the scope and effect of the alterations proposed in the jurisdiction of the common law courts has been greatly misconceived, while the objectors appear to have lost sight of the extent to which equitable jurisdiction has already been conferred on these courts, as well as of the great improvements which have been introduced in modern times into their procedure.

In the sweeping criticisms with which our recommendations have been assailed the proposal to confer further equitable jurisdiction on the courts of common law has been treated as a scheme of innovation and demolition, now first propounded, and the incompetency of the common law judges and the inadequacy of their procedure to deal with equitable rights has been taken for granted and unhesitatingly asserted, as though equitable jurisdiction had never before been conferred upon or exercised by the legal tribunals of the country.

We shall have no difficulty in showing that, with a single, and that a very unimportant, exception, in no instance is it proposed to enlarge the equitable jurisdiction of the common law courts, except where this jurisdiction already to some extent exists, and where the competency of these courts and of their procedure to administer it has already been established by practical experience.

It may not be inexpedient to pause for a moment to take a brief survey of what has already been done in this respect.

The rigid simplicity of the ancient common law and its strict and inflexible procedure having proved inadequate to meet the exigencies of a state of society becoming every day more complicated and refined, and the Legislature omitting to intervene to bring the law into harmony with the more liberal principles of rational and enlightened justice, courts of equity stepped in to supply the place of legislation, by the application of a rude yet not wholly inefficacious remedy—partly in eking out the defectiveness of the common law procedure, partly in mitigating the rigour of the law where an adherence to its letter would have worked injustice—not, indeed, by attempting directly to control the action of the legal tribunals, an attempt which would at once have been resisted, but by coercing the suitors by means of personal duress to forego their legal rights, and to submit to have justice done between them on equitable principles.

Experience, however, soon made men sensible that the benefits of this equitable jurisdiction were greatly diminished by the drawbacks of double tribunals and a twofold litigation, attended by a vast increase of expense. Hence, from time to time, during the last century and a half, according as particular inconveniences successively forced themselves on the attention of the Legislature, portions of the jurisdiction at first exercised only by the courts of equity have been transferred by statute to the courts of common law.

The power to relieve against the penalty of bonds conditioned on a defeasance, to relieve up to the time of trial against actions of ejectment on forfeiture for non-payment of rent, to relieve mortgagors in actions on mortgage bonds or actions of ejectment, on payment of the principal and interest, and the important process of interpleader, are examples of this transfer of jurisdiction.

To these instances of encroachment on the domain of courts of equity must be added the transfer, in our own time, of the whole of that extensive and important jurisdiction which was known under the name of "auxiliary equity." The powers included under this head being wanting in the original procedure of the common law, courts of equity, as has already been observed, took upon themselves to make good the deficiency. Better this, no doubt, than that such powers should nowhere be found for the protection of right; yet so great the evil that a Court in which a suit was pending should not have the means of doing justice between the litigants; so great the hardship of being compelled to resort to a second Court to supply the defects in the procedure of the first; so serious the harassment, and, above all, the expense of the double proceeding that the remedy was often more grievous than the absence of redress; and parties, especially of the poorer sort, more particularly where the matter in dispute was not of large amount, preferred to submit to injustice rather than have recourse to a remedy oftentimes far worse than the mischief to be cured. When, therefore, the Common Law Commissioners recommended the transfer of these powers to the courts of law, Parliament at once saw the propriety of the suggestion, and gave effect to it by legislative enactment. Yet the same argument might have been urged then which is resorted to now. The powers which it was proposed to confer on the common law courts were powers which the courts of equity for many generations had exclusively exercised, according to principles and rules with which, so far as their practical application was concerned, the common law judges could not be expected to be familiar. Yet these powers have now been extensively exercised by the common law courts to the infinite advantage of the suitors. The judges have had no difficulty in familiarising themselves with the principles and rules established by the practice of equity in this department; and the machinery of the common law has proved itself abundantly adequate to the exigency of the occasion.

It may safely be asserted that, owing to the increased facility and diminished cost of the present mode of proceeding, for every instance in which the resort was had to a court of equity under the old system, hundreds of instances now occur in which the corresponding powers of the common law courts are called into action, and are found fully effective for the purpose.

The innovation introduced by the Legislature into the established jurisdiction of the different branches of our judicature did not however, end here; and assuredly a further and a great change was imperatively called for.

The existence of two conflicting systems of law, recognising inconsistent and incompatible rights, the one called common law, the other equity, administered by two distinct sets of tribunals, each refusing to give effect to rights which would be

enforced by the other, is not only an anomaly in jurisprudence but has been found to be attended with practical inconvenience and mischief of the most serious character. That a plaintiff, who has brought his action in a court of law, the only court to which he could resort, should be liable to have his action suspended, or the fruits of the judgment he may have obtained withheld, while he is compelled to follow his opponent to a different tribunal on an allegation of equity; or, still worse, that a defendant, sued in a court of law, and having a valid defence on equitable grounds, though none at law, should be under the necessity, instead of at once setting up such equitable defence as an answer to the action, to resort to another court, and there initiate a new and costly proceeding, at an expense in many instances immeasurably disproportioned to the value of the matter of the dispute, was a judicial grievance and abuse which neither time nor authority could sanction, and which, as soon as the work of legal reform was undertaken in a large and earnest spirit, neither prejudice nor interest could defend so far as to resist some modification of the evil.

When, therefore, in our second report, we had gone the length of recommending that jurisdiction should be given to the courts of law to entertain considerations of equity when arising incidentally in an action at law, the legislature although it did not see fit to give full effect to our suggestions in respect of equitable jurisdiction, yet took the very important step of enacting that equitable defences might henceforth be pleaded in an action.

Here, again, it may be observed that almost all the arguments which are now urged against the extension of jurisdiction at present proposed, would have been equally applicable to the change then introduced. The best answer to them is, we think, to be found in the practical experience of the working of this equitable jurisdiction, which has been exercised by the common law courts for now six years. It is from our experience of the usefulness of this jurisdiction, so far as it extends, from our persuasion that its only defectness arises from its not being sufficiently extensive, as well as from our conviction that, if the jurisdiction were enlarged, the courts of common law possess ample machinery for working it out, that we have been led to urge the expediency of extending the sphere of equitable defences in actions at law.

It will be convenient to divide the subject of the equitable jurisdiction proposed to be conferred by the Bill into two branches: 1. where the jurisdiction proposed to be enlarged or conferred arises on an action pending; 2. where it is to be exercised independently of an action.

EQUITABLE DEFENCES.

In the first branch equitable defences occupy the most prominent place. Equitable defences being now admissible in an action, a class of cases has arisen in which, although the defendants were desirous of pleading equitable pleas, a practical difficulty presented itself from the equity being conditional on something to be done *in futuro*, or on a contingency. Such a plea a court of law could, in the exercise of its discretion, allow to be pleaded; inasmuch as the plea once found for the defendant would be a bar in all time to come to the plaintiff's right, while the Court would have no power to compel the performance of the condition on which the equity arose. Now, it is plain that, if this difficulty can be removed, the same reason exists for permitting an equitable plea of this nature to be made available in an action as exists where the equity is unconditional and complete.

If the condition had been performed, we have the sanction of the Legislature for saying that the equitable plea should be allowed. If the performance of the condition can be ensured there can be no conceivable reason why the defendant, who is willing to perform the condition in order to obtain the benefit of the equity which would so result to him, should be driven to a court of equity to establish his defence. Of course, this is said on the assumption that a court of common law would be able, from the competency of its judges and its officers, to ensure the due and effectual performance of the condition. To doubt of this would be, as it seems to us, to doubt of their competency to administer the law at all; and we cannot bring ourselves to suppose that any serious resistance can be offered to the proposed amendment on this ground. It seems to us to follow from what has been said, that conditional equity be made available as a defence in an action at law, just as unconditional equity already is. Whether this should be done by an application for relief to the court in which the action is pending (as proposed by the Bill) or by allowing such an equitable defence to be pleaded, and giving the Court power, if the plea should be found for the defendant, to enforce the performance of the condition, on the application of the plaintiff, may be open to consideration.

INTERPLEADER.

The next instance in which it is proposed to give jurisdiction in respect of equitable matter is the case of interpleader. It is of everyday occurrence that, money or goods being in the hands of persons not claiming beneficial interest therein, or goods being seized by sheriff's in executing the process of the courts, adverse claims are set up whereby persons thus circumstanced are placed in an embarassing position and are exposed to be harassed by actions, and subjected to eventual loss. It is plain that persons so circumstanced ought, in justice, to be relieved, on actions being brought against them, by the parties claiming the beneficial interest being put to fight out their claims. Formerly this relief could only be obtained by interpleader bill in equity, a proceeding, which, as the statute of 1 & 2 Will. IV. c. 58, recites, was "attended with expense and delay."

By this statute interpleader jurisdiction was given to the courts of law. But this jurisdiction does not attach where the *jus tertii* set up is founded on equitable right. This jurisdiction it is now proposed to give. It cannot be contested that an innocent party, thus placed between two fires, ought equally to be relieved in the case of equitable as of legal claims. The expense and delay to the party against whom the adverse claim is set up by the institution of fresh proceedings in equity is, of course, equally great. The action is already in the Court of Common Law, and the reasons against the double litigation apply as strongly as this as in other instances. The object ought obviously to be to place the case on such a footing that the action shall become one betwen the parties really interested. Now, if the action were between the real parties, as, for instance, between an execution creditor (on a seizure of goods by the sheriff) and a party setting up an adverse claim, instead of between the claimant and the sheriff, an equitable right of the claimant would be available to him against the plaintiff under an equitable plea without recourse to a court of equity. But if, in an ordinary action of trover between A. and B., any equitable rights of the defendant as an answer to the action would be cognisable by the Court, it seems difficult to understand why, when it is sought to bring A. and B. into their proper position as litigants, at the instance of a party entitled to interpleader relief, the equitable nature of B.'s interest, which would be cognisable by the Court if A. and B. were once before it as plaintiff and defendant, should be a reason from withholding from the Court the power of granting such relief, and for putting the parties concerned to the vexation and expense of a fresh suit before another tribunal. In addition to which, another and a very cogent reason for extending the process of interpleader to such cases is to be found in the fact that the setting up of adverse claims by third parties generally arises on the seizure of goods by sheriffs in execution on process from the common law courts. To these officers courts of equity, as was pointed out in our late report, have refused relief by interpleader, while on the other hand they are liable to hostile proceedings if they omit to to take possession of property according to the exigency of the writ of execution.

FORFEITURE.

Next, as to the proposal to extend the jurisdiction first conferred on the common law courts by the Act 4 Geo. 2, c. 28, in an action of ejectment brought on a forfeiture for non-payment of rent. By that statute the equitable power, previously exercised by courts of equity alone, of relieving the tenant on payment of the rent due, was given to the court in which the action is brought up to the time of trial. Relief may be obtained in equity for a further period of six months after execution; but to obtain the latter relief fresh proceedings in equity must be taken. The simpler course would surely be to allow the Court in which the action has been brought to afford relief to the same extent as a court of equity can afford it. The record is in the former court; the facts are before it; the application may be by motion on affidavit: the expense of a second suit in a different court, with a fresh statement of facts and perhaps fresh proofs will be avoided. Nor can any possible ground be suggested, as far as we are aware, why the Court which is thought competent by the Legislature to give relief up to the time of trial should not be equally so after trial.

In like manner we cannot but think that the power conferred on a court of equity by the 22 & 23 Vic. c. 35, s. 4, to relieve against a forfeiture on a covenant to insure, where no loss has occurred, and the breach has been committed by accident or mistake, or otherwise without gross fraud or negligence—and a policy is, in fact, in existence, such as the covenant requires—might advantageously be extended to courts of common law, at all events when an action has been brought on the forfeiture. It must, we apprehend, be at once conceded that the questions involved are peculiarly within the province of the common law court; and there seems to be no conceivable reason why a second suit should be necessary to afford the defendant protection.

OMISSION TO PLEAD EQUITY.

We pass on to the important question, whether a party to an action who has once had the opportunity of pleading equitable matter, and who has not availed himself of it, shall be concluded by the omission—as he would have done by the omission to plead matter available at law if his case had rested on legal grounds—so as to preclude him from afterwards resorting to a court of equity to defeat the action.

The affirmative of this proposition appears to us to follow of necessity the moment equitable matter is permitted to be introduced at all into the action of law. The argument that a plaintiff who has necessarily commenced his suit in a court of law ought not, at the option of the other party, to be dragged before some other tribunal applies equally at whatsoever stage of the suit this anomaly arises, Indeed, the later the stage of the proceedings the greater and more grievous the hardship; inasmuch as, if the equitable right should eventually prevail over the legal, all the expense of the action which may perhaps have involved a trial at Nisi Prius, and may have proceeded even to judgment and execution, will have been entirely thrown away. Added to which, it seems repugnant to justice that a party shall be thus permitted to fight out his cause with his adversary on one stage, and having there taken his chance of success, shall be at liberty, when defeated, to renew the conflict on a different ground, which, if rightly taken at first, would have prevented the prolongation of the original contest; while if the equitable ground be wrongly taken at such later stage. the effect is necessarily to delay the party who has succeeded in the contest at law from reaping the benefit of the decision in his favour.

It is unnecessary to dwell on the various grounds on which the salutary rule is based, that in judicial proceedings litigant parties must put forward their respective cases, whether of attack or defence at the proper stages of the suit, or be concluded by their omissions; as well as that judgment once pronounced in the last instance shall be final and conclusive. They may be summed up in a word; without this rule litigation would be interminable, nor could rights ever be definitely ascertained or securely established. It is obvious that this principle applies equally to the case of equitable as of legal defences; and it seems to us to follow that, if matter or equity is allowed to be pleaded in actions at law, and a court of common law is to have jurisdiction in respect of such matter at all, it should be obligatory on the party relying on equitable grounds to put them forward at the fitting time, just as it would be to bring forward matter of law; and that a party omitting to take his stand on equitable grounds which it was competent to him to bring forward in the action ought not to be allowed afterwards to harass his opponent by a renewal of the litigation by proceedings in a court of equity.

NEW TRIAL.

It it obvious that much of the foregoing reasoning applies to the bill in equity for a new trial, by which, after trial and judgment in a court of law, on the discovery of new matter, though amounting only to a defence of law, relief may be applied for in a court of equity after the expiration of the time within which a new trial could be applied for in the court in which the action has been brought. It seems to us plain that this is an inconsistency which ought to be removed. If the time limited in the court in which the action has been brought and the trial had, is too short, that time should be extended. But it seems a startling anomally that when the Court in which the action has been properly brought has pronounced its final judgment, a second court, not having any appellate jurisdiction over the first, may take the cause in hand, try the whole matter over again, deprive the victorious suitor of the judgment he has obtained, and decide in favour of the opposite party.

The only rejection to our recommendation is this respect, so far as we are aware, has been the denial of the existence of such a process. This, however, is a mistake. The proceeding has, as was stated in our third report, fallen into disuse, but there is nothing to prevent its being revived. The weapon may have been laid aside and may have grown rusty, but there is nothing to prevent its being again brought forth and made an instrument of mischief. The forensic combatant will not have to search far or deep to find it. In two text books of the profession, namely, "Mitford on equity pleading" (p. 131) and "Story on Equity" (secs. 887, 888), the bill of new trial is treated of as an existing part of equity procedure, and its terms and conditions prescribed with considerable detail. The jurisdiction is treated as an existing one, nor is it suggested that, if again invoked, it must not be exercised. On reference to these authorities it will be seen that where a bill of review in respect of a suit in equity may be brought, the bill of new trial upon judgment in an action at law may be resorted to. Acting upon such authorities we deem it our duty to direct attention to this conflict of jurisdiction, and to suggest the expediency of cutting off the possibility of its practical recurrence.

(To be continued.)

THE FUSION OF LAW AND EQUITY.

(From the Solicitor's Journal.)

We print elsewhere an able and ingenious defence of the Law and Equity Bill, which was read by Mr. Walker Marshall, at the last meeting of the Juridical Society. Although our opinion of the Chancellor's abortive measure is not in the least shaken by the clever argument contained in this paper, we are glad upon this, as upon all other subjects, to make the *Solicitors Journal* the medium for the freest possible discussion of every topic of professional interest. Mr. Marshall has adopted the well known device of advocacy which consists in accumulating arguments in support of a part of his case, which no one disputes, and quietly passing over the real difficulty, without anything more than a bare assertion in its suprort.

Nine-tenths of the paper is devoted to proving that the whole law of England, which, as he rightly says, comprises what is technically called equity, as well as what is technically called law, might have been just as well administered by one court as by two. Apart from the difficulties which arise from the circumstance that equity has in point of fact grown up in a different region from law, has been infused with a different spirit, and administered by means of a totally different procedure, no one in his senses can contend that the fusion of law and equity is not a desirable thing. We are prepared to go a step further and say, that it is not only desirable, but if attempted in the right way, without precipitation, quite practicable to effect this great reform, even at this day. Our charge against Lord Campbell's Bill was, not that it tended to fuse the two branches of English law into one, but that on the contrary, it was certain to destroy the larger and more comprehensive system, in the attempt to transfer it suddenly from courts where it has grown up towards perfection, and has developed a suitable practice, to other courts, by which it has always been regarded with more or less of narrow jealousy, and whose technical forms are utterly incapable of giving free play to equitable principles. If the Bill had not been virtually rejected already, it might have succeeded in destroying the jurisdiction of the courts where equity is really administered; but it could not have infused the spirit of equity in a moment into the rigid system of the common law, or have made room for equity jurisprudence in a procedure which would soon have cramped it to death.

Starting from the ground which is common to Mr. Marshall and ourselves, that the fusion of law and equity is one of the grandest objects which a law reformer could propose to himself, let us consider in what way the desired result can be most safely brought about. The real state of things is this. The law of England is made up of those principles which the common law courts enforce without coming into collision with the Court of Chancery, and of the doctrines which equity has added thereto. There is a class of subjects on which the legal tribunals would decide one way and the equitable courts another; but those instances fall under the second head, because in such cases of so called collision the law of England really is that which the courts of equity declare. For instance a court of law would say that a trustee of land is entitled to eject his *cestui que trust*, and that after the day of default is passed, a mortgagor has no interest in the mortgaged property. But the strictest of common lawyers would scarcely assert—certainly Mr. Marshall would not, if we understood him rightly—that it is any part of the law of England that a trustee may defraud his *cestui que trust*, or a mortgagee resist the right of his mortgagor to redeem. There is this further to be observed, that technical equity, by virtue of its maxim, *æquitas sequitur legem*, acknowledges the whole law of England, though it does not actively enforce so much of it as is adequately administered in other courts. Technical law, on the other hand, refuses to recognise more than a part of the jurisprudence of the country. If it were determined to fuse the two systems into one, there are but three ways in which it could be done. You might annihilate the Court of Chancery and direct the courts of law for the future to administer equity; or you might abolish the courts of law and require the Court of Chancery to enforce legal as well as equitable rights; lastly, you might give to each court a concurrent jurisdiction over law and equity, and before taking any further step, allow them time to accommodate their practice to their new duties until it was seen on which foundation a single court of universal jurisdiction could best be built up.

Of these three methods of bringing about the desired reform, the first two appear to us to be excluded by very obvious considerations. It is impossible, or at any rate—and that is enough for our argument—it is not proved to be possible, to transfer the traditions and spirit of either deparpment of law into the courts which have been hitherto almost exclusively occupied with the other. In so serious a matter as this it would be the height of rashness to impair the machinery either of legal or equitable courts, until experience had shown that the tribunal to which the jurisdiction was proposed to be transferred was thoroughly imbued with the principles which it would have to apply. There is another condition almost more essential, and that is, that the forms and procedure of the favoured court should be put into a shape which would not impede the efficient performance of its new duties. A *priori*, one would imagine that courts of equity, which in their daily business take account of legal rights as the foundation on which equity is built, would be more capable of administering the whole law of England, than the tribunals which, until lately, utterly ignored the principles of equity, and even now exercise, under recent statutes, a limited and not very successful jurisdiction of this kind. This, so far as it goes, would tend to show that it would be less hazardous to transfer legal jurisdiction to the Court of Chancery, than to hand over the functions of equity judges to the Courts of Westminister. But we are not advocates of either of these plans, which seem to us to be full of danger. The diverse nature of legal and equitable procedure appears quite conclusive upon this head. Equity once had, and still retains in theory, a system of pleading as artificial as that which culminated under the influence of Lord Wensleydale. But, side by side with this scheme of eliciting issues by alternate allegations, the Court of Chancery introduced the method of pleading at large, combined with the obligation of answering on oath; and so superior has this process been found for the investigation of equitable matters, that where some simple defence, like the Statute of Limitations, forms the essence of the contest, a plea is scarcely ever resorted to; and the looser but more convenient system of bill and answer is almost universally adopted. If the immediate question were the converse of Lord Campbell's project—viz., the the transfer of law to courts of equity—it might be a fair subject of discussion whether pleading at large, as practised in Chancery, would not work better even in the settlement of legal disputes than the ingenious but over subtle device of special pleading. The difficulty commonly suggested is, that without strict logical pleading it would be impossible to pick out the issues for a jury to try. But in point of fact, we know that the result of the pleadings is almost always to present a large number of false issues—the mere creation of the pleader—besides the one or two material issues on which the contest really turns. These same issues, moreover, are as often as not a compound of fact and law and cannot but be so by reason of the rule that facts are to be pleaded according to their legal effect. The practical result, therefore, that the jury learn the question which they are to try, not from the opening of the pleadings by the junior counsel, which they never understand, but from the statement at large of the leading counsel, and the summing up of the judge, who really performs the function which in theory belongs to the pleadings, of separating matters of fact from matters of law, and defining the precise points which the jury have to decide. It is by no means clear that a judge could do this quite as well with a bill and answer before him, as he can do it now with the aid or the embarrassment, as the case may be, of a set of complicated pleas, replications, rebutters, and the rest. But we are not concerned to prove that pleading at large might in all cases be substituted with advantage for the common law system. It is enough to say that strict pleading cannot, by possibility, adapt itself to equitable suits. The difficulties as to parties alone, would be quite insurmountable. Even at an earlier stage the procedure would break down. The theory of the common law was to label and ticket all the possible wrongs which a man could suffer, and furnish an appropriate writ for each. Narrow decisions, in early times, made this scheme worse in practice than even in theory; but even if all judges had been as liberal as Lord Mansfield, they would have failed to build up an exhaustive jurisprudence on such a foundation.

There are rights and wrongs which cannot be catalogued in this way beforehand; and no court which does not allow a plaintiff to state his own case in his own way, untrammelled by technical rules, can never effectually exercise an equitable jurisdiction. These considerations seem quite to exclude from the catagory of rational reforms attempts to transfer equity to courts of law without a radical change in their practice and procedure. At the same time the difficulty of engrafting trial by jury upon the forms of chancery pleading, which has not yet, at any rate, been surmounted, is an equally cogent reason for not taking away the jurisdiction of the common law courts, and handing it over to the Court of Chancery.

The only remaining method of bringing about the fusion which Mr. Marshall advocates, is to enlarge the concurrent jurisdiction of both courts. The great advantage of this plan would be, that common law courts would get no equitable suits until they had moulded their practice and their principles into a shape which would enable them to deal with such matters as successfully as the Court of Chancery now does. So, on the other hand, no purely legal questions would penetrate into Chancery until equity judges and equity procedure had proved themselves capable of administering relief as well as courts of law. If courts of law were empowered in all cases to grant injunctions, and courts of equity to enforce payment of tradesmen's bills, a man who wished to restrain equitable waste would probably prefer an equitable court, and a butcher who was anxious to get a settlement of his account, would be likely to select a legal tribunal. All would go on as before until it became manifestly for the benefit of suitors to carry any particular class of litigation to a different forum. It is possible that both legal and equitable courts, on being endowed with a universal concurrent jurisdiction, would modify their procedure so as to make it as widely applicable as might be. If they did so, the ultimate result would be the growth of a form of procedure fitted to deal with questions of every kind, and therefore suited to a single court of universal jurisdiction. But such a practice cannot be called into existence by guess work; still less can it be assumed that the existing methods of the common law supply all that is to be desired in this respect. Of course, it may be said, that if you were merely to give a concurrent jurisdiction on all matters to both courts, each might, perhaps, go on in its old ways, and the desired fusion would never be attained. But even in this event no harm would be done, which is more than could be said of a project to force an imperfect and distorted growth of equity in courts of law by the summary process of destroying the existing jurisdiction, and driving suitors, whether willing or unwilling, into a court where they would not otherwise have sought redress. The man who has an equitable title to relief ought not to be deprived of his resort to a court of equity, any more than a contest of a purely legal character ought to be forcibly transferred to the Court of Chancery. But it is such a transfer as this that Lord Campbell proposes to effect. He would give to a court of law the right to issue an injunction to prevent a court of equity from entertaining an equitable question.

There is no sort of analogy between such injunctions and those which are now granted to restrain legal proceedings. In effect, a court of equity in staying an action requires the defendant at law to admit the legal right. So far from hinderdering the legal remedy of the plaintiff at law, or taking upon itself to adjudicate upon it, the basis of its interference is the concession of all the legal rights which are claimed at law. But a court of law in staying an equitable suit under Lord Campbell's Bill, instead of making it a *sine quâ non* that the defendant in equity should concede the equitable question, would say, "True it is that you, the plaintiff in equity, may have right on your side; but we insist on your giving up the proceedings by which you have sought to enforce the right, in order that the questisn of equity may be decided in a legal court." If the court of law should ultimately prove the better tribunal for affording equitable relief, no harm would be done. But the only way to test this is to open the doors of both courts as wide as possible, and allow persons who seek equitable relief to go where redress can be most conveniently and effectually obtained. Mr. Marshall tacitly assumes that the administration of equity in courts of law would be as good as or better than it is at present; and his argument goes the full length of advocating the abolition of all the judicial functions of the Court of Chancery. An opponent who chose to assume that legal rights could be as effectually enforced in Chancery as at law, might argue in the same spirit that it was desirable to have but one tribunal, and that the cognisance of all legal questions ought therefore to be transferred to courts of equity, with power to restrain the courts of law from entertaining them. We are satisfied that neither of these assumptions would be justified by the event, and that a gradual modification of legal or equitable procedure under the influence of enlarged concurrent powers, can only supply the material out of which a single court of universal jurisdiction can be constructed, without emdangering the vital principles either of law or equity, and possibly of both.

ENGLISH CASES.

COURT OF EXCHEQUER.

MACKAY v. FORD.

Slander—Attorney's speech before magistrates, when pertinent to the questions before them, privileged.

An action for defamation will not lie against an attorney for words spoken by him as an advocate in a matter before magistrates when the language used is strictly relevant to the question before them.

Action for slanderous words. The declaration alleged special damage. Plea, the general issue. The plaintiff had been employed by a Mr. Jones to sell at the Albion vaults, wines, &c., upon commission for Jones, according to certain terms specified in a written agreement; Jones to allow Mackay the use of the vaults and fixtures, &c., and to supply him with good maketable goods, Mackay to be allowed as commission all he could make after paying for the goods supplied, and 4*l.* weekly for the privilege of selling there, &c., the same to so continue until one should give to the other twelve calendar months' notice in writing of his wish to determine the agreement. Jones subsequently made an assignment of his property for the benefit of his creditors, and the assignees sold the premises to one Eaton, who sent two men to take possession. The plaintiff resisted and they then proceeded to eject him by force. He then summoned them before the magistrates at Chester for an assault. The defendant, an attorney, appeared there for the defendants, and in the course of his observations to the justices upon the matter, said: "I am going to take an objection in this case. This is a case in which I apprehend the bench has no jurisdiction. Mr. Mackay claims certain rights and privileges under this agreement produced, but I think we have sufficient reason to terminate the connection therein referred to between Jones and Mackay. Mr. Jones has been plundered by this man to a frightful extent." The magistrates ultimately dismissed the complaint. This action was brought for slander against the defendant in consequence of his using those words. The cause was tried at Chester before R. Gurney, Esq. A witness deposed that he was present before the justices, and heard the defendant use the expressions referred to, and in consequence refused to take the plaintiff into his service. Defendant objected that the words he used on that occasion were privileged, and the judge reserved leave for the defendant to move to enter a verdict for him or a nonsuit, but summed up the facts to the jury, who found a verdict for the plaintiff for 20*l.* A rule *nisi* having been obtained pursuant to leave reserved, or that the verdict was against the evidence, or for misdirection.

Welsby and *McIntyre* showed cause.—It will not be disputed that words, although defamatory and slanderous, spoken by an advocate in a court of justice, are privileged if they are strictly relevant to the matter before the tribunal; that appears to be the law now clearly understood: (see 1 Stark. on Libel, 283; *Hodgson* v. *Scarlett*, 1 B. & Ald. 232, and note; *Revis* v. *Smith*, 18 C. B. 126.

But the question here is, whether the words spoken by the defendant were then relevant to the matter about to be inquired into before the justices—whether Mackay had or had not plundered Jones to a frightful or any less alarming extent, was not then a subject of investigation or inquiry before the justices, but whether the then defendants summoned for the assault had put the plaintiff out of possesion under a *bonâ fide* claim of right—a fact which, if established, would have been sufficient to terminate the magistrate's jurisdiction. *Henderson* v. *Broomhead*, 4 H. & N. 569, is not applicable to this case.

Gifford and *Hutton*, contra, in support of the rule, not called upon.

Pollock, C.B.—This is an action against the defendant, who is an attorney, for words spoken by him in a court of justice, where he was attending as an advocate for one of the parties. It seems that the plaintiff in this case entered into an agreement with one Jones to act as his servant in the sale of wines, &c. The agreement provided that the contract might be put an end to by either party giving the other twelve months notice in writing of that intention. There is no doubt, in point of law, I think, that such an agreement could be put an end to by Jones at any moment, if it turned out that the plaintiff had not behaved honestly towards him in the conduct of the business with which he was intrusted. A person would not be bound to give twelve months' notice to his servant and submit to be robbed by him during a whole year, under circumstances like these. On the contrary he may have a right to turn the offending party out at once. Jones assigned effects for the benefit of his creditors. His assignees sold the business to a person named Eaton, and the plaintiff, on being required to go out, refused; Eaton's men then turned him out. The question before the magistrates was, had they a right to do so? and that very much depended on whether the charge of dishonesty, which his employer made against him, was proved. The defendants on that occasion treated the contract as at an end on account of the plaintiff's alleged dishonesty, and so instructed their advocate, and he was not responsible for that. The plaintiff declining to go out, the men employed by the assignees proceeded forcibly to turn him out; it does not appear that they used any excessive force for that purpose; the complaint before the magistrates was for the assault in being turned out of the premises. The parties charged with the assault employed the defendant to conduct the case before the justices, who on that occasion said he had an objection to take to their jurisdiction. Properly speaking, perhaps, it was not an objection to the justices hearing the case, but an objection to their coming to a conclusion against his clients. The magistrates were bound to hear the charge, and if it turned out that the act complained of was done in the exercise of a right, and the defendants did not exercise too much violence in its assertion, they ought not to have said, "We have no jurisdiction;" but that, "having ascertained what the question is, we see what was done by the defendants was done in the exercise of a supposed right; and no more having been done by them than the exercise of such a right called for, we dismiss the complaint." In the course of that proceeding, in order to show that the plaintiff was properly dismissed, the present defendant said that the plaintiff plundered his employer. The question is, was that relevant to the question before the magistrates? I think it was; for it went directly to the question, was the agreement at an end, so as to justify the defendants turning the plaintiff out? And the judge at the trial having reserved the point, I am of opinion that the rule should be made absolute to enter a nonsuit.

Bramwell, B.—I am of the same opinion, and think the judge at the trial did right to reserve the point. The defendant acting as an attorney for certain defendants in an assault case, was before the bench of magistrates and in substance said: "I am going to take an objection to your jurisdiction, because the assault complained of was committed under a claim of right." He also said that the way his clients obtained that right was because the plaintiff plundered his master to a frightful extent. The plaintiff's counsel in the present case contend that if the defendant had said the then defendants had a *bonâ fide* claim to turn him out, it would have been sufficient to oust the jurisdiction of the justices, and therefore the defendant need not have said anything about the plaintiff having plundered his master. I think that is not so. In one sense it might not have been necessary for him to have said so, but in another sense it was because the magistrates might have said, "We don't take your view of the law; we think you had no *bonâ fide* claim to turn him out, unless the defendant had dismissed him from his service." Would not the defendant then have had a right to say what he did? and if he had a right to say that in answer, he had a right to say it in anticipation. Suppose an action by a servant against his master for words spoken when giving him a character. If the counsel for the master were to argue that the words were privileged, and spoken *bonâ fide*, he might also say that they were true. Surely that would not be irrelevant, because it would go to show that the words were spoken *bonâ fide*. So here, although it may not have been essential that there should have been a lawful cause of dismissal between Jones and the plaintiff, it was justifiable for the attorney to say what he did, and urge that his clients could not have had a *bonâ fide* right to do as they did unless the man had done sufficient to justify dismissing him.

Channell, B.—I am also of opinion that this rule should be made absolute. At the trial, when the plaintiff's case had closed, the counsel for the defendant objected that the action was not maintainable, because the words complained of were spoken by in the course of a judicial proceeding, and were relevant to the then subject-matter of inquiry; the point was thereupon reserved. The words were spoken by the defendant when he appeared before certain magistrates as an attorney and advocate in defence of persons then charged with an assault, and probably received his instructions from Jones, under whom those persons indirectly probably acted. The plaintiff had entered into a contract with Jones, by which he had become as it were Jones' servant. The assault complained of to the plaintiff was in removing him from the premises which he held under Jones. By that contract it was a question therefore whether the plaintiff had a right to be there when he was so removed, which depended partly on whether the agreement with Jones had been terminated. The plaintiff might have so conducted himself as would enable Jones to put an end to the agreement without the twelve month's notice. The defendant before the justices took the objection, that the then defendants were acting under the authority of those who had a right to turn the plaintiff out of possession. Was that irrelevant to the question before the magistrates? Were the words used by the defendant irrevalant? I own I do not think they were.

Rule absolute to enter a nonsuit.

DIVISION COURTS.

OFFICERS AND SUITORS.

Seizure under Execution in the Division Courts.

An Act of last session, entitled, "An Act to exempt certain articles from seizure in satisfaction of debts," (printed on page 125 of this volume,) will effect almost a revolution in the "small debt" business of the country. Those who have been in the habit of trusting out their property will be driven, in self defence, to limit their credits; and persons of small means, who would formerly be trusted on the strength of their being in possession of property at least sufficient to guarantee a creditor for a debt of forty or fifty dollars, must now give some additional security, or pay far beyond the market value of goods purchased, for the creditor's additional risk. However benevolent the intention of the law, we are decidedly of opinion that its working will not serve the class of persons for whose benefit it was designed.

It may be argued—it will do away with the credit system to a great extent! We doubt that. In the new and poor settlements, the people begin on little or nothing; they trust for the most part to their coming crops, and must in

the mean time have the means of support. Their first yoke of oxen, cows, sheep, implements of husbandry, are almost in every case purchased on credit; and the notes given in payment *had* something of a market value. They passed from hand to hand, and in new settlements served instead of money in the hundred and one little transactions between farmer and farmer. But these notes, if taken now, are not likely to do so, when the law is such as effectually to disable a creditor from enforcing payment.

Let any one calculate the value of the exemptions, and if we do not mistake they will on the whole exceed $300 in value. And how many settlers in the back woods will have goods and chattels to that amount? We venture to say, not one in every twenty. But perhaps some experienced clerk or bailiff would make an accurate estimate in detail, and send it to us for publication in our next number.

New settlers must procure necessaries for themselves and families, and must have the means of stocking and working their farms; and if men are found willing to supply them on credit, it is obvious a large advance will be asked on the cash value of the article, to cover the extra risk.

On the whole we regret, *on the poor man's account*, the change in the law; for unless we are greatly mistaken, it will have the effect of making him pay for his supplies at least one shilling in the dollar more than he now pays.

But our business is more particularly with the law as it is, and the mode in which it is to be administered.

The 151st section of the Division Court Act contained the provision exempting certain articles from seizure, namely, the wearing apparel and bedding of the party and his family, and the tools and implements of his trade to the value of $20. This exemption is repealed by the act of last session (*ante* page 125), and a general provision made for United Canada.

The 151st section of the Division Court Act (as altered by section 2 of the act referred to) now stands thus:

"Every bailiff or officer having an execution against the goods and chattels of any person, may by virtue thereof seize and take *any of the goods and chattels* of such person (*excepting those which are by law exempt from seizure*), and may also seize or take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, belonging to such person."

This is the only alteration made in the Division Court Act, and the provisions of the 150th and 152nd sections remain untouched.

Now for a few practical suggestions and remarks. There will doubtless be a revision of the rules and forms at an early day, to make them square with recent changes and alterations in the law; but in the mean time clerks issuing executions should take care to alter the forms so as to adapt them to the law as altered. For example, take Form 20, "Execution against goods of defendant." The necessary alteration might be made by striking out the words "*wheresoever the same may be found (except the wearing apparel and bedding of the defendant or his family, and the tools and implements of his trade, if any, to the value of £5)*," and inserting in lieu thereof the following words: "*being within the said county (except those which are by law exempt from seizure)*."

From this example, clerks will easily perceive the mode in which a like alteration would be made in other forms of execution; and officers getting blanks printed, would of course have the necessary change made by the printer.

The bailiff's duty, when acting under execution, will be to leave untouched the articles now exempt by law from seizure, unless in cases provided for by section 5 of the Exemption Act (page 125), which we hereafter notice.

We shall take the subsections of section 4 in order, making a few practical notes on each.

Section 4 is as follows:

"The following chattels are hereby declared *exempt* from seizure under *any* writ out of any court whatever in this Province, namely:

1. "*The beds, bedding and bedsteads in ordinary use of the debtor and his family.*" This, we take it, may cover two or more beds, and as many bedsteads, according to the number of the debtor's family; and we should say two at least, if the debtor has children, large or small. That at all events would be the safer view for a bailiff to act upon. The words, in their ordinary acceptation, would cover not only the clothes, &c., in actual use, but those required for a change.

2. "The necessary and ordinary wearing apparel of the debtor and his family." Why not at once have said "the wearing apparel," without using the words "necessary and ordinary?" It is useless for the Legislature to make these nice distinctions, which are so difficult to carry out, and which are not in point of fact carried out in actual practice. Of course one can imagine a man having a dozen or so of extra kid gloves for "ball practice," as many fancy waistcoats, and no end of fashionable *et ceteras;* and his wife having all sorts of extravagant things in dress, certainly not *necessary*, and not in *ordinary* use; and possibly, in such cases, a bailiff might be justified in seizing. But a bailiff is not, we think, to be expected to enter into any nice questions as to what is "*necessary and ordinary* wearing apparel;" and the best general rule we can suggest to a bailiff is, to keep his hands off wearing apparel of all kinds used by the debtor or his family. People take as different views respecting what is *necessary*, as they do respecting what is becoming; and indeed it would be hard to say what particular kind of wearing apparel is not within the meaning of this subsection.

(*To be continued.*)

INCREASED HEARING FEES.

The return called for by the Hon. Mr. Patton, and printed by order of the Legislative Council, showing, by counties, the number of cases in which increased hearing fees were charged, the amount of such fees, and the total amount of monies for which suits were entered, calls for remark; and we cannot but think that Mr. Patton has "done the state some service," in drawing the attention of the Government and the public to the very strange and altogether unaccountable way in which the fees were heaped up in some counties.

In April, 1859, the address passed, praying His Excellency to furnish this information; yet we find, after the lapse of a year, the Hon. Mr. Vankoughnet apologizing in the House for the delay in furnishing it. "There was no

way," said the honorable gentleman, "of forcing the returns to be made. The delay in not presenting those already made, arose from waiting for full returns." And from five counties no returns were sent in.

One naturally asks, why this omission to furnish the information sought? Information, which, in a well kept office, could be put into the form of a return in three or four hours, not produced after a year's delay! To say the least of it, the delay was not particularly respectful to the powers that be.

The printed return before us embraces all the counties in Upper Canada, except the five in default, and is for a period of eighteen months.

We subjoin a table, showing in condensed form the information it gives.

COUNTIES.	Number of cases in which increased Hearing Fees were charged.	Amount of such Hearing Fees.	Total amount for which Suits were entered during 18 months.
		$ c.	$ c.
Brant	1081	609 10	233,618 97
Carleton	72	69 35	93,072 30
Elgin	39	78 00	162,210 87
Essex	0	0 00	62,720 91
Frontenac, Lennox & Adding'n	67	62 00	226,806 21
Grey	403	578 80	147,836 28
Halton	158	162 40	129,658 76
Kent	0	0 00	113,566 86
Lanark and Renfrew	43	52 40	108,118 76
Leeds and Grenville	32	58 50	169,053 40
Lincoln	2	4 00	124,581 40
Lambton	174	275 75	85,116 92
Middlesex	30	52 00	300,222 60
Northumberland and Durham	0	0 00	434,699 95
Norfolk	0	0 00	138,820 72
Oxford	3	6 00	245,094 28
Prince Edward	0	0 00	80,178 30
Peterboro' and Victoria	0	0 00	171,630 30
Perth	102	156 80	183,239 03
Prescott and Russell	54	101 60	38,626 70
Simcoe	61	68 54	317,420 60
Stormont, Dundas & Glengary	45	33 75	169,958 99
Waterloo	724	756 90	251,521 96
Welland	193	163 30	116,129 30
Wellington	405	162 40	301,231 07
Wentworth	204	391 25	337,798 46

The four counties in which the largest number of suits were entered for the eighteen months (for amounts over $300,000 in each), are Northumberland and Durham, Simcoe, Wentworth, and Middlesex. In the first-named (Northumberland and Durham), no increased hearing fees appear to have been charged. In the others as follows: in Simcoe the amount was $68, in Wentworth $391, and in Middlesex $52; in all, $401; while in Grey alone the hearing fees charged amounted to no less a sum than $578.

On no ground of sound administration can this immense disparity be accounted for.

In Brant and Waterloo the charges are also very high; but Grey actually out-Herods Herod. Let us contrast the figures.

	Aggregate amount of monies sued for.	Aggregate of increased hearing fees.
Simcoe, Wentworth, Middlesex,	$955,440 00	$401 00
Grey alone!	147,836 00	578 00
Grey, Brant and Waterloo	632,975 00	1,943 00

Whatever may be said of Brant and Waterloo as to the character of the cases, Grey can urge nothing, for it is one of the most recently settled counties in Upper Canada, and the business transactions there can be neither very large in their respective amounts, nor complicated in character.

But in five counties *no* increased hearing fees were charged. This appears to us to be an error on the opposite side. In counties such as Northumberland, Essex and Kent, we must conclude that during a period of eighteen months, many cases have arisen, of such importance, and occupying such a length of time in the hearing, as to warrant a charge of $2 to the fee fund; and if so, fees ought to have been imposed.

It is most desirable there should be something approaching uniformity of action in taxing this Hearing Fee—some regulating principle kept in view. It is clear that the Legislature did not intend the increase to be governed by the amount of the claim, from the language in the table of fees. The time occupied in the investigation would be the more reasonable ground to act on. Suppose a "horse case" occupying some three or four hours, a case of "assault and battery" with five or six witnesses on each side, or any other case involving a long and difficult investigation, and you have a fit subject for an increased Hearing Fee. The $2, be itobserved, is not in addition to the items mentioned in the five fold gradation, nor does it follow that the fee, if increased, must be the exact amount of $2; it may be under that amount; but the whole fee on hearing cannot *exceed* $2 in any case.

We have felt it a duty to lay the matter before our readers. It is manifestly unjust and contrary to the intention of the law that an increased Hearing Fee should be the *rule*, it forms the *exception*, and the power to impose it ought to be carefully and judiciously exercised.

New Rules and Forms.

In reference to the enquiries, by more than one correspondent, touching the issue of a new set of rules and forms for the Division Courts, we have endeavoured to find out whether such is contemplated, but have not been able to learn whether it is the intention of the Board of Judges to take any immediate steps in the matter. The forms particularly require a complete revision. Additional rules and forms are necessary. They are now in a very unsatisfactory state, and require to be used with much caution. The present rules, however, are in force, but must be modified for use. The 70th section of the Division Court Act provides that they shall, as far "as applicable, remain in force until otherwise ordered." We notice the subject again as desired, but those who feel "the unsatisfactory condition of the present rules and forms, and the extra caution necessary in using them," should represent the matter in the proper quarter.

SUBPŒNAS FROM THE SUPERIOR COURTS.

The mode of securing the attendance of witnesses in the Division Courts, who reside out of the county, is supposed to be attended with difficulty. Whereas nothing can be more simple. It is very often the case that unwilling witnesses, though living close to a place where a court is held, refuse to attend an ordinary Division Court subpœna, knowing that they cannot be punished for default because living out of the bounds of the county. The 100th section of the Division Court Act meets a difficulty of this kind, and enables parties to obtain compulsory process from the Superior Courts. It has been suggested to us that it is only a few days before the sitting of the Court, in many cases, when it is discovered that a witness will not attend unless compelled to do so, and then that it is too late to go to the county town for a Superior Court subpœna.

The difficulty might, it seems to us, be obviated in this way. Let clerks obtain from the Deputy Clerk of the Crown, at the county town, some blank subpœnas, and keep one or two always on hand, to be used by parties as occasion may require. One of these blanks any clerk can readily fill in for the plaintiff or defendant, and he would be entitled to claim from the party asking for it the fee paid for the subpœna. Or if there be any professional man resident in the neighbourhood, he will generally have blank subpœnas by him. In serving a subpœna from the Superior Court, we would recommend a verbatim copy to be made and personally served on the witness.

The 100th section enacts, that "the witness shall obey such subpœna," *provided the allowance for his expenses according to the scale settled in the Superior Courts be tendered* to him at the time of service. Many of our readers for whom this article is intended may not know what that scale is, and we accordingly subjoin it.

It is not to be understood from what we have said that a clerk is *bound* to obtain a Superior Court subpœna for a party. He is not compelled to do so, but for public convenience ought to feel himself called on to assist suitors in the way suggested.

ALLOWANCE TO WITNESSES.

To Witnesses residing within three miles of the Court House, per diem	$0 75
To Witnesses residing over three miles from the Court House	1 00
Barristers and Attorneys, Physicians and Surgeons, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions, per diem	4 00
Engineers and Surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill and judgment, per diem	4 00

If the Witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each case only. The travelling expenses of witnesses over ten miles shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile one way.

THE LAW AND PRACTICE OF THE DIVISION COURTS.

Sufficient time has now elapsed to bring the law of these Courts to the test of administration; and having worked under rules for over six years, we think the period has arrived when a work "On the Law and Practice of the Upper Canada Division Courts" may with advantage be produced. Will any of our readers undertake the task of producing such a work? Or will the County Judges lend us some assistance with it? A work of the kind would require to pass under the hands of some one practically conversant with the law as administered in the Division Courts, and would of course occupy considerable time in preparing. But if it appeared (a portion each month) in this journal, the work would be light enough, and would besides by that means be subjected to the notice and criticisms of the profession and of Judges and Officers of the Courts, so that errors and omissions could be corrected and supplied in publishing the work when completed—*for the copy-right could be reserved.* If assured of the cordial aid of all interested, there would be a strong motive to undertake it. But we would rather offer inducements to another to assume the task, and we should be happy to hear what the feeling is, and to be favored with the opinions of the Judges.

OFFICERS PURCHASING GOODS SEIZED.

From facts to which our attention has been drawn, we have reason to believe that an alteration advisedly made, if not in the law at least in the language of a provision of the Division Courts Act, is not properly understood.

Nothing can be clearer now than that every one who holds the office of a Clerk or Bailiff of a Division Court is prohibited from purchasing directly or indirectly *any* property at *any* sale under execution by *any* Bailiff of a Division Court, and a purchase made in violation of this provision may be treated as a nullity, beside subjecting the offender to summary removal from office. In the 13 & 14 Vic. c. 53, s. 51, the word "*clerk*" was not contained. But the acting Commissioner, in submitting his final consolidation, made some alterations, which he explained in a note, as follows: "The word 'Clerk,' though not in the statute, has been inserted before 'Bailiff,' as within the spirit if not the letter of the law as an 'officer.' The words 'any Division Court Bailiff' are substituted for 'such Bailiff,' as being within the mischief."

The provision as consolidated stands as section 157 in the Division Courts Act, and the suggestion contained in the note was adopted by the Legislature, and is now law.

CONFESSION AND AMENDS.

We have to apologize to those of our readers who are principally interested in matters relating to the Division Courts for the rather limited supply of matter under that head, in our last number. The omission was unavoidably caused by an unusual press of business coming at the time when such matter is usually supplied. We have endeavoured, however, in the present number, to make up somewhat for former deficiencies.

CORRESPONDENCE.

To the Editors of the Law Journal.

JUNE 30th, 1860.

GENTLEMEN,—You would confer a favor on me by answering the following questions:

When a judgment is given, does the time granted for payment commence from the court day, or the time of service? Has the bailiff a right to fees on an execution when he cannot make a seizure, either from want of effects or other causes; it seems hard that he should travel ten or fifteen miles, and for no fault of his, be at a loss of time, &c.?

When does the 23rd Vic. chap. 25, come into force? You do not say anything about the time when in the *Journal* for June: or are we (as clerks) to know by instinct that such a Statute has been passed. You were good enough to say in one of your *Journals*, that the Division Court Clerks were not behind any class of men in the Province for intelligence, &c.; the government cannot think so, or if so, it seems to me a very *small affair* not to supply us with the Statutes—our fees are not so exorbitant that we can afford to purchase them, and they are supplied to Magistrates, some of whom cannot read them; and I suppose you are well aware that Clerks, particularly in the country, are looked up to for law advice in all small matters at court. I was in great hopes that you would have strongly advocated our being supplied with the "Consolidated Statutes," as even now they are out of the reach of most of us.

I shall not make any apology for troubling you, as you kindly give us every encouragement to do so.

A DIVISION CLERK.

1. [The time given for payment commences to run from the day on which judgment is given.

2. For an answer to his second query, we refer our correspondent to page 61 of volume 5 of this journal, where he will find the case treated in various aspects.

3. The Act "to exempt certain articles from seizure in satisfaction of debts," was assented to on the 19th of May, and consequently came into force on that day—no time being named in the body of the Act. Our correspondent will find an article on the subject of its provisions, under the head of "Divisions Courts" in this number.

Division Court Clerks, our correspondent we suppose, amongst the number, have lately been supplied with the Acts containing the Division Court Law taken from the revised Statutes. We suggested the advisability of this being done considering it a matter of great importance that Clerks should have every facility afforded them for being posted up in their duties. We could have no objections to seeing clerks supplied with copies of the Statutes which we have no doubt they could make as good use of as many of those who now get them do; but as the law has not yet recognized them as amongst its expounders, they must, we suppose, be satisfied with being furnished with that portion of it which it most behoves them to know.—EDS. L. J.

To the Editors of the Law Journal.

DEAR SIRS,—I enclose report of a Division Court case decided by our County Court Judge, the other day. The point is one on which I am aware many officers differ in their practice, and you may perhaps think it of sufficient importance to be published in your very useful journal.

I am, dear Sir, yours, &c.

Dundas, July 16, 1860. F. OSLER.

[Our best thanks are due to our correspondent for the report of the judgment published below. The point is an important one to be known to most if not all of our readers. We will be always happy to hear from him; our personal knowledge of his ability as a student, added to the high estimation in which we know him to be now held as a practising lawyer, affording us a sufficient guarantee that his communications will not fail to contain matter of interest to our readers.—EDS. L. J.]

WESTON V. THOMAS (SHERIFF).

Division Court execution—When returnable—Fi. fa. from Superior Court—Priority—141st sec. D. C. Act.

An execution from the Division Court cannot be executed after the expiration of 30 days from its date.

The facts of the case were as follows:

On the 18th May, 1859, a warrant against the goods of C. (which were then covered by a *fi. fa.* in the Sheriff's office) was placed with the D. C. Bailiff. The Sheriff levied and sold under his *fi. fa.*, but part of the goods were redeemed, and on 14th November the *fi fa.* was returned. The warrant in the meantime remained with the D. C. Bailiff, without being renewed, and on the 18th November the Sheriff received another *fi. fa.* against the defendant, under which he levied. On the day of sale, the D. C. Bailiff showed his warrant and claimed priority, and on the refusal of the Sheriff to pay over the proceeds of the sale this action was brought. The plaintiff contended that the warrant had not expired, because the Bailiff had been unable to make any levy until the 14th November.

C. L. P. Act, 256; Harr. Do. 333 and note; Ch. Arch. 1247; were cited for defendant.

LOGIE, J.—This case turns upon the construction of section 141 of the Division Courts Act (similar to sec. 56 of 13 & 14 Vic. ch. 53); and the question to determine is whether or not an execution issued out of a Division Court has any force or effect after the expiration of 30 days from its date. I think that the effect of the 141st sec., the 148th sec., and the form of execution framed by the Judges under the authority of the Act, is to make the writ returnable at the expiration of the 30 days, in the same way as a writ of *fi. fa.* issued out of one of the Superior Courts was returnable on a day in Term, before the recent alteration in the law. It is quite certain no levy could be made upon a *fi. fa.* after the return day. In Todd's Practice, page 1148, it is stated that "the utmost length of time the law allows for executing a writ, is the day whereon it is returnable." Nothing was done under this writ until after the return day; and not being in force when the Sheriff made the levy under the second writ, in his hands, it could not take priority over the second writ.

Judgment for the defendant.

U. C. REPORTS.

COURT OF ERROR AND APPEAL.

(Reported by THOMAS HODGINS, Esq., Barrister-at-Law.)

(Present, ROBINSON, C. J., DRAPER, C. J. C. P., MCLEAN, J., BURNS, J., SPRAGGE, V. C., RICHARDS, J., and HAGARTY, J.)

WATSON V. MUNRO.

Deed or Mortgage—Trustee—Issue at Law.

9th July, 1860.

Appeal from the Court of Chancery. The reports of this case will be found in 5 Grant 662, and 6 Grant 385.

The transaction out of which this suit arose, occurred in October, 1840. The defendant, Munro, had then brought an action against the plaintiff, Watson, to recover a debt of £35 17s. 11d., and that action was stayed by the plaintiff assigning to the defendant certain property on Yonge Street, in the city of Toronto. This property the plaintiff had, during the previous year, contracted to purchase from the Hon. Peter McGill for £150, but had only paid half a year's interest on the purchase money. He had, however, erected upon it a frame two-story dwelling house, and otherwise improved the property to about the value of £100, and had by a conveyance absolute in form, assigned the premises to

the defendant for the amount of the debt and £25. The plaintiff continued for about two years to receive the rents, which the defendant answered by stating that it was part of their agreement that the plaintiff should retain possession for a certian period; that shortly after the agreement he went to England, and the plaintiff in his absence still kept possession; and that on his return to to this province in June, 1841, the defendant took proceedings in ejectment, and evicted the plaintiff. The plaintiff filed his bill to redeem the premises in December, 1855.

The cause came on for hearing on the 30th September, 1856, before the Vice Chancellors, and the Court, although inclining to dismiss the bill, directed an issue as to the question of mortgage or no mortgage. The trial took place in Toronto, before the late Sir J. B. Macaulay, and a verdict was rendered in favour of the plaintiff, but the learned judge certified that he was not satisfied with the verdict, and that his impression from the evidence was unfavourable to the plaintiff. By arrangement between the parties the case came before the Court on a petition for a re-hearing, upon motion for a new trial and for further directions. The Court, although in favour of the plaintiff upon the finding of the jury and the evidence, granted a new trial on the application of the defendant, in consequence of the judge's certificate. But a material witness having died, the new trial did no take place, and accordingly a decree was made in favor of the plaintiff, from which the defendant appealed; and it was

Held per Cur., that the conveyance was absolute, and that the plaintiff was not entitled to redeem.

Held, (by ROBINSON, C. J.) that this was not a proper case to refer to a jury: that such references in cases of this kind, would have the effect of weakening the protection provided by the Statutes of fruds.

Per Cur.—Decree reversed and bill dismissed with costs.

CHANDLER v. FORD.

Trustee and Cestui que Trust—Breach of Trust—Account.

Appeal from the Court of Chancery. The case is reported in 6 Grant 607. The case while in the Court below, had been heard before the Vice Chancellors, but they having been unable to concur in a judgment, directed it to be re-argued before the Chancellor, when a decree was made in favor of the plaintiff. The facts of the case were as follows: Lands were held by Ford as trustee for Chandler, who assigned by a memorandum absolute in form, for a nominal consideration of 5*s*., but in reality by way of security to one Codd, the instrument declaring the trust. Subsequently the agent of Codd wrote to Ford, stating that the Chandler had assigned the instrument to Codd, and calling upon him to convey the property to Codd. Ford, without calling for the assignment, executed a conveyance and sent it by post, and shortly afterwards Codd sold to a purchaser without notice. Upon a bill filed by Chandler against Ford and Codd, the Court of Chancery held that Ford should have called for the assignment of his *cestui que trust*, and that under the circumstances he had committed a breach of trust; that he was bound to make good the trust estate, and an account was directed. Codd was directed to re-emburse Ford for any sum he might be compelled to pay under the decree. On appeal it was

Held, that from the evidence, Chandler was more at fault in the transaction than Ford, and was entitled to no equitable relief, and that as to Ford, the decree should be reversed and the bill dismissed with costs.

BOYS v. SMITH (Sheriff).

Chattel Mortgage—Replivin—Sheriff in possession under Absconding Debtor's Act refusing to replevy for mortgage.

Appeal from the Court of Common Pleas. The case is reported in 9 U. C. C. P. 27. The facts of the case were as follows: The plaintiff being the owner of certain goods, sold them to one P. S., taking as security a mortgage of all the goods, merchandize, and chattels at present situated, lying, and being in the brick store on lot No. 1, on the north side of Dunlop Street in the town of Barrie, for £386 with interest payable in three, six, and nine months, and it was stipulated that in case of default for principal or interest, the plaintiff might take possession of and sell the goods or keep them at his own option. The affidavit describes the barginee as "of the Town of Barrie in said County, gentleman." The mortgagor remained in possession and made large purchases from other parties, and then absconded. The Sheriff then received a writ of attachment against his goods at the suit of R. M. & Co., and under it seized all the goods in the store as belonging to the absconding debtor. The plaintiff, while the Sheriff was in possession, and there being two instalments of principal and interest due on the mortgage, issued a writ of replevin, but the Sheriff refused to execute it, whereupon the Court

Held, that the plaintiff was entitled to recover, and that the Sheriff was liable for not executing the writ.

That the affidavit was sufficient (*Moyer* v. *Davidson*, 7 U. C. C. P. 521 and *Brodie* v. *Ruttan*, 16 U. C. Q. B. 207).

From this judgment the Sheriff appealed, and

Per Cur.—Appeal dismissed with costs.

COMMON PLEAS.

Reported by E. C. JONES, Esq., *Barrister-at-Law.*

CARROLL v. CORPORATION OF PLYMPTON.

Contract—Injury done in performance of—Agency.

To sustain an action for damages occasioned in the performance of a contract it must be shewn that the contractor is the authorised agent of the parties sought to be charged, or at all events that they subsequently ratified or adopted the work as their own.

The declaration contained two counts. 1st.—That plaintiff was lawfully possessed of a close in the township of Plymton, No. 1, front concession, and a close in the township of Sarnia, being No. 1, front concession, on which was a large quantity of timber, cordwood, cedar posts, &c.; that there was a public allowance for road between plaintiff's said lots, and the timber in the said road allowance had been cut down and was lying on the road; that defendants, well knowing the premises by their servants and agents, entered on the road allowance with fire to burn off the timber thereon, and it was their duty to manage the said fire in a careful and proper manner to prevent any injury to the plaintiff.

Breach.—That by reason of the negligence and want of proper caution by defendants certain dry timber then and there being set on fire, and the fire extended to plaintiff's closes and burned the said timber, cordwood, &c., and destroyed cedar timber growing on plaintiff's closes. The second count was nearly similar.

Pleas to both counts.—1st. Not guilty. 2nd. That the closes were not plaintiff's. 3rd. That the timber, cordwood, &c., were not plaintiff's.

The case was tried at Sarnia in April last, before *Richards J.* One George Bell swore that he took a contract from the corporation; that Mr. Whiting, who was the defendant's treasurer, put up the logging and burning of the town line (of which the allowance for road mentioned in the declaration formed part) and he (Bell) bid it in at $8 per acre, and he told two men who were working for him that if they would do the job they might have the profit. He first put fire into it himself. The reeve of the township stated that the councillors of the townships were usually authorised to expend money which was appropriated by the council for roads within their respective wards; that money was appropriated to clear the town line; that it was sometimes left to the councillors to select commissioners, and sometimes they were selected by the corporation. The commissioners certify to the work being done, and they superintended it and give orders on the township treasurer, and countersigned the order; but the jobs were all given out by auction. Mr. Whiting, the township treasurer, proved that the work was first let to Bell, and as three weeks after nothing had been done but what the fire had done, he re-let the job of clearing out the town line between Plympton and Sarnia, between No. 1 on each side. When he went to re-let it he found the fire had been burning some weeks, and he then let it to Bowden, who was paid for doing it. Mr. Whiting stated that he had no authority from any one but the trustee, (*qy.* commissioner,) who requested him to let out the work. Another witness stated

that he was present when Whiting let it to Bell; that Bell put fire into it that evening, but it did not take, the weather being unfavorable, and this delayed it for two or three weeks, and Bell handed it over to the two Bowdens. The plaintiff further gave proof that they set fire in the road allowance which spread on to his property, and he gave evidence of the damage he had sustained.

At the close of the plaintiff's case a nonsuit was moved for on the ground that the damage was not brought home to any act of the defendants, or of those for whom they were responsible; that the work was let out by contract, and that the contractor and not the defendants are liable.

The learned judge was strongly inclined to this view, but allowed the case to go on, subject to the opinion of the court if plaintiff obtained a verdict. The defendants then went into evidence to rebut the assertion that the fire was caused by the Bowdens, and also to negative damages to the plaintiff as the general result of the fire. The learned judge left it to the jury on the question of negligence of the parties clearing the road being the cause of the damage to the plaintiff, and that in fact there was negligence in setting fire to the timber in the road, which was the act complained of, assuming, for the purposes of the trial, that the defendants were liable for the acts of those who claimed the road. The jury found for the plaintiff with £100 damages.

In Easter Term *Richards*, Q. C., obtained a rule *nisi* to set aside the verdict, and to enter a nonsuit or a verdict for defendant on leave reserved, or for a new trial on the law and evidence; that nothing was shewn to have been done by defendants to render them liable; no evidence of any corporate act by their by-law or other sufficient act to authorise the opening of this road; that if any one was liable for the damage complained of it was the contractor; that no negligence either in making or taking care of the fire was in fact shewn.

Cameron, Q. C.—The verdict of the jury determines the questions of fact, viz., that the fire caused the damage the plaintiff has sustained, and that there was negligence in making or managing that fire. Then as to the defendant's liability, the law makes it their duty to take charge of highways, and therefore they must be taken to be the parties by whom work on the highways is directed to be done, and in that view are to be looked upon as having done it. He referred to *Farrell* v. *The Town Council of London*, 12 U. C. Q. B. 373.

Richards, Q. C., contra, cited *Steel* v. *S. E. Railway Company*, 16 C. B. 550; *Overton* v. *Freeman* 11 C. B. 867; *Reedie* v. *London & N. W. Railway Company*, 4 Exch. 244; *Knight* v. *Fox*, 5 Exch. 721; *Peachy* v. *Rowland*, 13 C. B, 182.

Draper, C. J.—It seems to have been conceded for the purposes of bringing the question before the court, that Bell stood in the position of a contractor, to perform the work of clearing this road allowance, which the defendants desired should be done, and either that he gave up his contract to others and they undertook it and were paid for performing it, or that Bell the contractor having neglected it, a new letting took place to other parties the same as Bell gave up to, and on this new letting, though on the same terms as Bell had undertaken it, the work was performed. If it had been denied that the work was done by parties who contracted to do it, and to be paid a certain price by defendants for doing it. that question should have been submitted to the jury. But when the objection was taken at the trial the plaintiff's counsel did not appear to have denied that the parties actually doing the work were doing it as contractors; but it was then insisted, as it was by Mr. Cameron in his argument, that under that state of facts the defendants are liable.

In *Knight* v. *Fox*, Alderson, B., says, "The real question and the only one, is, whether the negligent act by which the injury was occasioned to the plaintiff was the act of C. as the defendants' servant." In other words, whether the negligent act is to be treated as having been done by the person who actually did it, as the servant of the person sought to be charged. This remark is quoted with approbation by Maule, J., in *Overton* v. *Freeman*, and that case and others cited by Mr. Richards as well as many older authorities, shew that where the work is done by any party under a contract that negatives the contractor being the servant of the party for whom the work is undertaken and performed.

According to *Steel* v. *The South Eastern Railway Company*, it makes no difference whether the contract be by parol or otherwise. If the evidence did not shew the letting of the work at a fixed price per acre to be performed for the defendants and paid for by them, and which letting, if not previously authorised by them, they subsequently ratified and adopted, it did not connect the defendants with the act complained of as negligent, and then the action fails, and if the work was done upon a contract it equally fails.

In either point of view the rule for entering a nonsuit should be made absolute.

Rule absolute.

Wilson v. Thompson.

School act—Special meeting—A resolution passed by—May alter one passed a a general meeting.

Held, that power is given to assemble a special meeting of the freeholders and householders of any school section for the purpose of maintaining a common school within their section.

Held, also, that any resolution passed at the general annual meeting may be rescinded by a special meeting properly convened for that purpose.

Replevin for a cow, value £10.

Pleas.—1st. *Non cepit.* 2nd. *Non detinet.* 3rd. Goods not the property of the plaintiff. 4th. That plaintiff, on the 1st December, 1857, was a freeholder and a householder resident within school section No. 4, in Warwick, and so continued up to the 21st of December, 1858, and was liable to be assessed for school purposes during that period, and being duly assessed, was liable to pay certain money as a rate therefor, to wit, £3; and said sum was remaining unpaid, the trustees of the said school section No. 4, afterwards, on the 19th of October, 1858, issued their warrant under their hands and seals, and thereby required one James Thompson to collect the school rate from the individuals named in the rate bill annexed to said warrant the sums set opposite their names, and to pay the amount over to the secretary and treasurer of the section within thirty days, and in default of payment by any person so rated then to levy the amount by distress and sale of the goods and chattels of the person or persons making default; that plaintiff was rated on said roll, for, to wit, £3, and having made default in the payment of said sum after demand, and after the expiration of 14 days from such demand, said James Thompson, within 30 days from date of warrant, and within said school section seized and took the goods and chattels in the declaration mentioned, and sold the same as a distress for the rate so due by the plaintiff, said cow having been first duly advertised according to law, at which sale defendant bought said cow, which is the alleged taking and detaining complained of.

Replication.—1st joins issue on 1st, 2nd, and 3rd pleas. 2nd, as to the fourth plea, that the rate therein named as rated and assessed against plaintiff was not lawfully rated or imposed, nor was the same lawfully attempted to be levied of plaintiff's goods, and said seizure and sale as well as said rate were illegal and void, and of no lawful authority or affect.

The case was tried at the last assizes for the County of Lambton before *Richards*, J., when a verdict was taken for the plaintiff subject to the opinion of the court upon evidence, of which the following is the part material to this decision.

Tilton Howard sworn.—I am deputy sheriff. I executed the writ of replevin. I took under it a cow; it was then in defendant's possession; he said he had bought the cow at auction.

Mark Hagle.—I owned the cow once. I sold it to the plaintiff the latter part of last summer. I was present when one James Thompson was about to sell this cow. Plaintiff forbid him doing so. The notice (a notice signed by the witness himself) produced was read, and defendant was present when it was read and heard it read. The notice was signed by me. I was a school trustee. He bought the cow for $8. I sold her for $20. I took a warrant after the replevin from one Joseph Macpherson and gave it to Mr. Adams.

For the defendant it was admitted that at the Annual school meeting in January, it was decided that the school should be supported by a rate bill of 1s. 3d. a month payable in advance. Mr. *Becher* contended for plaintiff that this admission put the case on such a ground that plaintiff cannot but fail on this suit.

James Thompson.—We applied to the people; they said the times were so hard they would have to take their children out of school, as they could not pay the 1s. 3d. a month, and they wished that the resolution of the annual meeting should be re-considered. On getting a letter from Dr. Ryerson on the 2nd of February, 1858, three copies of the notice produced were put up, one on the school house door, and the other two in two of the most public places in the township.* The reason why Somer's name was inserted was, there was a dispute whether Somer's or Hagle was the third trustee. We have since accepted Hagle as the trustee. A meeting was held on the 10th of February (proceedings put in of the meeting). On the 19th of October last we made out the rate bill and annexed the warrant to it. It had the proper seal of the corporation of the school section to it. Plaintiff was rated in the bill for the amount therein. I seized the two cows and sold them both. I think it was Mr. Hay put up the notices. I saw the notices up after they were posted. Hagle did not have notice of the meeting of the trustees at the time of the second meeting of the trustees for re-considering the rate bill. I was secretary and treasurer. John Thompson and Timothy Hay have my bonds. I did not ask Hagle to go to the meeting, because I did not consider him a legal trustee then. Afterwards we took him as a trustee. We had a trustee meeting at Timothy Hay's house on the 2nd of February The notices were drawn up, and that is the way the meeting was called. Hagle and old McPherson came in at the close of the meeting, and Hagle objected to the proceedings. We were more than half an hour at the meeting. We waited for nearly an hour before we got through. Myself and Timothy Hay made out the rate rolls. We called a meeting, giving Hagle notice, about eleven days before this, 8th or 9th October, to come and make out the estimate; he did not attend. We gave him notice also to attend and make out the rate bill and sign the warrant; he did not attend. The corporation had a seal; got it at Toronto the beginning of 1858. There were thirty-one resident freeholders and householders in the section. All paid the taxes willingly but Hagle. Two McPhersons and three others, six altogether, attended at the meeting.

Timothy Hay. I am one of the trustees ot No. 4, in Warwick. I put up two of the notices and saw the third put up; one on the school house, the other places, two of the most public. Before the rate bill was made up I saw Hagle and wished him to come up and make up the estimate and a rate bill. He said he would not come. Afterwards, when I was returning, he said I had taken advantage of his being away to court. It was a dispute whether Hagle was elected to fill a vacancy or for a full period. Hagle refused to give up the papers to see if he had been elected or not. We accepted the other, and afterwards agreed that Hagle should come in.

The case was argued by *Richards*, Q. C., for plaintiff, and *Wilson*, Q. C., for defendant.

DRAPER, C. J.—The points made for the plaintiff at the argument were:

1st. That the trustees of the school section had no power to act except in accordance with the resolution of the annual school meeting when a majority of the freeholders, and householders then present decided that the salary of the teacher and expenses connected with the operation of the school should be defrayed by a rate bill of 1s. 3d. per month upon each child attending the school, payable in advance, for this decision could not be revoked or changed during the year for which it was made.

2nd. That the proceedings of the trustees, admitting they had power to call a special meeting of the inhabitant freeholders and householders for the purpose of reconsidering, and if they saw fit changing, the mode of providing for the school expenses, were irregular and void for want of notice or reference to, or the concurrence of Mark Hagle, the third trustee.

3rd. That the trustees could not call a special meeting, since that power by the 16 Vic., ch. 185, sec. 14, was conferred on the local superintendent.

It was urged in support of the first objection, that the statute gave no authority to any one to change or vary anything which had been determined on at the regular annual school meeting, and it was conceded on the other side that the statutes gave no such power. But it is equally certain that there is nothing in the statute to prohibit it.

If there was no provision or authority for convening the freeholders and householders of a school section except at the annual meeting, or if such power was only conferrred for certain limited and defined purposes, which clearly excluded the dealing with what had been decided at the annual meeting, the plaintiff's case would be unanswerable, but the contrary is the fact. Among the powers given to the trustees by sec. 12 of the school act of 1850 is the following: 12thly. To appoint the place of each annual school meeting, and to cause notices to be posted in at least three public places of such section at least six days before the time of holding such meeting; *to call* and give like notices of any special meeting of the freeholders or householders of such section for the filling up of any vacancy in the trustee corporation occasioned by death, removal, or any other cause whatever, or for the selection of a new school site, *or for any other school purpose as they may think proper.*"

But it may be firstly said, that while this language is large enough to give the trustees power to call a special meeting for any such school purpose; it does not necessarily follow that the special meeting has authority to revoke the proceedings of the regular annual meeting in this or any other particular.

In reply it may be first noticed that it is the plain intent of the school acts to refer every question which affects expenditure to the consideration and control of those by whom the means are to be furnished. There must always be a local assessment equal to the sum apportioned out of the government grant, and it is a duty particularly devolving on the freeholders and householders of each school section to decide how this is to be done. (*a*) The trustees are to carry this decision into effect, and the direction to them to do so is in the 12th section, 17thly, thus set forth, "to provide for the salaries of teachers and all other expenses of the school in such manner as may be desired by a majority of the freeholders of such section at the annual school meeting, *or a special meeting called for that purpose.*"

Although the 9th section provides for the calling of a meeting in lieu of the annual meeting of the freeholders and householders, where, from some oversight or neglect, no such annual meeting has been held, it does not, nor does any other section that I am aware of, provide for the calling of a special meeting to do any of the things specially required to be done, but which may have been omitted from some cause or other, at an annual meeting duly convened or held; in this case either the business must be transacted at a special meeting called for the particular purpose, or not at all, and the school year be allowed to pass without it. I have no doubt in my own mind that any omission to do what should have been done at the annual meeting can be thus supplied.

The question then is reduced to this, whether any resolution improvidently made at an annual school meeting is irrevocable, even though it be plainly demonstrated that its effects will deprive the section of the benefits of the school act for the current year; I cannot bring myself to this conclusion. With regard to the election of school trustees, it is a different thing, but the unqualified admission, that having once elected, they cannot at a special meeting displace those who have been chosen does not affect this question. I assume that the resolution passed at the annual school section meeting in January, as to the monthly payment by each scholar, was found by the freeholders and householders to be practically injurious to the schools, keeping away pupils and thus reducing the means of defraying the necessary expenses, and of maintaining the school at all. In the absence of any prohibitory enactment, it is my opinion the freeholders and householders duly convened at a special school meeting might rescind the former resolution and substitute another mode—one authorised by law—to obtain their end of having a common school maintained in their section, and therefore, that this objection fails.

* The opinion given was, that a special meeting could re-consider the proceedings of the annual meeting

(*a*) The raising of a sum by assessment equal to the government grant is vested in counties in the County Council, and in cities, towns and villages, in their Municipal Corporations. These two sums are then divided among the school sections, and whatever sum in addition to these two is required for the salary of the teacher is provided by the Trustees, as directed by their constituents, in the section referred to.

I think my brother Richards gave a complete answer to the second objection at the trial. John K. Somers was in the office of trustee, acting as such, whether duly appointed or not. There is nothing before us to show, admitting that we could collaterally try the question, whether Somers was not, or that Hagle was third trustee; and if that was the ground relied upon to sustain the replication, the plaintiff should have given much more distinct evidence for the purpose.

I scarcely thought Mr. Richards attached any weight to the third objection. The 14th section of the 16th Vic., ch. 185, does (proviso 5) give the local superintendent "authority to appoint the time and place of a special school section meeting, at any time and for any lawful purpose, should he deem it expedient to do so," but this does not affect or take away the authority previously given to the school trustees.

I think the defendant is entitled to the *postea*. It is to be regretted that either a litigeous spirit or the ill-considered and perhaps even mischievous promptings of other parties should have induced the plaintiff to raise this question for the sake of a sum less than two dollars, sacrificing his property worth ten times the amount, according to the evidence, as well as incurring the costs of a very unnecessary lawsuit.

Postea to defendant.

PIM v. THE MUNICIPAL COUNCIL OF ONTARIO.*

Assumpsit—Action of against a Corporation—Contract under seal.

An action cannot be sustained against a corporation for work and labour unless supported by contract under the seal of the Company.

Assumpsit for work and labour and materials.

Pleas.—Non assumpsit and payment. It appeared that by agreement, dated the 23rd of October, 1852, James Wallace covenanted with the Provisional Municipal Council of the County of Ontario, sealed with the seal of such council, to erect a gaol and court house in the said county, to be finished on or before the 15th of September, 1853, according to a certain plan and specification, and to the satisfaction of their architect, the price to be £5795, by monthly instalments of seventy five per cent. on the work done and materials on the ground, the remaining twenty-five per cent. being retained till the fulfilment of the contract. In default at the time £5 weekly penalty to be paid by Wallace. If the work should not be duly proceeded with the council to be at liberty, upon three days' notice in writing to Wallace, to employ others to finish the same, and deduct the costs from his allowance; the contract not to be assignable; all the materials delivered on the ground to become the property of the council, &c.

That Wallace proceeded with the work, and executed a large portion of it, but did not complete it by the day named, after which it was taken out of his hands by the architect acting under the authority of the building committee of the council, and plaintiff was employed by such architect so acting to finish it, to be paid by estimate as he proceeded, without any written or sealed contract, or any specific price being agreed upon; that the plaintiff did proceed and completed the work, finding materials, workmen, &c., to the satisfaction of the architect; that he was from time to time paid sums of money on account, twenty-five per cent. on the periodical estimates being retained, and in the end leaving a balance of £1051 12s. 6d., due him, for which this action was brought, and for which the jury found a verdict in his favour. The architect of the defendants certified to the correctness of this balance as due the plaintiff. A building committee, of which the Warden was chairman, was appointed by the council by a by-law No. 2, of the 25th June, 1852, and their report of the 11th November, 1853, that the work had been taken out of the contractor's hands for default, and its completion entrusted to others to be employed by the architect, was approved and adopted by the council.

Leave was reserved at the trial to defendants to move to enter a nonsuit on the ground that the defendants not having contracted with the plaintiff under seal, were not liable in law, and that £6,000 only being authorized by by-law on the works, the committee exceeded that sum independent of the balance claimed by the plaintiff in this action, and therefore defendants are not liable therefor.

A rule *nisi* was obtained accordingly by *McMichael*, and cause shewn thereto by *Freeland*.

MACAULAY, C. J.—If any thing, this is perhaps a stronger case in favour of the action than Marshall v. The School Trustees of Kitley (4 U. C. C. P. 373,) decided in this court last term, but I cannot satisfactorily distinguish it in principle. My own view of it is, that the plaintiff should recover on the evidence, but my learned brothers adhering to the views expressed by them in the former case, the result must be the same, and the rule *nisi* for a nonsuit be made absolute.

Per cur.—Rule absolute.

* This judgment was omitted at the time of its being delivered on account of its similiarity to the case of Marshall v. the School Trustees Kitley, but is now published as establishing the law, the decision being reversed in appeal. See next judgment.

IN THE COURT OF ERROR AND APPEAL.

PIM, APPELANT, v. THE MUNICIPAL COUNCIL OF ONTARIO, RESPONDENT.

The foregoing judgment having been appealed from, the decision was reversed and the rule discharged.

For the facts of the case, see the preceding judgment.

The case was argued in appeal by *Freeland* for appellant, and *McMichael* for respondent.

THE CHANCELLOR.—The present state of the law upon the subject is a reproach to the administration of justice in England. It may be that the evil calls for legislative interference, but if the legislature will neither declare the law nor alter it, courts of justice are bound to place their decisions upon some principle intelligible to the public and sufficient for their guidance.

It is said, I believe, in the case now under appeal, that the decisions in the English court harmonise and negative the right of the present plaintiff to relief. But the cases which have arisen since the decision in the court below shew that the judgments in the English courts are in direct conflict, and are so treated by the learned judges by whom they were pronounced. In Smart v. The Guardians of the Poor of the West Ham Union (L. Times, 277), *Parke*, B., says, "The case which has been cited and relied upon for the plaintiff is a case with which I cannot agree. It would in effect overrule several previous decisions of this court; and *Alderson*, B., adds, "I quite agree with the observation of my brother *Parke*, in reference to the judgment in Clark v. The Guardians of The Cuckfield Union (16 Jur. 686), as it is directly in opposition to several cases decided by the court upon similar questions. To these cases we should adhere until they are overruled by a court of error." While in the case alluded to, Mr. Justice *Wightman* admits his inability to reconcile his own judgment with the cases in the Exchequer; and in Henderson v. The Australian Steam Navigation Company (25 L. Times, 234), which is, I believe, the latest case upon the subject, Mr. Justice *Crompton* says with becoming candour, "At the same time I cannot distinguish this from Diggle v. The Blackwall Railway Company (5 Ex. 442, reported also 14 Jur. 937), Homersham v. The Wolverhampton Waterworks Company (6 Ex. 187). I cannot disguise from myself that we are deciding the case in opposition to these authorities, which have, however, I believe, excited some surprise." See also, and contrast Clark v. The Cuckfield Union, (16 Jur. 686,) and Sanders v. St. Neots Union (8 Q. B. 810), with Diggle v. The Blackwall Railway Company (14 Jur. 937) and Lamprell v. The Guardians of The Poor of The Billericay Union (3 Ex. 283), and other cases in the Exchequer.

It cannot be doubted, therefore, that the authorities in the English courts conflict, and it is certainly difficult, moreover, to extract from them any satisfactory principle for our guidance. But the cases have been so often collected, and so fully commented upon of late days, and are so familiar to every one conversant with the subject, that it would be mere pedantry to enter upon a detailed review of them here. I shall content myself, therefore, with a short statement of the principle upon which, in my humble opinion the judgment of the court below ought to be reversed.

The action in this case is brought upon an executed contract. The court house had been built under the supervision and to the satisfaction of the defendants' architect before action brought. The justice, therefore, of compelling the defendants to pay for the work, labour, and materials, of which they have had the benefit, is obvious; and if there be a principle upon which they are to be absolved from that just liability, it must be the principle, that being a corporation, their will cannot be expressed except through their common seal; and as they are incapacitated from making their own will known, except through their common seal, so it cannot be implied by courts of justice, from their conduct, so as to subject them to any liability either in tort or assumpsit.

Now it will be found, I apprehend, that there never was any such universal rule as that which has been supposed.

The old notion certainly was, that a corporation being a body politic, and invisible, could neither act nor speak, except by its common seal, (Bac. Abr. Tit. Corporations and Capacities,) or as it was expressed in argument in Rex v. Bigg, (3 P. W. 423,) the common seal was the hand and seal of the corporation. But that dogma, never well founded in point of reason, was from the first subject to considerable qualification, and has undergone, from time to time, still further limitations.

Matters of small amount and frequent recurrence were always treated as exceptions from the rule. It is difficult to understand the principle upon which that class of cases is said to have proceeded. Had the rule rested upon a different foundation it might have been relaxed for purposes of convenience, but being a rule of necessity, and not of policy, it is difficult to understand how it can be made to consist with the cases to which I have referred. See observations of *Macaulay*, C. J., in Marshall v. The School Trustees of Kitley (4 C. P. U. C. 373), and of *Patteson*, J., in Beverley v. The Lincoln Gas Light & Coke Co (6 A. & E. 844.) In Henderson v. The Australian Steam Navigation Company, already cited, (25 L. T. 234,) *Erle*, J., says, "It would be very dangerous to vest the exception upon the ground of frequency or insignificance; nor do I gather from the cases that that has been put forward as the principle. Certainly, as to trading corporations, the exception has not been so limited; and I think that the soundest princip'e on such a matter is too look to the nature and subject matter of the contract, and if that is found to be within the fair scope of the purposes of incorporation, to hold the contract binding, even though not under seal." The doctrine propounded by Mr. Justice *Erle*, if it be sound, and I very much incline to think it so, would furnish a solution for most of the difficulties which have arisen upon the subject; but upon that point, which does not necessarily arise in the case before us, we need not express any opinion, because the plaintiff's right to maintain this action may be rested, as it seems to me, on well-established principles.

When it had been determined that the corporate will might be ascertained in certain cases otherwise than through the common seal, and that, as a necessary consequence, assumpsit might be maintained in such cases, either by or against corporations even upon executory contracts, the difficulty of maintaining the rule as to torts and executed contracts must have been obvious. Had the old dogma been maintained in its integrity, a corporation could not have been liable in tort unless the agent had been appointed or the act adopted under the corporate seal, and in no case could a promise have been implied by law from conduct; and upon reasoning of that sort the liability of corporations under such circumstances has been from time to time resisted. But the inconvenience and injustice of such a rule was felt to be intolerable. Had this been the law, corporations would have been, as Mr. Justice *Coleridge* has expressed it, a great nuisance.—Hall v. Mayor of Swansea (Q. B. 544). And it is now well settled that corporations aggregate are liable in tort although there has been nothing under the common seal authorising the agent, or adopting his act. Yarborough v. The Bank of England (16 East 6), Smith v. Birmingham Gas Company (1 A. & E. 526), Eastern Counties Railway Co. v. Broom (15 Jur. 297). Again, when land has been used and occupied by a corporation, the law implies a promise to pay a reasonable compensation. Dean and Chapter of Rochester v. Pierce (1 Camp. 466), Mayor of Stafford v. Till (4 Bing. 75), Lowe v. London and North Western Railway Co. (17 Jur. 375). And when money has been wrongfully received, assumpsit for money had and received may be maintained. Hall v. The Mayor of Swansea (5 Q. B. 526).

Now, if trover and trespass may be maintained under the circumstances to which I have alluded, and if the law implies a contract when land has been used, or moneys wrongfully received, it is difficult to understand why the same principle should not be applied wherever the contract, being legal, has been executed, and the corporation has received all that it could have demanded if there had been a contract under the corporate seal. The argument seems to me, I must confess, conclusive. In Hall v. The Mayor of Swansea (5 Q. B. 526), Lord *Denman* rests the judgment of the court of Queen's Bench, which has not, I believe, been questioned, upon the ground of necessity; and that language of Lord *Denman* has been since translated by Lord *Campbell* to mean "no other than a moral necessity; that the defendants should pay their debts;" or as Mr. Justice *Erle* has expressed the same sentiment, "that it was absolutely necessary that the defendants should be compelled to do that which common honesty required."—Low v. The London and North Western Railway Company (17 Jur. 376). Now, if the necessity in Hall v. The Mayor of Swansea was the moral necessity of compelling the defendants to do what common honesty required, assuredly that necessity exists to as great an extent at least in cases circumstanced like the present, when the consideration has been executed and the corporation has received all that it could have required if there had been a formal contract under the corporate seal.

But the distinction between executed and executory contracts does not depend upon the reason of the thing, however clear: it has been repeatedly recognised by judges of the greatest eminence; in The East London Waterworks Company v. Bailey (4 Bing. 287,) *Best*, C. J., in enumerating the cases in which a corporation is liable, although no contract has been executed under the corporate seal, says, "The first is when the contract is executed; in that case the law implies a promise, and a deed under seal is not necessary, as we have lately decided in the Mayor of Stafford v. Till, when it was holden that a corporation might maintain assumpsit for the use and occupation of the land." And in Beverley v. The Lincoln Gas Light and Coke Company (6 A. & E. 845), Mr. Justice *Patteson*, who delivered the judgment of the court of Queen's Bench says, "In the progress, however, of these exceptions it has been decided that a corporation may sue in assumpsit on an executed parol contract; it has also been decided that it may be sued in debt on a similar contract: the question now arises on the liability to be sued in assumpsit. It appears to us that what has been already decided in principle warrants us in holding that the action is maintainable."

It is said, however, that the distinction between executory and executed contracts was exploded by Church v. The Imperial Gas Light and Coke Company (6 A. & E. 846), which has been treated by some as a governing case upon the subject. I am not certain that Lord *Denman's* language, properly interpreted, means that; his lordship's object was to negative the distinction between executed and executory contracts—not generally—but as to contracts of a particular class: contracts which would be valid without the corporate seal; and in parts of the judgment the language is distinctly limited to that object; it is said, for instance, at page 859, "assuming it, therefore to be now established in this court that a corporation may sue or be sued in assumpsit *upon executed contracts of a certain kind*, among which are included such as relate to the supply of articles essential to the purposes for which it is created the first question will be, whether, *as affecting this point, and in respect of such contracts*, there is any sound distinction between contracts executed or executory." The question proper in that principle is strictly confined to contracts of the particular class to which I have referred, and viewed as a solution of that question, the judgment is quite sound; it must be admitted, however, that the language in other parts is much less guarded, and that the case has been often assumed to be an authority for the general proposition. The Mayor of Ludlow v. Charlton (6 M. & W. 825), Clark v. The Guardians of the Cuckfield Union (16 Jur. 686)

In answer to the argument deducted from Church v. The Imperial Gas Light and Coke Company, and the subsequent authorities in which that case has been recognized, an argument which possesses, I must admit, considerable force, I have to say, first, that the point was not decided. Secondly, that Lord *Denman's* reason-

ing as an argument for the general proposition, is, in my humble judgment, quite conclusive. And, lastly, that since the decision of the case alluded to, the distinction in this respect, between executory and executed contracts, has been recognized by the Court of Queen's Bench, including Lord *Denman* himself, on more occasions than one, and has received the sanction of other judges of still greater eminence In Sanders v. The Guardians of St. Neots Union (8 Q. B. 810), Lord *Denman*, delivering the judgment of the Court of Queen's Bench. says, "A motion in this case was made for a new trial on the ground that no contract under seal was proved against the defendants. But we think that they should not be permitted to take the objection, inasmuch as the work in question, after it was done and completed, was adopted by them for the purposes connected with the corporation." In Doe dem. Pennington v. Tanniere (12 Q. B. 1013), the same learned judge observes, "To enforce an executory contract against a corporation, it might be necessary to shew that it was by deed; but where the corporation have acted as upon an executed contract, it is to be presumed against them that every thing has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made." In The Fishmonger's Company v. Robertson (5 M. & G. 193), Chief Justice *Tindal* says, "The question therefore becomes this, whether, in the case of a contract executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained, it is an answer to an action of assumpsit by the corporation, that the corporation itself was not originally bound by such contract, the same not having been made under their common seal. Upon the general ground of reason and justice no such answer can be set up." Lastly, in the Governor and Company of Copper Mines in England v. Fox, Lord *Campbell* intimates his opinion that the distinction between executory and executed contracts had not been exploded by Church v. The Imperial Gas Light and Coke Company.

Upon the whole, I quite concur in the principle emunciated upon the subject so often and so clearly by his lordship, the Chief Justice, and by the late Chief Justice of the Court of Common Pleas; I am of opinion that the distinction, in this respect, between executed and executory contracts is sound, and ought to be maintained. I do not disguise from myself that this opinion is opposed to many cases in the Exchequer, and to much that is to be found elsewhere; but when these decisions are in such manifest and painful conflict, it becomes the duty of the court to adopt that conclusion which appears upon the whole most consistent with the principles of justice; and for the reasons already stated, I am of opinion that the plaintiff is entitled to recover, and that the decision of the Court of Common Pleas should be reversed.

HAGARTY, J.—I wish to state very briefly the grounds on which I consider the plaintiff in this case entitled to recover.

It is undisputed that he completed the work remaining to be done under the sealed contract entered into with the first contractor Wallace. That he worked regularily under the architects of the defendants, who were authorized by resolutions of the council to employ persons to do this very work.

The defendants were incorporated for the express purpose of erecting a gaol and court house, and were declared "to have all corporate powers necessary for the purpose of carrying into effect the object of their erection under such provisional municipal council, and none other." Nothing is said in the statutes as to their having a corporate seal, or how they are to contract.

The plaintiff has proved that he did the work—its value, and that the defendants are in possession of it, using it as their gaol and court house and council chamber, and the courts of assize and *nisi prius* sit regularly therein.

We are now asked by the defendants to support them in ignoring all this, and, assuming that they never contracted to employ the plaintiff or pay him for his work. I hope and believe the law will not be found so rigid in is application to the wants of communities. I will not pretend to reconcile all the cases in this point. I find that corporations are held liable in trespass; in trover; in case for non-feasance; in assumpsit for money had and received, and many other cases in which the acts complained of in the implied promise sought to be enforced were not proveable by their common seal. This, without entering upon the constantly cited cases in which, some variance seems to exist in the language held by the different courts as to the peculiar circumstances under which a departure from the law is generally applicable to corporations requiring them to contract under seal, is allowable.

The cases I have referred to are those in which there seems to be no dispute as to the liability.

The presence of the corporate seal seems required to speak the voice, to shew the assent of the corporations. In the cases put, the liability is enforced without the evidence under seal, on the intelligible ground, that, having done a wrong thing, they must not be heard to say they did not either agree to do it under seal, or so promise to make restitution.

I am aware of the important difference between trading and municipal corporations, and I desire to bear them constantly in mind. In the well-known Hall v. Mayor, &c., of Swansea, (5 Q. B. 547,) Lord *Denman* says, "If the corporation have helped themselves to another's money, it would be absurd to say that they must bind themselves under seal to return it."

Patteson J., says, "The true ground is necessity. It cannot be expected that a corporation should put their seal to a promise to return moneys which they are wrongfully receiving."

Once having conceded that trover for a wrongful conversion of chattels, and assumpsit for money had and received will lie against a corporation, municipal or trading, it really seems to me, with the deepest respect for the opinion of those who differ from me, to be a play upon words to hold that they can enter into, occupy, and use as their own a building erected for them by another, and ignore all liability therefor. They could not resist an action of trover at plaintiff's suit for any loose bricks or boards which he had left lying on this land; but having affixed the same bricks and boards to their freehold, they can say they belong to them, and refuse to pay for them in an action for the price —Australian Steam Navigation Company v. Marzetti (11 Ex. 228.)

CHAMBERS.

Reported by ROBERT A. HARRISON, Esq., *Barrister-at-Law.*

ARCHIBALD MCCALLUM V. PETER SNIDER AND JOHN MAYNARD.

Stat. 2 Wm. & Mary, ss. 1, cap. 5, s. 5—Construction—Damages—Costs.

It is enacted by the Imp. Stat. 2 Wm. & Mary, ss. 1, cap. 5, s. 5, that in case a distress and sale shall be made for rent, pretended to be in arrear and due, where in truth no rent is in arrear or due, &c., that then the owner. &c., of such goods or chattels distrained and sold as aforesaid, shall and may by action of trespass or upon the case to be brought against the person or persons so distraining. &c., *recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit. Held*, that the Legislature did not mean double of the value of the goods &c., distrained *and* double costs, but only double of the value of the goods, &c., and full or ordinary costs of suit.

(Chambers, June 30, 1860.)

This was a summons obtained by Mr. *McMichael*, calling upon the plaintiff to show cause why the Bill of costs taxed in this cause, should not be referred back to the master to be revised, and why on such revision the sum of £18 19s 2d, being the amount taxed and added to the regular full costs in this cause, on the principle that double costs were taxable to the plaintiff in this cause, should not be struck off and the said costs reduced by that amount, on the ground that this action was brought under the Statute 2nd William & Mary, chap. 5. section 5, for destraining and selling when no rent was due, the jury gave a verdict for double the value of the goods distrained and sold, and that under such statute double costs, or any costs above full costs, could not be and should not have been awarded, and that there is no other statute under which the Plaintiff should have more than full costs in this cause, and that the allowance of more than full costs is contrary to the practice of this court, and upon grounds disclosed in affidavits and papers filed, and why the *fi. fa.* issued in this cause (if any) should not be lessened that amount, and why the Plaintiff should not pay the costs of this application and of the revision.

Mr. *Smith* showed cause.

BURNS, J.—This action is brought to recover double value of the goods distrained and sold, when in truth there was no rent

due, and is brought under Stat. 2 Wm. & Mary, sess. 1, ch. 5, sec. 5. The words of the Act are these, "That the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators shall and may by action of trespass, or on the case to be brought against the person or persons so distraining any or either of them, his or their executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit."

The master, in taxing the costs to the plaintiff, has allowed the Plaintiff doubled costs, and has done so, as I understand, upon the principle which governs where a Plaintiff recovers treble damages and costs, that it means treble costs as well as damages, and consequently that in this case, the Plaintiff having recovered double value, he is entitled to double costs. This decision of the Master is questioned by the application to revise the taxation.

There is no doubt, that upon the construction of the 4th sec. of the same Act, where an action is given for pound-breach or rescue of goods, and which enacts that the person grieved shall "recover his or their treble damages and costs of suit against the offender;" the Court held that the Plaintiff was entitled to treble costs as well as damages. It was so held on the ground that the word "treble" applied to the costs as well as to the damages. *Lawson* v. *Story* (19 Ld. Ray) is a direct authority for it. The case, however, seems to have been questioned in *Butterton* v. *Furber* (1 Brod. B. 517), which was an action upon the 43 Eliz. cap. 2. The court of Queen's Bench, in *Deacon* v. *Morris* (2 B & Ad. 393), which was an action on 29 Eliz. cap. 4, affirms the principle that where the word "costs" is coupled with the word "damages," treble costs should be awarded as well as damages.

It should be observed, however, that in all these cases of damages being awarded, that it is not done by the Jury. The jury give what damages they think proper, and then the damages as well as the costs are trebled, in the manner which is understood to govern in awarding treble damages or costs at the entry of the Judgment.

In the present case, the Jury awarded as they were told to do, double the value of the goods as damages. That was the proper direction to give, as appears from *Masters* v. *Farris* (1 C. B. 715). There is in this case no awarding double damages, as in cases under the 4th section of the Act. The plaintiff recovers only single damages, but the Jury are bound by the Statute to award those single damages on the principle of double of the value of the goods distrained and sold. Then, when we come to the costs to be given, the words are, "together with *full* costs of suit." There is nothing coupling the word "costs" with the award of damages, as in the other case. It is quite clear to my mind that the expression does not mean double costs, but only means the full costs of suit whatever they may be.

Then the Plaintiff contends that if he is not to be allowed double costs, the Statute must mean something more than a Plaintiff's ordinary costs, and he contends that full costs should be construed to mean costs between solicitor and client, and that if double costs be disallowed, then he should have a revision upon that principle. The case of *Jamieson* v. *Trevelyan* (24 L. J. Ex. 74), upon the statute 17, Car. 2, cap. 7, sec. 3, using precisely the same expression, is an express decision to the effect that, "full costs of suit" means nothing more than the "ordinary costs."

The Defendants' summons to have the taxation revised, in order to disallow the double costs, must be made absolute and with the costs of this application and revision.

Summons absolute with costs.

MARTHA PALMER v. MICHAEL RODGERS.

Civil action—Arrest—Grounds for discharge.

The mere fact that both plaintiff and defendant are foreigners, does not of itself warrant the setting aside of an arrest made under a writ of capias.

A technical objection to the form of the affidavit to arrest, must be made before the time for putting in bail expires.

An objection to the effect, that although the writ of capias is issued from the Common Pleas, yet the affidavit to arrest is not intitled in any Court, is a technical objection to the form of the affidavit.

Quare,—Can a defendant apply to set aside a writ of capias, or the arrest made thereunder, on the alleged ground that there was not at the time of the making of the affidavit good and probable cause for the plaintiff believing that the defendant, unless forthwith apprehended, was about to quit Canada with intent to defraud his creditors, or the plaintiff in particular?

Quere,—If such be a good ground of application, has a Judge, in Chambers, authority to entertain the application?

Semble,—A person in custody on a criminal charge, may be detained in custody in a civil suit.

Where defendant was illegally detained in close custody, without warrant, at the instance of the plaintiff, on a charge involving the subject matter which was afterwards stated in the affidavit to arrest, as creating the demand for which the defendant was ordered to be held to bail in the cause, the defendant was discharged from custody on entering a common appearance to the action.

(Chambers, 31 May, 1860.)

This was a summons obtained by the defendant upon the plaintiff, to show cause why the defendant should not be discharged out of custody in this cause, and the order to hold to bail and capias, and the arrest of the defendant thereunder, and subsequent proceedings had thereon, set aside on the following grounds:

1st.—Because the defendant was a foreigner and a citizen of the State of Michigan, one of the United States of America at the time of the making of the affidavit to hold to bail, and the order for a capias to issue in this cause, and such arrest under the writ of capias in this cause, and had not been a resident of this country, and the affidavit to hold to bail could not be legally made alleging that there was good and probable cause for believing that the defendant, unless he should be forthwith apprehended, was about to quit Canada with intent to defraud his creditors generally, or the plaintiff in particular, for the reason above stated.

2nd,—Because the plaintiff is a foreigner and a citizen of the United States of America, and resided in the said State of Michigan, at the time of the making of the affidavit, to hold to bail, the order for said capias to issue, and the arrest in this cause; and that the defendant was during the respective times, aforesaid, a citizen of such State, and a foreigner, and the affidavit to hold to bail required by the statute in such case, could not under such circumstances be legally made for the reasons before stated.

3rd,—Because the affidavit filed on which the order to hold to bail in this cause was granted, was not at the time of the issuing such writ of capias, nor from thence, hitherto, hath said affidavit been entitled in any count, and therefore the writ of capias issued out of the Court of Common Pleas is not supported by any affidavit to hold to bail intitled in that court.

4th,—Because there was not at the time of the making such affidavit, to hold to bail, on said order, or the issuing such writ of capias, a good and probable cause for the plaintiff believing that the defendant, unless he should be forthwith apprehended, was about to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular.

5th,—Because the plaintiff caused the defendant to be arrested while he was in custody under criminal process, and privileged from arrest for debt.

6th,—Because the plaintiff procured the defendant's arrest in a fraudulent manner, by causing his person to be detained in custody under a pretended criminal proceeding, to enable her to arrest him for debt in this cause, and by duress and imprisonment resorted to by the plaintiff to enforce his detention, to enable her to arrest the defendant for debt in this cause.

Benson, for the application.

J. B. Read, contra.

The following cases were cited during the argument:—*Frear* v. *Ferguson*, 2 U. C. Cham. R. 144. *Swift* v *Jones*, 6 U. C. Law Journal, 63. *Barry* v *Eccles*, 8, U. C., Q. B. R., 112. *Robinson and Harrison's* Digest, p. 51.

RICHARDS, J.—As to the different grounds mentioned in the summons for defendant's discharge from custody, I have arrived at the following conclusions.

1st and 2nd,—The mere fact that plaintiff and defendant are both foreigners, does not of itself, in my judgment, warrant the setting aside of the arrest; *Terry* v. *Comstock*, in Chambers, January, 1860, a case much like this, may be referred to on that point.

3rd,—This is an objection to the *form* of the affidavit, in its nature technical, and I think defendant should have applied before the time for putting in bail had expired; *Fownes* v. *Stokes*, 4 Dowl, P. C. 125; *Patterson's Common Law Practice*, 729; *Primrose* v. *Baddeley*, 2 Dowl. P. C. 350; *Sugars* v. *Concanen*, 5 M. & W. 30.

4th,—I am uncertain whether I ought to set aside the arrest on this ground or not. I have doubts as to the propriety of doing so and stronger doubts as to my authority as a Judge in Chambers to do so.

5th.—I am not prepared to say that a person in custody on a criminal charge may not be detained in a civil suit.

6th.—I think the defendant intitled to his discharge on this ground. He was illegally detained without warrant at the instance of the plaintiff, on a charge involving the subject matter which is stated in the affidavit as creating the demand for which the defendant was ordered to be held to bail in this cause. After detaining him to answer the criminal charge, and knowing it could not be sustained, she proceeds to arrest him in a civil suit, involving the same matters. Though I find no case expressly in point, I think the analogy sufficiently clear to order the discharge of the prisoner from custody on this ground, on entering a common appearance to the action.

CHANCERY.

(*Reported by* THOMAS HODGINS, Esq., *Barrister-at-Law.*)

SMITH v. PORT HOPE HARBOUR COMPANY.

Practice—Dismissal of Bill by plaintiff before decree.

After a cause has been heard and is standing for judgment, the plaintiff cannot dismiss his bill on *præcipe*, but only on special motion.

After the hearing and while the cause was standing for judgment, the plaintiff dismissed his bill on *præcipe*, with costs. The defendants having prayed cross-relief in their answer, *Cattanach* moved to set the order to dismiss aside, and

ESTEN, V. C., granted the motion, holding that such an order could, at that stage of the suit be granted only on special motion.

Afterwards on the motion of *G. D. Boulton*, notice having been given to the defendants,

ESTEN, V. C., made an order to dismiss the bill, on the ground that the defendants could not obtain cross-relief in this suit.

GOODHILL v. BURROWES.

Practice—Sale or Foreclosure—Property unsaleable.

Where a sale has been asked for by a defendant and granted, and has proved abortive, the proper course is to file a petition to have the decree carried out.

In this case a decree for sale has been drawn up on the plaintiff consenting thereto, and waiving the deposit. Several attempts were made to sell the property for the amount of the debt, but it would not bring the full amount; and application was now made for an order, absolute, for foreclosure.

The CHANCELLOR.—In this case, it appears that the plaintiff is laboring under great hardship, that there have been numerous attempts to sell the property to pay off the mortgage debt, but they have failed owing to the property not being worth the amount due. In some cases the Court has imposed terms, that if the sale did not bring the amount due, then foreclosure; but there is no such provision in this decree. A rehearing, I think, would not do. The only remedy is to sell on the usual terms. I think the proper course is to file a petition in the nature of a bill to carry out the decree. A party having asked for a sale, and failed to sell for the amount required, should not be allowed to keep a decree alive to the injury of the plaintiff.

COUNTY COURTS.

IN MATTERS OF APPEAL.

(Before His Honor Judge MCKENZIE, County Judge for the United Counties of Frontenac, Lennox and Addington.)

H. CARTWRIGHT AND THE CORPORATION OF THE CITY OF KINGSTON.

SARAH A. WILSON AND THE CORPORATION OF THE CITY OF KINGSTON.

WM. HOLDITCH AND THE CORPORATION OF THE CITY OF KINGSTON.

W. M. HERCHMER AND THE CORPORATION OF THE CITY OF KINGSTON.

Non-Residents—Assessment of personal property—Con. Stat. U.C. c. 55, ss. 38, 39, 40.

Held, 1st. That the Assessment Act of Upper Canada requires every person to be assessed for personal property, at his place of business or place of residence. 2nd. That if the owners of personal property, being within a particular Municipality, be not themselves resident within that Municipality and have not a place of business within it, they cannot be properly assessed in respect of such personal property.

(11th July, 1860.)

These were appeals from the Court of Revision of the City of Kingston.

The appellant, H. Cartwright, was assessed for $1,000 stock in the Kingston Gas Light Company, and resided at the time the assessment was made, in the incorporated village of Portsmouth. The appellant, Sarah Ann Wilson, was assessed for $4,000 stock in the Kingston Gas Light Company, and resided in the township of Kingston when she was so assessed. The appellant, William Holditch, was assessed for $4,000 stock in the Kingston Gas Light Company, and resided at the time when he was assessed, at Plymouth, in England. The appellant, W. M. Herchmer, was assessed for $2000 stock in the said Kingston Gas Light Company, and resided at the time he was so assessed, at the incorporated village of Portsmouth, in Canada.

The appellants respectively appealed from the decision of the Court of Revision for the Corporation of the City of Kingston, to the County Judge, on the ground that they were not liable to be assessed for stock in the Kingston Gas Light Company, being non-residents, and having no farms, shop, factory, office, place of business, or place of residence within the limits of the Municipal Corporation of the City of Kingston.

J. A. Henderson, and *T. Parke, Junr.*, for appellants; *Agnew* for the Corporation.

MCKENZIE, Co. J.—By "The Consolidated Assessment Act of Upper Canada," the terms "Personal Estate" and "Personal Property," include "*shares in Incorporated Companies*," as well as goods, chattels, moneys, notes, accounts, and debts, at their full value, and all other property except land and real estate.—Consequently, the stock in question must be treated to all intents and purposes as personal property in the deciding of the appeals under consideration.

I find a plain and intelligent provision made in the Assessment Act in respect to the manner of assessing the land and real property of non-residents; but I find no such class of persons as non-resident owners of personal property recognized by the Act.—There are no such persons mentioned from the one end of the Act to the other. The framers of the Act must have had the common law idea of personal property before their eyes when they prepared it. According to the common law, personal property signified any moveable thing, quick or dead, belonging to and following the person into all lawful places. Personal property seems to be a thing appertaining to the person and moving with it. Whereas, "land" and "real property" are fixed, permanent and immoveable. Land, according to the Assessment Act, must be assessed in the "*Local Municipality or Ward in which the same lies*," no matter where the owner resides. But as to "personal property" the Act establishes a very different rule of assessment.

By the 38th section it is enacted, "That every person having a farm, shop, factory, office or other place of business, where he carries on trade, profession or calling, shall, for all personal property owned by him (wherever situate,) be assessed in the township, village or ward where he has such place of business at the time when the assessment is made." By the 39th section, it is enacted, "That if a person has two or more places of business in different Municipalities or Wards, he shall be assessed at each for that portion of his personal property connected with the business carried on thereat; or if this cannot be done, he shall be assessed for part of his personal property at one, and part at his places of business, or for all his personal property at one such place at his discretion." And by the 40th section, it is enacted, "*That if any person has no place of business, he shall be assessed at his place of residence.*" If the above words mean anything, they mean that a person must have such a place of business as is specified in the 38th section, or such a place of residence as is

mentioned in the 40th section of the Act, within the limits of the municipality, before he can be assessed for personal property in it.

Business or residence in a municipality seems to be the governing point for the assessment of personal property in it. It is not necessary here to inquire into the reason for placing the assessment of personal property in municipalities in Upper Canada upon such a footing. It is possible, however, that the Legislature wished to place non-residents on a more favourable footing than residents in this respect, with a view of encouraging the introduction of foreign capital into the Province, and as an inducement to non-residents to invest their money in public companies formed for local improvements and otherwise. Persons who carry on business in a municipality, or who may have a place of residence therein, stand in a different relation to the municipality from non-residents. The municipality owes many duties and obligations to residents, and such as carry on business in it—such as protection to property and person—municipal regulations for the maintenance of order—for repairs and improvements, and the like, which cannot be claimed by or extended to non-residents.

Be this as it may, the Assessment Act of Upper Canada requires that every person shall be assessed for personal property at his place of business or place of residence. And as the present appellants had no places of business or places of residence within the limits of the Municipal Corporation of the City of Kingston at the time they were respectively assessed for stock in the Kingston Gas Light Company now in question, they were improperly assessed for the same.

I therefore order that the Assessment Roll for Sydenham Ward be amended by striking out the name of H. Cartwright in respect to the $1000 assessed against her for so much stock in the Kingston Gas Light Company; that the Assessment Roll for St. Lawrence Ward be also amended by striking out the name of William Holditch in respect to the $4,000 assessed against him for so much stock in the same Company; that the Assesment Roll for Sydenham Ward be further amended by striking out the name of W. M. Herchmer in respect to the $2,000 with which he stands assessed for so much stock in the said Kingston Gas Light Company. At the hearing it was admitted that Sarah Ann Wilson is Executrix of the last will and testament of William Wilson, deceased; and that there is an office on Brock street in St. Lawrence Ward wherein the affairs of the estate under the will, are conducted and settled. I cannot accede to the views propounded by the learned counsel for the respondents, Mr. Agnew, in reference to the office or place of business. The office in question, would, no doubt, fit the liability of the appellant, Sarah Ann Wilson, for any personal property she held as executrix, but cannot be construed without straining the words of the statute to an unnatural and unwarrantable extent, to mean her place of business within the signification of the statute. It is not her place of business. She has no such place. It is the place of business of the executrix and executors of the will of the late William Wilson, deceased, out of which a liability to assessment in another form will arise, but cannot control her liability to be assessed for stock in question. I, therefore, order that the Assessment Roll for St. Lawrence Ward be further amended by striking out the name of Sarah Ann Wilson in respect to $4,000 with which she stands assessed for so much stock in the Kingston Gas Light Company.

The decision of the Court of Revision reversed.

(Before His Honor Judge ROBINSON, in the County Court of the County of Lincoln.)

FRENCH v. WEIR.

In this case the plaintiff sued the defendant on the common counts, including count for money had and received. At the trial in Sarnia, during the September sittings of the Court, it appeared in evidence that the defendant, being a contractor, had employed various sub-contractors, and among them certain persons under the name or firm of Featherstone, Gerard and Company, who were indebted to the plaintiff in a considerable amount; and these sub-contractors not being able to pay, and the defendant being indebted to them, one of them went with the plaintiff to the defendant, who obtained from the sub-contractor a receipt for the sum claimed in this suit, as so much money paid to him; and the defendant then wrote across the plaintiff's account, in pencil, "*if this account is correct pay it*," and directed this order to his clerk, who refused to pay it because it was only written in pencil. It was also proved that the defendant promised to pay the plaintiff's account, and had since that promise paid others of the same nature, to the extent of fifty-six cents on the dollar. It was also proved that the plaintiff was about to attach certain goods of sub-contractors, but did not do so on defendant's promise of payment.

At the close of the plaintiff's case, it was objected by *M. C. Cameron*, of Toronto, the defendant's counsel, that no case had been made out, there being no privity of contract established between plaintiff and defendant: that defendant promised in consideration of plaintiff not attaching to pay, there should have been a special count, and that there was no evidence whatever to sustain a verdict on the common counts.

The learned Judge seemed to think so too, but the plaintiff's counsel refusing to submit to a nonsuit, the case went to the jury, who found for the plaintiff and $106 86 damages, being at the rate of 56 cents on the dollar on plaintiff's claim.

In October Term, *Davis*, for the defendant, obtained a rule calling on the plaintiff to shew cause why there should not be a new trial on the law and evidence, and because there was no privity of contract and no cause of action that would sustain a declaration on the common counts; and because the verdict was perverse and against the Judge's charge.

Mackintosh shewed cause, contending that the plaintiff was clearly entitled to recover under the count for money had and received by the defendant to the use of the plaintiff, citing *Israel* v. *Douglas*, 1 H. Bl. 239; *Wilson* v. *Coupland*, 5 Pal. 228; *Walker* v. *Rostrom*, 9 M. & W. 411.

ROBINSON, Co. J.—The facts of this case seem to me to come fully within the principle established by *Walker* v. *Rostrom*, 9 M. & W. 411. There was an appropriation of a sum of money coming to Featherstone, Gerard, Bycraft and Company, from the defendant to the plaintiff. This arrangement was made by the defendant, the plaintiff, and one of the firm. According to Lord Abinger, such an arrangement could not be altered without the consent of all parties. The plaintiff can therefore recover the amount as money had and received to his use.

Rule discharged.

GENERAL CORRESPONDENCE.

TO THE EDITORS OF THE LAW JOURNAL.

Non-residents—Collection of Taxes.

GENTLEMEN,—I beg to ask you, through the press, in a way you may see fit to let it be known, whether the treasurer that gives the wild lands to the sheriff for sale every five years for taxes, or another that at the end of six or seven years offers them for sale, fulfils the Assetsment Act of 1853.

Lands assessed in 1855, due 1st May, 1856; in 1856, due 1st May, 1857; in 1857, due 1st May, 1858; in 1858, due 1st May, 1859; in 1859, due 1st May, 1860.

Please to let it be known whether the lands assessed in 1855 should now be offered for sale by the sheriff, and whether the county treasurers should not pay over the balance of wild land taxes when they strike the balance, and add 10 per cent. on the 1st May, and not on the 1st of January in the following year, as is the case in certain counties.

The explanation of the above will be of great service to new townships.

I have the honor to be, Gentlemen, your obt. servt.,

J. F.,

Treasurer of a new Township.

Tilbury East, 25th June, 1860.

[Our correspondent does not seem to understand the working of the Assessment Act as regards the collection of taxes due on the lands of non-residents. Rather than answer his questions in detail, we shall explain the law in general terms.

No land shall be sold for taxes unless a portion thereof has been due for five years. (Con. Stat. U. C. cap. 55, sec. 123.) Then the treasurer of the county is to issue a warrant to the sheriff of the county, commanding him to levy upon the land for the arrears due thereon, with costs. (Sec. 124.) After the issuing of the warrant, the treasurer is to receive no payment on account of the sums contained in the warrant. (Sec. 128.) Immediately upon receipt of the warrant, the sheriff is to advertise a list of the lands. (Sec. 128.) The day of sale is to be more than three months after the first publication of the list. (Sec. 130.) The sheriff, at the time and place appointed for the sale, is to sell by public auction so much of the land as may be sufficient to discharge the taxes, and all lawful charges in and about the sale, and the collection of the taxes. (Sec.137.) Within one month after sale, the sheriff is required to make a detailed return to the treasurer, of each separate parcel of land included in the warrant, and to pay him the money levied by virtue thereof. (Sec. 144.) The owner of the land sold may, at any time within one year from the day of sale, redeem the estate sold, by paying or tendering to the county treasurer, for the use and benefit of the purchaser, the sum paid by him, together with 10 per cent. thereon. (Sec. 148.) All moneys received by the county treasurer, on account of the taxes on non-residents' lands, whether paid to him directly or levied by the sheriff, constitute a distinct and separate fund, called the Non-resident Land Fund of the county. (Sec. 154.) The treasurer is required to open an account for each local municipality with that fund. (Sec. 155.) The surplus moneys in the fund may, by the Council of the county, be from time to time, by by-law, apportioned amongst the municipalities ratably, according to the amounts received and arrears due on account of the non-resident lands in each municipality. (Sec. 163.)—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. Thompson v. Ross. *Nov.* 2.

Seduction—Services—Child in service doing work for parent with permission of master.

The daughter of the plaintiff was in the service of the defendant's mother, and with the permission of her mistress, worked to assist her mother in making shirts at her mistresses house, after the domestic labours of the day were at an end.

Held that there was no such service rendered to the mother as entitled her to maintain an action for seduction.

C. P. Morris v. Barrett. *Nov.* 15.

Payment under a judge's order—When to be made—The day named in the order falling on Sunday.

Where a payment was to be made under a judge's order on the 25th day of the month, and that day fell on a Sunday, and tender of it was made on the Monday before judgment had been signed which was afterwards done.

Held, that the tender was made at the proper time and that the judgment should be set aside.

C. P. Hemmings v. Hall, et al. *Nov.* 9.

Escape—Damages—Payment by execution creditor to Sheriff—Receipt of money from sheriff by plaintiff's attorney.

A. having recovered in an action judgment against B. for £45 5 B. was taken in execution on a *ca sa*, B. paid the £45 5 to the sheriff who thereupon let him out of custody. The attorney who had been employed to issue execution authorised F. to receive the money so paid to the sheriff; the sheriff paid F. £20 of the £45 5 on F. promising to bring the Attorney's receipt for the money, whereupon F. was to receive the remaining £25 5. F. disappeared with the £20. A brought an action against the sheriff for the escape, the sheriff paid £25 into court, and A. replies—damages *ultra*.

Held, that on this issue the defendant was entitled to the verdict.

C. P. Ramazzotti v. Bowring. Nov. 24.

Undisclosed principal—False representation by clerk—What question to be left to the jury.

In an action by an undisclosed principal for goods supplied to the defendants by his clerk N. It appeared that N. was indebted to the defendants, and that upon B., one of the defendants, applying to him for payment, he represented himself to be "the Continental Wine Company," and got him to take some wine and spirits in part payment of the debt There was no evidence to show that the defendants knew that N. was only clerk to the plaintiff. The Judge's direction to the jury was, that if they believed that the Continental Wine Company was at the time of the contract being entered into carried on by the plaintiff, he was entitled to recover, notwithstanding that N. represented himself to be the Continental Wine Company and to be the principal in the contract.

Held, that the direction was wrong, and that the proper question to be left to the jury was, whether the plaintiff allowed N. to hold himself out as the owner of the Continental Wine Company, so that a person dealing with him might suppose that he was dealing with the principal.

EX. White v. Leeson. Dec. 7.

Tenant for life—Act enabling to grant leases—Power to lay out ways.

By a private act for enabling a tenant for life to grant leases, it was enacted that "it should be lawful for him to lay out and appropriate any part of the land and hereditaments therein authorised to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate and the accommodation of the tenants and occupiers thereof."

Held, that it was competent for the tenant for life to lay out and appropriate part of the lands as a private road, and grant a right of way thereupon to some only of the lessees under the powers of the act.

It was contended that a road laid out pursuant to the act should by virtue of the act be for the benefit of all. But the Court said that would go to show that if a square with large houses were set out with an enclosure, all the tenants on the estate would have a right to walk in it, though they live in cottages at a distance.

EX. Warlor v. Harrison. Nov. 26.

Auctioneer—Sale without reserve—Principal and Agent—Pleading—Amendment.

An advertisement of sale by auction without reserve, means that neither the vendor, nor any person on his behalf shall bid, and that the property shall be sold to the highest bidder.

At such sale the plaintiff was the highest *bona fide* bidder for a mare; but the auctioneer knocked down the lot to the next bidder, who was the owner, and entered his name in the sale book as purchaser. The plaintiff tendered the price which he had bid, and demanded the mare, but the auctioneer refused to deliver her to him.

Held, that the auctioneer was liable to the plaintiff in an action for breach of contract.

Held, also, by MILLES J., and BRAMWELL, B. that upon the evidence in the case the auctioneer was liable to the plaintiff for the breach of an undertaking on his part that he had authority to sell without reserve, and that the declaration ought to be framed accordingly.

Held, (affirming the judgment of the Queen's Bench) that the auctioneer was not liable upon a count charging him with a breach of duty as agent of the plaintiff.

Before the contract has been complete, the owner may revoke his authority to the auctioneer to sell; but at the peril of having to indemnify the auctioneer, if, by reason of his employment he has incurred any liability. But held that in this case the bidding of the owner of the mare did not amount to such revocation.

The court will exercise largely it powers of an amendment, in order to determine the real question in controversy; and in the case allowed the pleadings to be amended.

CHANCERY.

M. R. VEAL v. VEAL. July 26.

Donates Mortis Causa—*Unindorsed Promissory Note.*

A delivery of unindorsed promissory notes payable to the donatrix, held a sufficient delivery to constitute good *donates mortis causa.*

M. R. GOULDER v. CANNON. Nov. 5.

Will—Separate estate—Husband and Wife.

A devise to trustees for "the use and benefit of a woman, she to receive the rents from the tenants herself whether married or single," does not create a separate use.

A direction in a Will that no sale or mortgage should be made by the devisee will go for nothing, unless the estate be properly limited to him.

L. C. PIGGOTT v. STRATTON. Nov. 12.

Building lease—Covenant—Representation.

A lease for 999 years, with restrictive covenants as to the mode of building upon the land demised, was granted to S., who sold a house built thereon to P., representing that he S., was prevented by his lease from building on other parts of the land, so as to interrupt the sea view. S. also granted an under lease to H., to whom S. made similar representations; S. covenanting to observe the lessees' covenants in the original lease, and to indemnify H. in respect to any breach. H. assigned his under lease to P. Subsequently S. surrendered his original lease, and obtained a fresh one not containing the restrictive covenants.

Held, that the covenant of S. in the under lease to observe all the covenants in the original lease, had the same effect as if the latter covenants had been repeated at length in the under lease; and, also, that S. was bound by his representations.

L. C. THIEDEMANN v. GOLDSCHMIDT. Nov. 8.

Bill of Exchange—Acceptance obtained by fraud—Title of indorsee for value—Jurisdiction.

H. drew a bill of exchange on the plaintiff, and induced him to accept it by sending with it a forged bill of lading. H. then indorsed the bill of exchange to the defendants for value without notice of the forgery. The plaintiff filed a bill against the indorsers, to restrain them from suing him at law, and praying that the bill might be delivered up to be cancelled.

Held, that the fraud practiced on the acceptor was no defence against the indorsers for value.

Fraud being a good defence at law to an action on a bill of exchange, there is no ground for seeking relief in equity. And *semble* the bill in the present case would have been demurrable if it had not prayed that the bill of exchange might be delivered up.

M. R. PEDDER v. PEDDER Nov. 11.

Revivor—Executor.

Where there is a sole plaintiff in a suit, and a sole defendant, and the defendant dies, having appointed the plaintiff his sole executor, an order to revive may be obtained by the plaintiff as executor, against the persons beneficially interested who have been summoned to attend the proceedings in Chambers.

M. R. *In Re* DAVIE, *Exparte* WHITE. Nov. 12.

Taxation—Solicitor—Costs.

Where a bill of costs is paid under a protest, an order to obtain some document on which the solicitor whose bill of costs is sought to be taxed has a lien, the objectionable items in the bill ought to be specified before payment.

V. C. S. HANCOCK v. ROLLISON. Nov. 16.

Practice—Dismissal of bill for want of prosecution.

A bill was served on a defendant on the 14th of March, to which an answer was put in on the 28th of April following; the answer became sufficient on the 16th of June. No further steps having been taken in the cause, the defendant in the following November, moved to dismiss for want of prosecution. The court refused the plaintiff leave to amend, and dismissed the bill with costs.

M. R. STAMSFIELD HALLAM. Nov. 11.

Husband and Wife—Equity of Redemption—Mortgage.

Where a husband and wife have joined in a Mortgage of the wifes copyhold and freehold estate; and the equity of redemption has been reserved to the husband and his heirs *simpliciter*, and the husband during their joint lives pays off the mortgage with the wifes money, and dies, leaving their son his heir-at-law; the court will, in the absence of any evidence of an intention, alter the course of the descent of the equity of redemption, decreeing a reconveyance by the husband's heir to the use of the wife in fee.

M. R. THOMPSON v. ROBINSON. Nov. 18.

Will—Legacy—Nephew and Niece and Grand Nephew, and Grand Niece.

A bequest to A. and B., as "nephew and niece," although in the subsequent part of the Will, the testator alludes to them as the children of his nephew, will not be sufficient to indicate that in a subsequent bequest to nephews and nieces," the testator intended that his grand nephews and grand nieces should be included.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

MICHAEL LAWLOR, Esq., M.D., Associate Coroner City of Toronto.

LORENZO CLOSSON, Esq., M.D., Associate Coroner United Counties of York and Peel.

DANIEL COON, Esq., M.D., Associate Coroner County of Perth.—(Gazetted 21st July, 1860.)

NOTARIES.

ROBERT MORTIMER WILKISON, of Kingston, Esquire, Barrister at Law, to be a Notary Public in Upper Canada.

JOHN WESLEY KERR, of Cobourg, Esquire, Attorney at Law, to be a Notary Public in Upper Canada.

GEORGE SECORD, of Gainsborough, Esquire, to be a Notary Public in Upper Canada.

CHRISTOPHER ZOEGER, of Petersburgh, Esquire, to be a Notary Public in Upper Canada.

WILLIAM CANNON, of Westmeath, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 21st July, 1860.)

TO CORRESPONDENTS.

A DIVISION COURT CLERK—F. OSLER—Under "Division Courts," p. 181.

J. F.—Under "General Correspondence," p. 190.

DIARY FOR SEPTEMBER.

1. Saturday..... Paper Day, Common Pleas.
2. SUNDAY..... 13th *Sunday after Trinity.*
3. Monday..... Last day for notice of Examination in Chancery, Sandwich and Whitby. Paper Day, Queen's Bench. Last day for notice of Trial in County Courts.
4. Tuesday..... Chancery Examination Term, Toronto, commences. Paper Day, Common Pleas.
5. Wednesday ... Paper Day, Queen's Bench.
6. Thursday ..... Paper Day, Common Pleas.
8. Saturday ..... TRINITY TERM ends.
9. SUNDAY ..... 14th *Sunday after Trinity.*
10. Monday..... Last day for notice of Examination in Chancery, Chatham and Cobourg.
11. Tuesday..... Last day for service of Writ for Toronto Fall Assizes. Quarter Sessions and County Court sitting in each County.
16. SUNDAY ..... 15th *Sunday after Trinity.*
17. Monday..... Last day for notice of Ex. in Chancery, London & Belleville.
18. Tuesday..... Chancery Examination Term, Sandwich & Whitby, commences.
21. Friday ..... Last day for declarations for Toronto Fall Assizes.
23. SUNDAY ..... 16th *Sunday after Trinity.*
24. Monday..... Last day for notice of Examination in Chancery, Brantford and Kingston.
26. Tuesday..... Chancery Examination Term, Chatham & Cobourg, commences.
29. Saturday..... Last day for notice of Trial for Toronto.
30. SUNDAY ..... 17th *Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

SEPTEMBER, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

SO "*Henry Tompkins* $25 '60." *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The* "60" *has reference to the year, and not to the amount represented as due.*

THE COMMON SCHOOL ACT—EXTRA-JUDICIAL OPINIONS.

The Act of last Session (cap. 49) "to amend the Upper Canada Common School Act," discloses a new feature in legislation upon which we feel bound to remark. So singular, and if acted on, so mischievous a provision as that contained in the 23rd section may well invite discussion. The few remarks we purpose to make are offered with a view to draw the attention of our readers to the Act, rather than with a design to discuss the subject of it at this time.

In looking over the Act we were met at the first step with a common error in the framing of statutes: the preamble does not fully embrace the whole subject matter of the act. Preambles are not necessary in a well drawn act; they are seldom as clear and accurate as they ought to be and are often incorrect, as in the example before us:—

"Whereas it is expedient to amend the law respecting *Common* Schools, &c.," is the preamble. The 23rd sec. goes beyond it and amends (or purports to amend) the law respecting *Grammar Schools*, and the last clause of the act embodies a great error in legislation, that of leaving the courts to find out and determine what provisions of previous acts are repealed, instead of at once expressly stating what clauses were intended to be repealed.

In another place we have spoken of the very objectionable form of enactment that "*so much* of a previous act *as is inconsistent with the provisions of this act is repealed.*"

But let us look at sec. 23—it is as follows:—

"It shall be lawful for the Chief Superintendent of Education, should he deem it expedient, to submit a case on any question arising under Grammar or Common School Acts to any Judge of either of the Superior Courts for his opinion and decision."

We object to this provision, believing it unsound in principle as well as inexpedient. It places the Judges of our Superior Courts—men holding the highest offices in the country—in the position of being legal advisers to the Chief Superintendent of Education—called upon to pass an opinion upon every case he "*deems it expedient to submit*" to them.

We ask—is it right to call upon these high functionaries to give an opinion upon any case got up by any individual, whatever may be his position officially or otherwise? How is the Chief Superintendent to collect and ascertain the facts—how is the clause to be worked? Is he to seek the interpretation of any word or clause on which a difficulty as to the application suggests itself, *to require an interpretation so comprehensive, a paraphrase so clear, as to provide for every case which may arise?* Our Judges are able men and sound lawyers no doubt, but they will scarcely be able to accomplish such a feat. Is the Chief Superintendent to give his own version of specific cases as they arise, and is the Judge to act upon that functionary's *ex parte* statement of the facts? We cannot understand how the material for "the case" is to be obtained. We know of no machinery for taking evidence to ground a case for a judicial decision, and we cannot suppose that any clandestine method is contemplated. We do not mean the word "clandestine" to be understood in an offensive sense; but any plan of collecting facts for such a purpose, not in

accordance with common law principles, may well be called clandestine. If the decision of the Judge were to have any weight it might condemn or operate injuriously against a party affected by the question, without his being heard —an infringement on the first principles of common justice.

But suppose a case laid before and acted upon by a Judge—what is to be the legal effect of his "decision?" What does it adjudicate? Between whom does it decide? Will parties be justified in acting on such a decision? Will it oust the courts of jurisdiction upon action brought respecting the same subject matter? Will it preclude the parties injured, or supposing themselves injured, from seeking redress through the ordinary tribunals? Surely not. What then — is the Chief Superintendent really authorized to take opinions upon abstract questions and supposed or possible cases, and the Judges to pronounce upon and explain "the true intent and meaning" of the language, or to trace out the proper procedure for the Chief Superintendent, in the exercise of his very large powers? In other words, is Sir John Beverley Robinson, or Chief Justice Draper, for example, to write a treatise upon the muddy portions of the School Act for the Chief Superintendent of Education?

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But, secret or open, there is an additional objection to taking the opinion of any Judge in the way proposed. It places him in a false position; and a Judge who is committed by a deliberately pronounced opinion does not often alter it. We do not mean to say that any opinion would be adhered to from improper motives; far from it. But there is a certain feeling incident to our common nature, though the individual may be insensible to its influence, which would render it exceedingly dangerous to the due administration of justice that a Judge should (on the mere motion of an irresponsible agent, whenever such agent deems it expedient) be placed in a position of saying to-day what it may be to-morrow argued that he was wrong in saying.

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Let us not be understood, from what we have said, as assuming that any one of the Judges would feel it to be his duty, or that he was acting in the execution of his judicial powers, for which alone he was appointed, in furnishing materials to enable an oracle of the Common School Law to propound dogmas or give responses to the enquiring public. We unhesitatingly say that the man who penned that clause is a dangerous man, or is grossly ignorant of the fundamental principles of law. Nothing can be more constitutionally dangerous or foreign to the genius of the laws of England than requiring a Judge to give an opinion to any person or department on any matter not formally in litigation. No person or officer should be allowed to act on any opinion given as to a case that *might* arise. If the School Department may obtain a judicial opinion, why not the Crown Law Department, the Finance Ministers' Department, or any branch of the Executive, before engaging in some criminal prosecution or political scheme? But our space will not permit us to pursue this view of the matter further at present. So having opened the question to our readers, and especially to our professional readers, let us add: We have been speaking of what the framer of the 23rd section may possibly have had in his wise head, namely, to make it "competent" for the Chief Superintendent to submit a case to any Judge of the Court of Queen's Bench, the Court of Common Pleas, or of the Court of Chancery in Upper Canada. But we venture to doubt (if such was the object) that it has been attained—to doubt that such is the meaning of the clause—and gravely to doubt that it is capable of being acted on at all, and, even if otherwise perfectly unobjectionable, that a Judge of any of the three named Courts would feel that he was acting with authority in deciding any such case, or that he had any jurisdiction in the matter.

The language used is, "may submit a case to any Judge of *either* of the Superior Courts," &c. We of course assume that the Courts meant are "Superior Courts" *of Upper Canada;* but as there happens to be three Superior Courts, which two out of the three are meant? It is obvious from the language used in two places in the clause ("either of the Superior Courts") that two only (and the Judges of such Courts) were intended by the Legislature to be invested with the jurisdiction, and that to two only of the three can the Chief Superintendant apply.

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But the right to bring these suits was objectionable in principle, and ran counter to the steady current of modern legislation in favor of decentralization. We believe the time is fast approaching when any suit, whatever the subject matter, may be entered in the first instance in a local court, capable of course of being removed by *certiorari*, or, as is the case now in respect to actions against Justices of the Peace, subject to the defendant's right to object to the jurisdiction.

The 4th sec. of the Act furnishes evidence of the feeling in favor of the disposal of plain cases in the County Court, irrespective of amount, for it enables every case in which the amount of demand is *ascertained* by the signature of defendant to be transferred to the County Courts for trial; and this clause, if we rightly remember, was added to the original bill in the Upper House.

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The Act before us is a good specimen of the great and manifest improvement in the form of recent enactments. It harmonises with the excellent foundation we have in the consolidation (we had almost said code) for Upper Canada. It does not interfere with the order of provisions in the Consolidated Statute, and the alterations it makes are easily noted therein. Moreover, it is not defaced by that abomination of abominations, a long and illogical preamble, and no more words appear to be used (with the exception of sec. 4, which is rather verbose and ill arranged) than are necessary to convey the meaning.

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"the words Superior Courts shall mean the Court of Queen's "Bench, the Court of Common Pleas, *and* the Court of "Chancery;" and that "the words *Superior Courts of* "*Common Law* shall mean the two former, and that Court "of Equity shall mean the Court of Chancery." In using therefore the words Superior Courts the Legislature employed an expression the definite meaning of which had been already legislatively fixed, and which in that sense is found mentioned throughout the whole body of our statute law. In other acts of the last session of Parliament the expressions are used in accordance with their defined meanings.

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We are amongst those who thought there was no real value in the provision. Many instances occurred, in which suitors suffered severely both in time and pocket, in consequence of their claims being entered in "the Inferior Jurisdiction." We indicated a long time since, what was the true solution of "the three lists." Apart from the inconvenience and loss to the public, the Judges of the Superior Courts, already overburdened with work, had, at the whim or caprice of practitioners, a large share of business thrown upon them, a result that never could have been contemplated by the Legislature.

But the right to bring these suits was objectionable in principle, and ran counter to the steady current of modern legislation in favor of decentralization. We believe the time is fast approaching when any suit, whatever the subject matter, may be entered in the first instance in a local court, capable of course of being removed by *certiorari*, or, as is the case now in respect to actions against Justices of the Peace, subject to the defendant's right to object to the jurisdiction.

The 4th sec. of the Act furnishes evidence of the feeling in favor of the disposal of plain cases in the County Court, irrespective of amount, for it enables every case in which the amount of demand is *ascertained* by the signature of defendant to be transferred to the County Courts for trial; and this clause, if we rightly remember, was added to the original bill in the Upper House.

It would have been much more simple to have at once given primary jurisdiction to the County Courts in such cases, instead of doing it in a roundabout way. There can be no real distinction between a liquidated demand for $100 and $400—on a promissory note for example, when the powers to enforce the judgment, and the officers through whom it is to be enforced, are the same in both tribunals, Superior and Inferior.

The Act before us is a good specimen of the great and manifest improvement in the form of recent enactments. It harmonises with the excellent foundation we have in the consolidation (we had almost said code) for Upper Canada. It does not interfere with the order of provisions in the Consolidated Statute, and the alterations it makes are easily noted therein. Moreover, it is not defaced by that abomination of abominations, a long and illogical preamble, and no more words appear to be used (with the exception of sec. 4, which is rather verbose and ill arranged) than are necessary to convey the meaning.

Sec. 1, blots completely out of the Consolidated Statutes every provision respecting the "Inferior Jurisdiction." The plan of making a clean sweep in this way is the very best, and saves a world of doubt and difficulty in construction. A large proportion of the cases before our courts, upon the meaning of statutes, grew out of the plan of altering the law, and virtually killing off a number of provisions, but leaving them still upon the statute book—a parcel of rubbish to fructify litigation at the expense of unfortunate suitors. A common method was to add a general clause, providing that "all acts and parts of acts inconsistent with this act, shall be, and are hereby repealed"—a convenient mode certainly, for ignorant, lazy, or stupid persons, but not a method to which a man acquainted with his subject, and anxious to do it justice, would resort.

There can be no question that law practitioners alone are fully qualified to judge of the fitness of an act relating to the administration of the law, and so to shape it that it may harmonize with existing provisions—but as all men fancy that they know how to poke a fire or boil potatoes, so they all seem to fancy that they know how to frame all kinds of laws.

accordance with common law principles, may well be called clandestine. If the decision of the Judge were to have any weight it might condemn or operate injuriously against a party affected by the question, without his being heard —an infringement on the first principles of common justice.

But suppose a case laid before and acted upon by a Judge—what is to be the legal effect of his "decision?" What does it adjudicate? Between whom does it decide? Will parties be justified in acting on such a decision? Will it oust the courts of jurisdiction upon action brought respecting the same subject matter? Will it preclude the parties injured, or supposing themselves injured, from seeking redress through the ordinary tribunals? Surely not. What then — is the Chief Superintendent really authorized to take opinions upon abstract questions and supposed or possible cases, and the Judges to pronounce upon and explain "the true intent and meaning" of the language, or to trace out the proper procedure for the Chief Superintendent, in the exercise of his very large powers? In other words, is Sir John Beverley Robinson, or Chief Justice Draper, for example, to write a treatise upon the muddy portions of the School Act for the Chief Superintendent of Education?

Judicial opinions are not given *ex parte*, nor without hearing all parties concerned, and judicial decisions are not made upon such foundations. What then is meant? Surely not that the Chief Superintendent may quietly obtain and privately keep in the archives of his office the secret opinions of the Judges? That can hardly be: it would humble the Judges to the dust.

But, secret or open, there is an additional objection to taking the opinion of any Judge in the way proposed. It places him in a false position; and a Judge who is committed by a deliberately pronounced opinion does not often alter it. We do not mean to say that any opinion would be adhered to from improper motives; far from it. But there is a certain feeling incident to our common nature, though the individual may be insensible to its influence, which would render it exceedingly dangerous to the due administration of justice that a Judge should (on the mere motion of an irresponsible agent, whenever such agent deems it expedient) be placed in a position of saying to-day what it may be to-morrow argued that he was wrong in saying.

Why should a Judge be thus committed to an opinion upon "a case," without the advantage of having that case sifted and debated before him previously to his being called upon for a decision?

Let us not be understood, from what we have said, as assuming that any one of the Judges would feel it to be his duty, or that he was acting in the execution of his judicial powers, for which alone he was appointed, in furnishing materials to enable an oracle of the Common School Law to propound dogmas or give responses to the enquiring public. We unhesitatingly say that the man who penned that clause is a dangerous man, or is grossly ignorant of the fundamental principles of law. Nothing can be more constitutionally dangerous or foreign to the genius of the laws of England than requiring a Judge to give an opinion to any person or department on any matter not formally in litigation. No person or officer should be allowed to act on any opinion given as to a case that *might* arise. If the School Department may obtain a judicial opinion, why not the Crown Law Department, the Finance Ministers' Department, or any branch of the Executive, before engaging in some criminal prosecution or political scheme? But our space will not permit us to pursue this view of the matter further at present. So having opened the question to our readers, and especially to our professional readers, let us add: We have been speaking of what the framer of the 23rd section may possibly have had in his wise head, namely, to make it "competent" for the Chief Superintendent to submit a case to any Judge of the Court of Queen's Bench, the Court of Common Pleas, or of the Court of Chancery in Upper Canada. But we venture to doubt (if such was the object) that it has been attained—to doubt that such is the meaning of the clause—and gravely to doubt that it is capable of being acted on at all, and, even if otherwise perfectly unobjectionable, that a Judge of any of the three named Courts would feel that he was acting with authority in deciding any such case, or that he had any jurisdiction in the matter.

The language used is, "may submit a case to any Judge of *either* of the Superior Courts," &c. We of course assume that the Courts meant are "Superior Courts" *of Upper Canada;* but as there happens to be three Superior Courts, which two out of the three are meant? It is obvious from the language used in two places in the clause ("either of the Superior Courts") that two only (and the Judges of such Courts) were intended by the Legislature to be invested with the jurisdiction, and that to two only of the three can the Chief Superintendant apply.

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And with this class of legislators the clause we speak of is "*a love of a clause.*" We heard one of our Judges who is noted for "his sayings," suggest the form of an act for fusing law and Equity—brief and comprehensive. We record it for the benefit of "all whom it may concern."

BE IT ENACTED AS FOLLOWS:—

SEC. 1—LAW AND EQUITY ARE FUSED.

SEC. 2—THE JUDGES SHALL FRAME RULES TO CARRY OUT THE FOREGOING PROVISION.

SEC. 3—ALL LAWS INCONSISTENT WITH THIS ACT ARE ABROGATED.

The 2nd and 3rd secs. of the Act before us, adopt a convenient method in making alterations in detail. It was first introduced, we believe, by the late Hon. Robert Baldwin. It substitutes new clauses for two of those repealed—so that the connection will remain unbroken in the Common Law Procedure Act, as consolidated, and the alterations may be readily made on the face of the book.

The 4th sec. enables a Judge of either of the Superior Courts of Common Law, to send a case down for trial in a County Court.

1st.—When the amount of the demand is ascertained by the signature of the defendant.

2nd.—In any action for any debt that in the opinion of a Judge may be safely tried in a County Court.

The second ground gives a wide margin for the exercise of judicial discretion, and may be made legitimately to embrace one-third of the business now set down for trial at the assizes. It will, however, depend upon the plaintiff's attorney whether this clause be much acted on. Probably the chief inducement to the practitioner to avail himself of its provisions, will be the saving in time.

THE U. C. CHANCERY REPORTS.

We observe that the reporter of the Court of Chancery has issued No. 1 of vol. 8, of the Chancery Reports. It is the commencement of the series, at the reduced rate of £1 5s. 0d., recommended by the Law Society. The subscription price hitherto was £2 10s. 0d., and the object of the reduction is to increase the circulation of the Reports among the legal practitioners in Upper Canada.

We believe that as respects the Upper Canada Common Law Reports, neither the Law Society nor the Reporters have been disappointed. The increase in the number of subscribers has, we understand, been nearly as much as was anticipated when the reduced price was proposed. The price is now really so moderate as to place the Reports within the reach of every practitioner.

We perceive that the Reporter of the Court of Chancery has, in carrying out the objects of the Law Society, gone further than the Reporters of either of the Courts of Common Law. He offers to furnish *students* and *articled clerks* with his Reports, at the price of 15s. per volume, and the Chamber Reports of his Court, at 5s. per annum. For this, Mr. Grant, the Reporter, deserves the thanks of every law student and articled clerk in Upper Canada, who we hope, will testify their approbation by subscribing for the Chancery Reports.

No lawyer can, in the present state of the law, practise successfully without a law library. The sooner the library is commenced the less onerous will be its formation in the end. Students emulous of success in the profession, should make it an inflexible rule to read the Reports of the Courts of Upper Canada, and not only to read them but to purchase them for the sake of reference and as the nucleus of the libraries, which in after years they must acquire. Better far for a law student to deprive himself of trifling luxuries in order to a make permanent and substantial investments of his spare means, than to waste them in idle pursuits. We know of no better investment for law students and articled clerks than the Reports of our Courts.

Reports of the Court of Chancery are now offered at a price so low, that no law student or articled clerk can excuse himself for the want of them.

UPPER CANADA MUNICIPAL REPORTS.

The third number of these Reports has been issued, and contains many valuable cases on the Municipal and School laws of Upper Canada, to which extensive and useful notes are appended, illustrative of the various points of law decided in the judgments reported. The publication has, we learn, been most successful.

NEW RULES.

QUEEN'S BENCH AND COMMON PLEAS.

TRINITY TERM, 24 VIC., 1860.

1st. It is ordered, that from and after the first day of this present Trinity Term, 24 Victoria, Rule No. 155, of this Court of Trinity Term, 1856, be rescinded, and that the following be substituted therefor:—No. 155, In any action of the proper competence of the County or *Division Courts* respectively, in which final judgment shall be obtained for a plaintiff without trial; *or in which plaintiff shall obtain execution on proceedings in the nature of a final judgment*, no more than County or Division Court costs, as the case may be, shall be taxed without the special order of the Court or a Judge, but this Rule shall not extend to costs on *interlocutory proceedings*.

2nd. It is also ordered that Rule No. 16, of Trinity Term, 20 Vict., be rescinded and the following substituted therefor:—The offices of the Clerks of the Crown and Pleas shall be kept open as follows, that is to say, during Term from ten in the morning till four in the afternoon, and (except between

the first day of July, and 21st day of August) at other times from ten in the morning until three in the afternoon, Sundays, Christmas Day, Good Friday, Easter Monday, New Year's Day, and the birthday of the Sovereign, and any day appointed by General Proclamation for a General Fast or Thanksgiving, excepted and between the first day of July and twenty-first day of August, both days inclusive, when the said Offices shall be open from half-past nine in the forenoon until twelve o'clock noon.

JNO. B. ROBINSON, C. J.
WM. H. DRAPER, C. J. C. P.
A. MCLEAN, J.
ROBT. E. BURNS, J.
WM. B. RICHARDS, J.
27th August, 1860. JOHN H. HAGARTY, J.

AUTUMN CIRCUITS, 1860.

EASTERN CIRCUIT.

The Hon. Sir JOHN B. ROBINSON, Baronet, Chief Justice.

L'Original	Wednesday	3rd October.
Ottawa	Tuesday	9th October.
Perth	Friday	19th October.
Brockville	Friday	26th October.
Cornwall	Friday	2nd November.

MIDLAND CIRCUIT.

The Hon. Mr. JUSTICE BURNS.

Whitby	Monday	1st October.
Peterboro'	Monday	8th October.
Cobourg	Monday	15th October.
Picton	Wednesday	24th October.
Kingston	Monday	29th October.
Belleville	Wednesday	7th November.

HOME CIRCUIT.

The Hon. Mr. JUSTICE McLEAN.

Owen Sound	Wednesday	3rd October.
Barrie	Tuesday	9th October.
Milton	Tuesday	16th October.
Hamilton	Monday	22nd October.
Welland	Tuesday	6th November
Niagara	Tuesday	13th November.

OXFORD CIRCUIT.

The Hon. Mr. JUSTICE HAGARTY.

Simcoe	Tuesday	2nd October.
Brantford	Monday	8th October.
Cayuga	Tuesday	16th October.
Woodstock	Monday	22nd October.
Stratford	Monday	29th October.
Berlin	Monday	5th November.
Guelph	Monday	12th November.

WESTERN CIRCUIT.

The Hon. CHIEF JUSTICE OF THE COMMON PLEAS.

Chatham	Wednesday	3rd October.
Sandwich	Tuesday	9th October.
Sarnia	Monday	15th October.
St. Thomas	Friday	19th October.
London	Wednesday	24th October.
Goderich	Tuesday	6th November.

TORONTO ASSIZES.

The Hon. Mr. JUSTICE RICHARDS.

Toronto	Monday	8th October.

LAW SOCIETY OF UPPER CANADA.

TRINITY TERM 24 VIC.

The following gentlemen were called to the degree of Barrister-at-law:—

Alexander Mair, of Markham; T. H. Spencer, LL. B., of Toronto; John Livingston, LL. B., of Toronto; D. Blain, LL. B. of Toronto; Thos. H. Bull, B.A., of Toronto; J. A. McCulloch, of Stratford.

The following gentlemen having passed their examinations at Osgoode Hall, have been sworn in Attorneys-at-Law:—Messrs. Macneil Clarke; O. J. McKay; John Finn; J. Fox Smith; R. B. Bernard; A. L. McLellan; J. K. Galbraith; R. S. Applebe; T. H. Bull; T. B. Pardee; William Crant; William Lilly; Edward Stonehouse; P. A. Hurd; R. C. Scatcherd; G. P. Land; John Michael Tierney.

JUDGMENTS DELIVERED.

COURT OF ERROR AND APPEAL.

Present: The CHIEF JUSTICE OF UPPER CANADA; Mr. CHIEF JUSTICE DRAPER; Mr. JUSTICE McLEAN; Mr. JUSTICE BURNS; Mr. VICE-CHANCELLOR SPRAGGE; Mr. JUSTICE RICHARDS; Mr. JUSTICE HAGARTY.

Saturday, August 25, 1860.

Whitehead v. *The Buffalo and Lake Huron Railway Company.*—This was an appeal from a decree pronounced by the Court of Chancery. The plaintiff filed a bill in the court below, claiming compensation from the defendants for a large quantity of work done by him for the defendants, and materials for the same provided, pursuant to certain verbal and written contracts made between the plaintiff of the one part, and Captain Barlow, acting for and on behalf of the defendants, of the other part. In the same bill plaintiff also claimed damages for the interruption by the defendants, of his works, on several occasions, and prospective damages for money that plaintiff might have made out of the contracts if allowed by defendants to fulfil them. The court below pronounced a decree in favor of the plaintiff for $50,000 for work done, materials, &c., and ordered a reference to the Master to inquire into the damage sustained by plaintiff in consequence of the interruptions and as to prospective damages. Against this decree defendants appealed. Held, per Robinson, C. J., that the decree should be varied only as to the prospective damages. *Held*, per Draper, C. J., that the relief should be reduced to the value of the work done and materials provided. McLean, J., concurred. Spragge, V.C., concurred with Draper, C.J., but thought that the work should not be estimated by the schedules annexed to the contracts. Richards, J., concurred with Draper, C.J., and thought the schedules binding. Hagarty, J., was of the same opinion as Richards, J. Decree varied as above, and appeal dismissed.

Hurd v. *Lewis.*—Appeal from the Court of Queen's Bench. The question raised was as to the construction of a will. Appeal dismissed with costs.

Henderson v. *Fortune.*—Appeal from the decision of the Court of Queen's Bench, as reported in 18 U. C. Q. B., 520. *Venire de novo* awarded.

Mann & Hobson v. *The Western Assurance Company.*—Appeal from the decrees of the Court of Queen's Bench, as reported in 18 U. C. Q. B., 190. Dismissed with costs.

Shaw v. *The De Salaberry Navigation Company.*—Appeal from the decree of the Court of Queen's Bench, as reported in 18 U. C. Q. B., 541. Dismissed with costs.

Boulton v. *Gillespie.*—Appeal from the Court of Chancery. The question raised was, whether plaintiff by taking certain securities as the price of lands sold, had or had not waived his lien for the purchase money. Appeal allowed, and plaintiff's bill in court below, dismissed.

COMMON PLEAS.

Monday, August 27, 1860.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

Trent Road Company v. *Marshall.* — Defendant's rule discharged. Plaintiff's rule made absolute to increase the verdict as to £36 11s. 0d.

Trustees of School Section No. 6 of York v. *Hunter.*—Rule *nisi* to enter a non-suit made absolute.

Wallace v. *Adamson.*—Rule *nisi* to set aside verdict found for defendant, and to enter same for plaintiff, discharged.

Weaver v. *Bull.*—Demurrer. Judgment for plaintiff. *Held*, that School Trustees, prior to the passing of the Act of Last Session, had no power to determine as to the question of personal liability of School Trustees, and had no power to award costs of the arbitration to be paid by the Teacher or the Trustees.—*Quære*—As to the effect of the Act of Last Session on the right of determining the question of personal liability?

Edinburgh Life Assurance Company v. *Clarke.*—Rule absolute for a new trial without costs.

QUEEN'S BENCH.

Tuesday, August 28, 1860.

Present: ROBINSON, C. J.; MCLEAN, J.; BURNS, J.

Van Buren v. *Bull*—Trover. *Held*, that arbitrators before the recent School Act, had no power to award costs. 2—Or to award that the Trustees should pay the amount awarded within 30 days, or be personally liable. 3.—That the authority of the arbitrators was at an end when the award was made. 4—That it was not any part of the arbitrators duty to decide whether the Trsutees had or had not exercised their corporate powers.

Burns v. *Boyd.*—Judgment for defendant on demurrer.

Whitehouse v. *Roots.*—*Held*, plea bad—replication good.

Wallace v. *Hewett.*—Rule to enter verdict for plaintiff discharged.

Gaston v. *Watson.*—Action for negligent fire. Rule *nisi* to enter nonsuit pursuant to leave reserved, made absolute.

PRIVILEGES OF ADVOCATES.

(*Concluded from page* 174.)

INJUNCTION.

We next proceed to consider the proposal to give to the Common Law Courts power to protect by injunction property, whether real or personal, the title to which is in contest in an action at law, from alienation, waste, or injury, till the right shall have been determined.

We must, in all humility, confess that we are at a loss to conceive that any substantial objection can be offered to a proposal so obviously reasonable.

It is plain that such a power should exist somewhere. A man in possession of land the title to which is contested, *à fortiori* a man in possession without a title, ought not to be permitted, pending proceedings to eject him, to commit waste to the damage of one who claims with a better title. A man who is in wrongful possession of a chattel, for the loss of which money may be a very inadequate compensation to the rightful owner, ought not to be left at liberty to make away with it while an action for its recovery is pending.

At present, protection in this respect can only be obtained by recourse to a court of equity, while the recovery of the thing itself can only be effected in a court of law: two suits with twofold expense, where one would suffice!

And no question here can be raised as to the competency of the tribunal.

It would be strange indeed, if it could be doubted that the Court which in an action of ejectment or detinue has to to determine the right to the corpus of the estate or chattel, was also capable of deciding whether the defendant should be restrained from committing waste or making away with the thing in dispute until the right was determined.

We now pass on to consider the instances in which it is proposed to confer new jurisdiction on courts of law irrespective of any pending action.

And, first, as to the proposed power of restraining by injunction the impending violation of any legal right. We must here beg it may be borne in mind that it is not proposed in this branch of the subject to confer on courts of law powers in respect of any rights which are not strictly of a legal character. Throughout the contemplated amendments it has never been proposed, where title to property was complicated by equitable rights to withdraw the decision from the courts of equity. This being kept in view, we must confess ourselves altogether at a loss to conceive why, when legal rights alone are involved, a court of law, whose special and proper province it is to determine such rights, should be without power to protect them from violation. And it must be observed that this anomaly in our judicial system is rendered the more striking and discreditable to our jurisprudence by the partial jurisdiction already extended to the legal tribunals by the act of 1854.

As the law now stands, if a single act of wrong has been committed, a court of law, on an action being brought, has power to grant an injunction to prevent a repetition of the wrong. If a nuisance were about to be created which would seriously lessen the value of a man's property, as, for instance, if a local board were about wrongfully to bring the main sewer of the district close to a man's premises, no protection could be afforded by a court of law, But if the thing has once been done, and the whole expense incurred, not only may damages be recovered for the present injury, but the nuisance may be abated for all future time. If out of a thousand trees growing on an estate a single tree be wrongfully cut down, an injunction may be obtained from a court of law to prevent the cutting down of the remaining 999. But if, with the certainty of impending injury, the party whose rights are about to be invaded should come to a court of law for protection before the axe has been laid to the root of the first tree, he would be told that while, if he had waited till one tree was cut, the Court would have protected him as to all the rest, the Legislature has not thought fit to entrust the Court with powers for the protection of the first, but has committed that to the exclusive keeping of a court of equity. We cannot but think that this state of things (arising as it does out of the partial manner in which the recommendations of our second report as to injunction were carried into effect) is an anomaly in our judicial system which almost borders on the ludicrous, and is a serious reproach to our legislation.

We must be forgiven for saying that we cannot comprehend the alarm which the proposal to remove it has occasioned. The jurisdiction is one which, reference being had to the subject matter, falls properly within the province of the common law courts. It is one which these courts already possesses and exercise in an ulterior stage. The competency of the Courts or of their procedure cannot come into controversy. The question has been concluded by the Legislature itself in conferring powers which presuppose all the qualifications both in the judges and their procedure which are necessarily for the exercise of those now proposed to be given. We cannot but think that the objection to this extension of jurisdiction has arisen principally from its having been overlooked that it is only proposed to confer it where damages can now be recovered in an action, and where, therefor, strict legal rights are involved, and that the powers proposed to be conferred by the present Bill are neither more nor less, in substance and degree, than those created by the Act of 1854: the difference consisting simply in this, that they may be exercised before the mischief instead of after it has commenced.

DOCUMENTS.

The only other instance in which authority is proposed to be given to a court of law, independently of a pending action, is the power to order the delivering up of documents which on the face of them appear to give a right of action at common law, but which, by reason of circumstances which, if an action were brought, would constitute a defence, ought not to be available, and, on the contrary, ought to be given up or cancelled.

The ground on which a party liable to be prejudicially affected by such a document has a claim to have it given up or cancelled, is that the document, remaining in the hands of the opposite party, after all just claim to enforce it is gone, may one day be brought forward, after the evidence by which it would have been defeated has ceased to exist.

It is plain that power to afford relief from such a possibility, and to protect a person so circumstanced from having such a danger from hanging over his head for years, ought to exist somewhere. It has hitherto been confined to courts of equity alone. The reasons for proposing to extend it to the courts of law, are, first, that the documents in question would be enforceable in a court of law alone; secondly, that the matter of defence, on which the claim to have the document annulled arises, would be capable of being pleaded and tried at law if an action were brought upon it; thirdly, that the common law procedure for trying the facts, if contested, is indisputably superior to that of a court of equity.

NEW EQUITABLE JURISDICTION AT LAW.

We have now past in review the several cases of equitable jurisdiction proposed to be conferred by the Bill. It remains for us to deal with a few general objections put forward against the measure as a whole.

The principal of these is founded on a misapprehension which it is important to clear up. It seems to be supposed that equitable title to property is sought to be brought within the jurisdiction of the legal tribunals. This is evidently pointed at in the two cases, prominently put forward in the objections of the equity judges, in which fraudulent plaintiffs with legal titles are supposed to bring ejectment in a court of law for the purpose of avoiding the discussion of adverse equitable rights before an equity court.

This is a very serious misapprehension. It overlooks the fact that, with reference to equitable defences, the action of ejectment—the only action in whsch the right to real estate can be enforced—was not included in the Act of 1854;* and that, with the exception of the comparatively small matter of relief from forfeiture for non-payment of rent and for omitting to insure, this action is not proposed to be touched by the present Bill. So large a proportion of property in this country being held in trust, and trusts being the peculiar province of courts of equity, however serious the inconvenience arising from the occasional conflict of jurisdiction may be, it is not proposed that powers should be given to courts of law to entertain equitable considerations on a trial of title. If our last report be referred to, it will be seen that our recommendation as to the power to grant conditional relief is confined to cases in which equitable defences are already admissable, but in which the presence of a condition prevents the Court from entertaining a plea. This, of course, does not apply to ejectment in which no equitable plea is admissible. The present Bill does not include ejectment, so for as title to property is concerned. The imaginary cases put farward by the equity judges as illustrative of the mischievous operation of the enlarged equitable jurisdiction could not therefore arise.†

We cannot but think that much of the opposition offered to this measure has been founded on the notion that it was sought to withdraw by it questions upon equitable title to property from the jurisdiction of a court of equity. It is desirable that this misapprehension should be dispelled as speedily as possible. No such thing has been suggested, or is contemplated by the present measure. Of course, if it should be thought that the language of the Bill leaves room for the possibility of a different construction, nothing would be more easy than so to frame the enactment as to limit its operation to the extent designed.

Another objection insisted on by the equity judges is that a plaintiff having a mere legal as opposed to an equitable right will now have a choice of courts, and will naturally take his cause to the court in which equity is the least likely to be well administered. Assuming for a moment the inferiority of the legal courts in dealing with equitable questions (on which a word presently), we must be forgiven for observing that this argument rests on a fallacy. A plaintiff having only a legal right to insist on has no choice of courts; he can bring his action in a court of law alone. If he went to a court of equity, he would be told that, having a remedy at law, he had no business there. The position of such a plaintiff will nowise be altered. But let us look to the other side of the case. Take the case of an honest plaintiff bringing an action on a legal claim, which he believes to be well founded. Having brought his action in the only court to which he can resort, why, because his adversary sets up an equitable defence, is he to be forced to become defendant in a new suit before a different tribunal? Or, take the perhaps still more striking, case of a defendant, in an action at law, having a defence on equitable grounds alone, which he is desirous of setting up in the court where the action is pending. Why is he to be driven to the necessity of going to a second court, and there instituting a second and more expensive suit? Why, if his equity depends on the performance of some condition, is he to be driven to another court to obtain the relief which performance of the condition might just as well secure to him in the first?

The equity judges assert that "no solid reason can be given for the proposed transfer of jurisdiction." We, on the other hand, submit that abundant reason is to be found in all the evils attending on a double jurisdiction and a twofold litigation—two suits relating to the same subject matter of dispute, in two separate courts, separate pleadings, separate sets of counsel, fresh fees of court, all harassment, expense and delay of a suit in chancery needlessly superadded to the simpler proceedings of an action at law. Surely, it cannot seriously be disputed that if the necessity for resorting to a second court can be dispensed with—wherever justice can be done in one court and one suit—there is every reason for relieving the suitors from the inconvenience, the expenses, and the delay of a double litigation.

We guard ourselves by saying "where justice can be done." We readily admit that where what the objectors not inaptly term the "machinery" of the courts of common law is inadequate to deal with questions of equity, a sufficient reason exists for maintaining the divided jurisdiction. We admit that to a certain extent, the objection to conferring equitable jurisdiction on the courts of law on this ground is well founded. But to this extent care has been taken that the jurisdiction shall not be exercised. The objection becomes unfounded and unjust when it overlooks a distinction which the framers of the Bill have not been unmindful to observe. It is true, as is urged by the equity judges, that there are cases in which equitable rights cannot properly be determined without more parties being brought before the court than the parties immediately in presence in an action at law. It is true that a court of law has no procedure for bringing such further parties before it. Possibly it may not be desirable that it should have. Actions to recover real property excepted, as to which the

* See *Neave* v. *Arye*, 24 L. J., C. B. 207; 16 C. B. 323, S. C

† We may also here observe, in passing, that the third case but by the equity judges by way of objection, namely, that of an equitable mortgagor bringing detinue for deeds deposited by way of equitable mortgage, with a view to avoid a court of equity, is equally ill-founded. The plaintiff would be defeated at law. The action could not be maintained under such circumstances.

present question does not arise, the cases which come before courts of law are seldom of sufficient magnitude to make the multiplying of parties desirable; as the so doing, however necessary in order to settle the rights of all concerned has a natural tendency, except where great interests are involved, to bring about the result that, by the time the rights of all parties concerned are adjusted, there remains but little to be divided amongst those who are found to be entitled. Be this as it may, the objection of the equity judges, founded on the inability of the common law courts to bring other parties before them, has, as regards the present measure, no application. It is not proposed to admit equitable defences in cases to which the objection relates. By the operation of the 86th section of the Common Law Procedure Act of 1854 and the 12th clause of the present Bill, courts of law will not be called upon to entertain questions of equity where the equitable rights of parties other than the immediate parties to the action at law are involved. It is suggested indeed, that a court of law might fall in error in deciding whether, in any particular case, the equitable rights of other parties do or do not come into question. But it may be answered, first, that in the more simple cases of equity which present themselves in actions at law, no serious difficulty on this score is likely to arise; secondly that the supposition that the judges would have any difficulty in deciding such a matter is an assumption of incapacity in them which ought not lightly to be made; thirdly, that the objections, if good for anything, would apply equally to the equitable pleas already permitted to be pleaded; lastly, that in the exercise of the existing jurisdiction no such difficulty has in point of fact been experienced.

MACHINERY.

The question as to the adequacy of the "machinery" of the common law courts being thus reduced to its proper limits, we have no hesitation in affirming that the procedure of these courts, enlarged and amended as it has been in modern times, is abundantly sufficient to enable them to exercise the powers proposed in a perfectly satisfactory manner.

With reference to matters of equity brought forward in pleading, no question as to the adequacy of the proceedure can arise. The facts on which the equity arises being set forth in the pleading, the effect of them, if admitted, is at once for the court. If not admitted, the facts will be tried by a jury in the ordinary way. And it may be here incidentally observed, that if in the same action there should also be issues of facts relating to matter of common law to be tried, it is more convenient that both sets of issues should be tried and disposed of in the same inquiry, than that one set of facts should be tried in a court of law, the other in a court of equity. No one, we apprehend, will question the superiority of the common law procedure over that of equity for the trial of issues of fact; and it may be observed in passing, that as, in the discussion of questions of equity, wheresoever they may be raised, questions of disputed fact will frequently arise, this superiority of the common law proceedure for the decision of questions of fact is so far in favour of the transfer of jurisdiction.

As regards equitable matters arising on application to the court, as for relief on conditional equity, or for protection of property, either on apprehended injury or during the pendency of an action, the efficiency of the machinery cannot seriously be questioned. The application would be by motion founded on an affidavit setting forth the facts. If any difficulty should arise in the ulterior stages of the discussion, the court would have ample means of completing the inquiry by an issue or reference to a master. The only difference, we apprehend, between such a proceeding and that of a court of equity would be, that the latter would require a written or printed statement of the case, which would be echoed by an affidavit. The common law process, while it is equally efficacious, is the simpler and less expensive of the two.

The question of the competency of the common law judges to administer equity is one on which, for obvious reasons, we are reluctant to touch. We may, however, be permitted to observe that in the simpler questions of equity which are likely to come before courts of common law, we cannot anticipate any serious difficulty. While, on the one hand, it may be admitted that, where more complicated rights are involved, such as arise upon intricate questions of real property, of trusts, the administration of estates, and the like, the principles and rules of equity constitute an elaborate and special system of jurisprudence, a perfect knowledge of which it may require special study and practice to acquire, yet it must not be forgotten that one of the principal merits of this system is that its leading rules—at least, where unembarrassed in their application by the intricacies and subtleties of real property law—rest on the plain and simple principles of rational justice, as distinguished from the more technical and arbitrary rules of positive law.

More especially is this the case with reference to the grounds on which equity relieves against legal rights sought to be enforced in actions at law. To suppose that common law judges or practitioners either are unacquainted with or will be unable to master a system so simple, would seem to be a gratuitous and unwarranted assumption. No such difficulty has hitherto arisen in administering the powers either of auxiliary or substantive equity heretofore conferred. So far as we are aware, one instance only has occurred of an appeal from the decision of any court of law on an equitable plea, and in that instance the appeal was unsuccessful.

We believe the apprehension of incompetency in this respect to be wholly unfounded. The large knowledge of the law essential to the administration of equity has never been questioned in equity judges; and we are at a loss to understand why credit should not be given to common law judges for capacity to possess a corresponding knowledge of equity in the limitation of legal rights. When we reflect how many of the great equity judges who have presided in the court of chancery and in the House of Lords have been taken from the common law courts, we are surprised that capacity should be denied to the collective ability of the common law judges, assisted by a bar inferior to none in learning and attainments, to deal with the simple questions of equity which are likely to arise incidentally in proceedings at law.

Before we quit this subject, we must advert to an argument prominently put forward, namely, that the effect of thus conferring equitable jurisdiction on common law courts will be to restore in substance the ancient equity jurisdiction of the Court of Exchequer, abolished in recent times by the Legislature. That this view of the matter is altogether erroneous may readily be shown. It assumes that the jurisdiction of the Court of Exchequer as a court of equity was exercised by it incidentally to proceedings pending before it as a court of law. Nothing can be more incorrect. The Court of Exchequer in equity was as distinct from the Court of Exchequer as a court of common law, as the Court of Exchequer now is from the Court of Chancery. The jurisdiction was distinct; all suits were distinct; the proceedure was distinct; the officers of the court were not the same; the practitioners were a separate and distinct class. A party seeking protection or relief from an action pending on the common law side of the court was obliged to file a bill in equity, and was in all respects in the same position as if he had gone into chancery. All the evils of the double jurisdiction arose, without any of those benefits which may be anticipated from enabling full justice to be administered in a single court. Other causes therefore, making it desirable that the Court of Exchequer as a court of equity should be done away with, its abolition took place, but without the slightest reference to any inconvenience arising from a blending of jurisdiction such as is now proposed. To represent the two cases as analogous is to confound things essentially distinct and having nothing in common but a name.

COURT OF APPEAL.

Lastly, as to the objection taken to the measure with reference to the proposed Court of Appeal. It is said, "the appeal is to be a court of error—a very competent tribunal for determining the points of law which remain when a jury has solved the questions of fact, but rigid in the extreme in its rules of procedure, and utterly incompetent to dispose of the mixed questions of fact and law that continually arise on appeals from courts of equity." We have here again a serious misapprehension. It is assumed that the Court of Exchequer Chamber, the proposed Court of Appeal, will be simply a Court of Error in the strict sense of the term; that is to say, a court confined to error appearing on the face of the record, and bound by some rules of procedure differing from those of the court in which the proceedings originated. This is an entire mistake. The Court of Exchequer Chamber, when exercising the appellate functions conferred upon it by the recent Procedure Acts, is no longer a mere Court of Cessation. It is a Court of Appeal in the fullest sense of the term; that is to say, it is invested with all the powers, both as to substantive law and procedure, which are possessed by the court from which the appeal comes, and can even draw inferences of fact where the court below could do so.

While upon this subject, we cannot but express our surprise that the objectors should have overlooked the fact that from the decisions of the Court of Exchequer Chamber on appeal there is an ulterior appeal to the House of Lords, where the presence of so many equity authorities will secure the correction, if necessary, of the decisions of the common law tribunals and ensure the administration of equity according to its established and undoubted rules.

We conceive that we have thus made good the propositions which we undertook to establish; that starting from the incontestable position that every court should have power to carry on a suit properly commenced in it to final adjudication and completion, as also to protect rights which are clearly within the compass of its jurisdiction, we have shown that the powers which it is proposed to confer on the common law courts are essentially necessary to this end; that they have been already partially given, and so far beneficially exercised; and lastly that, so far as it is now proposed to go, the procedure will be fully equal to the purpose.

CONCLUSION.

The equity judges declare that "no attempt should be made to alter our tribunals until a careful revision has been made of our whole law." But is not this to put off the work to the Greek Kalends? We readily agree that the bringing the conflict of law and equity into unison would be better dealt with as a part of the substantive than of the ancillary law; and would be best affected by abrogating from the body of our law rights which ought not to be, and which equity does not allow to be enforced, instead of by seeking to attain the end by a fusion of jurisdiction and procedure. But who is there among us so sanguine as to expect that this great work of the revision of the whole body of our law will be undertaken, much less accomplished in our days? In the meantime the suitor bandied to and fro from law to equity, and from equity to law, suffers what he feels and knows to be—with whatever complacency legal practitioners may from habit be brought to look on the matter—a practical and substantive grievance. To whatever extent, though it may be but a partial one, that grievance can be abated—to whatever extent the great desideratum of uniformity in the law as administered by the judicial tribunals of this country can be effected,—to that extent, at least, the practical good should be secured, although the means resorted to may not be such as a scientific jurist might deem the most eligible. At all events, if any immediate, though but partial remedy can be applied, it would surely be unwise to refuse to accept it because it is not presented as a part of a general revision of the whole body of our laws, of which no reasonable hope presents itself even in the indefinite future.

We have the honour to remain, my Lord,

Your obedient and faithful servants,

A. E. Cockburn.
Samuel Martin.
G. Bramwell.

The Right Honourable the Lord Chancellor.

THE LAW OF EVIDENCE.

A Bill was some time since introduced into the Upper House of Parliament, by Lord Brougham, to enable the accused parties in criminal cases to offer themselves as witnesses, and, in that event, render them subject to cross examination like other witnesses. This bill having been received unfavourably, his Lordship has just introduced a fresh one, by way of substitute for it, which proposes to accord this faculty to accused persons in cases of misdemeanour only. The principle involved in both bills is a most important one, being at variance with the theory and practice of English law from the earliest times; and the question is a branch of a more general one, which has recently been discussed at the Juridical Society, viz. whether the rule of law which prohibits the examination and cross-examination of accused persons in criminal cases is a sound one. It is a question of great difficulty and importance, and much may be urged on both sides.

The advocates on the one side argue as follows:—The rule of law which excluded from bearing testimony not only the parties to suits, but so many witnesses, on the several grounds of infamy, interest in the event of the suit, &c., has been condemned in modern times as wrong in principle. That rule was energetically attacked by Bentham, who laid down as a sacred principle of judicature, that it is the duty of courts of justice to use all available means of getting at the truth of the matters in question, and consequently reject no medium which could tend to help them to that truth; and the Legislature has adopted this view by abolishing, first, the incompetency of witnesses, and afterwards that of of the parties in civil causes, leaving the case of the accused parties on criminal trials almost the sole remaining fragment of the ancient rule, which ought to follow the fate of the others. One reason given for the rule—namely, that the allowing the examination of accused persons would induce a vast amount of perjury—is a weak and insufficient one, and leads to this injustice, that, the witnesses for the prosecution depose on oath against the accused, while his mouth is stopped from contradicting them. The accused, being the person best acquainted with the fact of his own guilt or innocence, is naturally the best source to apply to for information on the subject. If he is guilty, a well-conducted cross-examination will wring the fact from him, to the furtherance of public justice; while, if he is innocent, he has nothing to fear from any cross-examination, however severe. And lastly, in accordance with these views, we find that a rigid interrogation of the accused forms an important part of every criminal trial in France and other continental countries.

On the other side it is urged that the rule laid down by Bentham, however sound as a general principle, is not of universal application, and must be understood with these limitations—first, that by the means of getting at the truth of the matters in dispute must be understood such means as are likely to extract it in causes in general, and not merely in some particular ones; and, secondly, that those means be not such as would give birth to collateral evils outweighing the benefit of any truth they extract. Instances might easily be quoted from Bentham's works in which he has admitted, though perhaps unintentionally, the existence of these exceptions; and numerous ones are to be found in the judicial practice of all countries where evidence, valuable in itself, is rejected on the ground of the great mischiefs that would result from

receiving it; such as secrets of State, confidential communications made by clients to their counsel, evidence to remote to be received without forming dangerous precedents, &c. Admitting, therefore, that an interrogation of the accused would in *some cases* extract truth, which would be sought for in vain without it—an admission which, as all systems have their advantages and disadvantages, may be made in favour of torture, judicial expurgation, trial by ordeal, &c.—still, if the *general* effect of the practice would be to give birth to any collateral evils outweighing the advantage derived in those particular instances, the practice should have no place in an enlightened system of judicature. It is a fallacy to look on the accused in the light of a witness; the line of demarcation between them has always been recognised even under the most conflicting systems—as, for instance, the English one, which will not allow the accused to be questioned; and the French one, which, while it subjects the accused to a severe, and often most unfair, interrogation, does not put him on his oath, or treat him as a witness in any respect. And there is good reason for this. The accused, whose conduct is the subject in question before the tribunal, and whose life or liberty depends upon the result of the proceedings, stands in a very different position, and does not speak under the same sanctions of truth as the witness, who is a third person coming before it to give information on the matters in dispute. The latter has not the same strong interests to pervert the truth, and speaks with the terror of a prosecution for giving false testimony before his eyes—a terror at which the man whose life or liberty is at stake would only smile. The reason for rejecting the testimony of accused persons is not, as suggested, to prevent individuals incurring the guilt of perjury; for oaths, however beneficial, are not essential to the existence of a court of justice, and the reasons for receiving or rejecting such testimony would equally apply whether they were in use or not. The argument, that under the existing practice a prisoner's mouth is stopped, is a mis-statement of the law; for he is not only allowed, but invited, to say what he pleases in his defence; and, what is more, is accorded a favour which is accorded to no other litigant party, namely, that if he makes an exculpatory statement of facts, the jury are to take into their consideration, and acquit him if they believe it; whereas all other litigants are held strictly to prove their allegations by evidence. The rejection of the testimony of accused persons rests, chiefly at least, on a different principle from that of interest, being founded on the maxim, which runs through the whole English law, "Nemo tenetur seipsum prodere"—a maxim framed not with the view of sheltering guilty persons, as is sometimes represented, but of protecting innocent ones, and carrying out the general policy of the laws. There is an essential difference between civil and criminal cases. A civil cause is a dispute between private individuals, who may dispose of their own rights as they please; a criminal one is an affair between the accused and society, whose laws he is charged with having broken; and public policy requires that his conviction should be based, not merely on a preponderance of probability, as in civil cases, but on a moral certainty of his guilt, which can only be expected from independent testimony borne against him, or his own voluntary statements. It is also a mistake to say that an innocent person has nothing to fear from cross-examination, especially when we remember that it would necessarily be conducted by a person vastly his superior in legal knowledge, and probably in natural capacity likewise, and who might or might not conduct it honestly and fairly. Such a process would often extract falsehood instead of truth; for when a man is suspected of crime, there is a natural tendency in the human mind to run after real or supposed admissions of guilt, and jump to conclusions from them; while weakness of nerves would frequently lead innocent men, but very rarely criminal ones, to falter and become confused in their answers; and to expect that even innocent men would not, under the tremendous pressure upon them, occasionally yield to the temptation of giving false or equivocating answers, and so work their own destruction, is putting too severe a strain on frail human nature. But although evidence extracted from the accused against his will cannot generate that moral certainty on which alone it is safe to act, it can, and is pretty sure to, generate sympathy in his favour, and thus shake public confidence in the administration of the law; while the opposite course, of holding the prosecution strictly to proof of the charge, encourages confidence in the law, and the hearty co-operation of society in its enforcement. The practical result of the suggested course would be to put the burthen of proof on the wrong party; so that when a man became suspected of a crime, instead of searching carefully for evidence against him, as is the case at present, all efforts would be made to escape the necessity of adducing proof by extracting from his own lips something to his prejudice; and mistaken convictions, especially where prosecutions are unfounded, or the result of malice or conspiracy, would be the frequent consequence. For these, and perhaps other reasons, the English law deems it the safest course to allow every accused person to defend himself in his own way, and enable him to say to his accuser, "If I have done evil, bear witness of the evil."

But while, on these grounds, we deem the rule of our law, which prohibits the examination of accused persons, a sound one, we do not look on its present practice as faultless. An accused person ought to be allowed the most ample latitude in defending himself, and this, it appears to us, he does not receive at present, when he is defended by counsel. By the common law, when a prisoner is defended by counsel, in cases where that course is allowable, his own mouth is, unfairly we think, stopped at the trial. A similar practice has been adopted in cases of felony since the Prisoners' Counsel Act, and a construction has been put on that statute which goes far to neutralise its benefits. Several judges have held, that when a prisoner is not defended by counsel, the jury may weigh the credit of any statement he makes in his own defence, although not supported by evidence; but that counsel appearing for him are bound by the same rule as parties and counsel in civil cases, namely, not to state as fact any matter which they are not prepared with evidence to substantiate—a ruling, the effect of which, in many cases, amounts simply to this, that a prisoner, by employing counsel, causes his defence to be suppressed, except so far as it can be suggested in a hypothetical form. It is remarable, that on charges of high treason the prisoner is asked by the Court, after his counsel have spoken, whether he wishes to add anything for himself.

The principle of Lord Brougham's bill, as already stated, is only an off-shoot of a more general one, It is to be observed that that bill does not empower the prosecution to examine the prisoner as a witness in chief against himself, and thus essentially ignores the principle of Bentham, that *every* medium of testimony ought to be resorted to. It also affirms the anomalous position, that a party may be a competent witness for one side, although not for the other—an absurdity which might fairly be supposed to have become extinct with the other ancient rules of incompetency. The bill is avowedly founded on the notion that the accused should be allowed to contradict on oath what is advanced against him on oath, overlooking the immense difference in the respective positions of the accused and the witness; and the recent case of the Rev. Mr. Hatch is cited as an instance where an improper conviction would have been averted had that course been open to the accused. It is, however, by no means clear that there was any defeat of justice in that case, for it has been suggested that it was lost, not through any defect in the law, but in consequence of the counsel for the defendant injudiciously refusing to call witnesses on his behalf. Moreover, although the principal witnesses was afterwards convicted of perjury, partly on the testimony of Mr. Hatch himself, the rest of the evidence against

that gentleman, coupled with the admissions made by himself on oath, on the trial of the witness, which it is assumed, he would have made on his own if he could have been examined on that occasion, formed an ample case for the jury. Be this, however, as it may, the making laws to meet unusual or extreme cases has been looked on in every age as the characteristic sign of short-sighted and weak legislation; and is in violation of the well-known rule of our own jurisprudence—"Ad ea quæ frequentius accidunt jura adaptantur," (2 Inst. 137); as well as of the Roman law—"Jura constitui oportet in his quæ ἐπὶ τὸ πλεῖστον i. e. ut plurimum accidunt, non quæ ἐκ παραλόγου, i. e. ex inopinato." (Dig., lib. 1, tit. 3, 1. 3.)

We have just stated our views on the general question, and on Lord Brougham's bill as a part of it. That many of our readers will disagree with us in the above conclusions is probable enough; but there is one matter connected with the subject on which we trust we shall have the concurrence of all reflecting persons—namely, that as the bill proposes to effect an organic change in a system which has existed and, rightly or wrongly, been lauded for centuries, the expiring month of a session of Parliament, whether accompanied or not by the heat of the dog-days, and the annually recurrent nuisance of the Thames, is not the fit period for its introduction far less for its discussion.—*Jurist.*

DIVISION COURTS.

OFFICERS AND SUITORS.

Seizure under Execution in the Division Courts.

(*Continued from page* 178.)

3. This sub-section specifies particularly a variety of articles, and needs no remark.

4. The same may be said of this sub-section.

5. Exempts certain animals, and food "*therefor*," that is, for *all* the animals named.

6. "Tools and *implements* of, *or chattels* ordinarily used in the debtor's occupation, to the value of $60." The wording of this sub-section is somewhat vague, and may lead to difficulty in carrying it out. Our impression is, that in the case of a *farmer*, ploughs, harrows, scythes, spades, forks, and such like articles come clearly within the meaning of *tools* of a farmer's occupation; as cultivators, fixed threshing machines, reapers, &c., would be within the meaning of the word *implements.* All certainly would be included under the terms *implements of husbandry.* But this section goes further, and exempts *chattels* ordinarily used in the debtor's occupation. Now "chattels" is the most comprehensive word that could be used, and to particularise, would in our judgment exempt cattle, or other animals used to work a farm, to grind for a tanner, for a brick maker, or to turn a lathe for a turner, and might (save the mark,) exempt a lawyer's or doctor's books, such property in no case exceeding the value of $60. "Goods" and "Chattels," are nearly alike in import, and are commonly found together, but "chattels" is the more technical and appropriate word, and where there is a difference, is the most extensive in meaning. Chattels in its largest sense signifies all a man's moveable property—all that is not real estate. It must not be lost sight of however, that it is chattels *ordinarily used* in the *debtor's* occupation, that are exempt.

Sec. 5. Limits the operation of the preceding clause, by providing in effect, that if the execution be upon a judgment recovered for the price of any particular chattel mentioned in sub-secs. 3, 4, 5, and 6, it may be seized and sold on such execution, notwithstanding the general exemption. The words are, "Nothing" and "shall exempt from seizure in satisfaction of a debt contracted for such identical chattel, any article enumerated in sub-secs. 3, 4, 5, and 6." That is, if execution for the price of a stove, a cow, or a horse, &c., sold to the debtor, the identical stove, cow, or horse, &c., may be seized, and sold to satisfy the judgment. We take it if the stove, cow, or horse, &c., be exchanged or traded for some other chattel before execution, such last mentioned chattel cannot be seized for the execution, it would operate only on the *identical* property, the value or price of which was the subject of the suit in which execution issues.

Sec. 6. Gives the debtor the right to select out of any larger number, the several chattels which are exempt. This seems to apply to the property enumerated specifically in sub-secs. 1, 2, 3, 4, and 5 only. The time when this selection is to be made is not provided for; it will probably be held that it must be made at the time of seisure, or at the earliest practicable time after notice of seizure comes to the debtor.

We have now gone over minutely, the several clauses of the Act; some persons may think we have gone too much into detail, but our remarks are mainly intended for officers, and we know what suits them, what they desire, and to inform them, and serve them is our object.

A word of caution to Bailiffs.—Upon nearly every one of the exemptions, a question of *fact* may be raised. An action may be brought against a bailiff, the defendant can have the case tried by a jury, and every one knows that there is a prejudice against officers, and that juries are not likely to set too high a value on property that is declared exempt from seizure under a certain amount; but a question of value is not the only one that can be brought before a jury for decision; so that bailiffs who would be safe, should act with great caution and some liberality, in computation towards debtors.

If a debtor have no property besides that exempted, the Bailiff will be justified in returning the execution no goods, but it is recommended that to the usual forms of a "*nulla bona*" return, the words "*liable to seizure,*" should be added.

At the time of seizure if there be several chattels of the description exempted, three or more cows for example, the Bailiff should ask the debtor if he wishes to select a particular one, under his right to retain one cow, and if so, to do it.

If any question as to value arises, and that the Bailiff thinks the debtor claims to retain more than would be covered by the value amount of exemption; the former may well ask the latter to put a value on each chattel, and if he refuses to do so, when reasonably requested, the circumstance of his refusal may be urged against the debtor in any after proceeding by him against the Bailiff.

The effect of exempting particular subjects is to make the act of seizing them under an execution the same as if seized without an execution at all: and Bailiffs and their sureties would be responsible for the wrongful act.

It will not do to quit the subject without referring to cases where the landlord makes a claim for rent.

(*To be continued.*)

Replevin in the Division Courts.

We direct attention to the Replevin Act of last session (cap 45) which confers jurisdiction on the Division Courts to issue writs of Replevin when the value of the property taken or detained does not exceed forty dollars. The enactment is as follows:

"6. In case the value of goods or other property or effects distrained, taken or detained does not exceed the sum of forty dollars, the writ may issue from the Division Court for the division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained taken or detained.

"7. But the matter shall be disposed of without formal pleadings, and the powers of the courts and officers and the proceedings generally in the suit shall be as nearly as may be the same as in the other cases which are within the jurisdiction.

of Division Courts, and this act and the act relating to replevin shall so far as any such suit is concerned be read as if they formed part of the act respecting Division Courts. (Consolidated Statutes for Upper Canada, cap. 19.)

This new and important jurisdiction furnishes another proof of the necessity for an early issue of a new set of Rules—for as proceedings are to be "as *nearly as may be* the same as in the other cases within the jurisdiction of the Division Courts," it is obvious that to secure anything approaching uniformity of procedure general rules and appropriate forms must be provided.

Clerks will notice that they are not authorised unless in the instances mentioned in the act to issue a writ (sec. 1) without a judge's order, and until procedure in the courts and rules are given on authority, doubtless the judge granting the order would send with it a form for the writ—like all the writs it should be signed by the clerk and issued under the seal of the Court.

This new jurisdiction materially enlarges the duties of officers, yet but little can be said with advantage till a practice is settled. All we can do at present is to give the practical proceedings in suing out the writ from a Court of Record and replevying goods under it at least so much and in such a shape as may be necessary to help officers to a better understanding of the subject.

It will be observed that the 7th section incorporates the acts relating to replevin so far as any suit brought in a Division Court is concerned.

Suppose, then, the goods of a party are wrongfully taken or detained, and he desires to obtain possession of them—in other words to replevy—the following steps are taken in the Superior Courts.

The person claiming the property his servant or agent makes an affidavit setting forth the facts of the wrongful taking or detention, the value and description of the property and that the person claiming is the owner or is lawfully entitled to the possession thereof.

On this affidavit application is made to a Judge for an order for a writ of Replevin to issue and the Judge either grants the order on an *exparte* application or a rule or order calling on the defendant to shew cause why the writ should not issue.

When the order is granted it is taken to the clerk who files it and issues the writ. The party obtaining it, then takes it to the sheriff to be executed, and at the same time and before any action is taken on the writ he must give a bond to the sheriff, himself and at least two securities, in treble the value of the property to be repleved, conditioned for his prosecuting the suit with effect and wi hout delay, that he will make a return of the property, if such is adjudged and will pay such damages as the defendant may sustain by the issuing of the writ if he fails to recover judgment, and will observe and keep all rules and orders made in the suit.

The sheriff upon being satisfied in respect to the bond at once proceeds to replevy the property and delivers it into the possession of the claimant or his agent. He then makes a return of the writ with a statement or schedule annexed thereto giving the names, residence and additions of the sureties, date of the bond, the name or names of the witness or witnesses thereto, and the number, quantity and quality of the articles of property replevied.

If only a portion of the property is replevied the statement should also mention the articles not replevied and the reason why not.

As the act provides that in Division Courts the matter shall be disposed of without formal pleadings, the claimant or defendant will not require to take any further action in the matter until the trial. The cause will be entered by the clerk in his books, and included in the list for trial in the usual manner.

The foregoing summary applies to the usual class of cases but in some instances the property to be replevied or a portion of it, cannot be found in the sheriff's bailiwick, for which contingency provision is also made in the Replevin Act, the nature of which together with other matters relating to this action, necessary to be known by clerks and bailiffs, we shall treat of in a subsequent number.

REPLEVIN BOND AND AFFIDAVIT.

The following we have received from a valued correspondent, a County Judge, of whose extensive experience we shall be happy to avail ourselves in matters of Division Court practice. We take the liberty of publishing his letter with the forms accompanying it.

To the Editors of the Law Journal.

DEAR SIRS,—Having been called upon yesterday to allow the issue of a writ of Replevin out of one of the Division Courts of this County, under the sixth section of the Act of last Session, 23rd Vic., ch. 65, I found it necessary to frame a form of writ. As I have taken some pains to make the form of writ given in the Replevin Act applicable to the Division Courts, and as the form may be useful to the readers of the *Law Journal*, I take the liberty of enclosing it for publication. I also enclose a form of affidavit for the writ which I have drawn up for the use of my clerks. I have endeavoured to embrace in it all the cases of wrongful taking and detention likely to occur in practice, and to make the allegations as concise as possible.

Urgent cases requiring the issue of a writ without a Judge's order, under the 2nd section of the Act, are not likely to occur in the Division Courts, and therefore I have not made the affidavit applicable to such cases; but the attention of the clerks might be called to the additional allegations required by that section.

Cases under the 3rd section are likely to occur frequently, but unless there is great urgency, a Judge's order should be obtained for the writ, as a precaution against informality or irregularity in the proceedings. The form of affidavit sent, is or may be made applicable to cases coming within that section.

I would suggest that you should, in an early number of the *Law Journal*, inform the Clerks and Bailiffs of their duties under this Act; such directions with regard to these duties, as you have given to guide them in the performance of their other duties, would be very useful.

FORM OF WRIT OF REPLEVIN.

No. —, A.D. 1860.

In the —— Division Court of the County of ——.

[Seal of Court.]

You are hereby commanded that without delay you cause to be replevied to (A. B.), his goods, chattels, and personal property following, that is to say (here describe the property as in the affidavit), which said (A. B.) alleges to be of the value of —— dollars, and which (C. D.) hath taken and unjustly detains (or unjustly detain) as it is said, in order that the

said (A. B.) may have his just remedy in that behalf. And to summon the said (C. D.), by serving a copy of this writ upon him, to appear at the sittings of this Court to be holden at ——, in the Township of ——, in the County of ——, on the —— day of ——, A.D. 1860, at the hour of —— in the forenoon to answer to the said (A. B) in an action for unjustly taking and detaining (or unjustly detaining) his goods, chattels, and personal property, aforesaid. And to return this writ and what you shall have done in the premises, to the Clerk of the Court forthwith. And herein fail not.

Given under the seal of the Court this —— day of ——, 1860.

—— ——,

To —— Bailiff of the said Court. } *Clerk.*

FORM OF AFFIDAVIT FOR WRIT OF REPLEVIN.

In the —— Division Court of the County of ——.

I, A. B,, of ——, make oath and say:

1st. That I am the owner of (describe property fully), at present in the possession of C. D.

Or, That I am entitled to the immediate possession of (describe property), as *lessee*, (*bailee* or *agent*,) of E. F., the owner thereof, (or as Trustee for E. F.,) (or as the case may be,) at present in the possession of C. D.

2nd. That the said goods, chattels, and personal property are of the value of —— dollars.

3rd. That on or about the —— day of ——, the said goods, chattels, and personal property, were lent to the said C. D., for a period which has expired, (or were delivered to the said C. D., for a special purpose, namely, ——,) and that although the said goods, chattels, and personal property have been demanded from the said C. D., he wrongfully withholds and detains the same from me, the said A. B.

Or, That on or about the —— day of ——, the said C. D., wrongfully took the said goods out of my possession, (or out of the possession of E. F.,) and withholds and detains the same from me.

Or, That on or about the —— day of ——, the said C. D., fraudulently obtained possession of the said goods, chattels, and personal property, by falsely representing that ——, and now wrongfully withholds and detains the same from me.

Or, That the said goods, chattels, and personal property were on the —— day of ——, last, distrained or taken by the said C. D., under color of a distress for rent, alleged to be due by me, to one E. F., when in fact no rent was due by me to the said E. F. (or as the case may be).

4th. That the said C. D. resides (or carries on business), at ——, within the limits of the —— Division Court of the County of ——. (Or that the said goods, chattels, and personal property were distrained,) (or taken and detained,) (or detained,) at ——, within the limits of the —— Division Court, of the County of ——.

Sworn, &c.

NOTE.—(If the property claimed, consists of a single article, the name of the article may be substituted for the words goods, chattels, and personal property, and the verb altered to the singular number.)

WINDSOR, 11th August, 1860.

To the Editors of the Law Journal.

GENTLEMEN,—You will please excuse the liberty I have taken in asking your opinion on the following questions:

1st. Has the Judge of a Division Court a right to extend time on an execution in Bailiff's hands, under ordinary circumstances?

2nd. Is it lawful to grant a *new trial* after a judgment has been rendered on an interpleader? Some of our Judges have decided they have not the power to do so, while others contend that they have.

Please answer in your next issue and oblige

Your obedient Servant,

E. S. WHIPPLE.

[1st. We do not think that the Judge of a Division Court has any power, under ordinary circumstances, to extend the time for payment of an execution in the Bailiff's hands. After an execution is once issued, the party in whose behalf it is sued out has, in our opinion, alone the right to exercise such control over it.

2nd. We are of opinion that the Judge has the power of granting a new trial in interpleader matters as in other cases.

The section of the Act which regulates the practice in interpleader cases states, that the order of the Judge "shall be enforced in such manner as any order made in any suit brought in such Court, *and such order shall be final and conclusive between the parties.*" This might seem to lead to the inference that the parties would not be entitled to a second hearing, but when taken in connection with the 84th section of the Division Court's Act of 1850, wherein it is also provided, that every order and judgment of any Division Court "shall be final and conclusive," but goes on to provide that "the Judge shall also, *in every case* whatever, have the power, if he shall think fit, to order a new trial;" we think that the opposite conclusion must be arrived at.

Upon principle, also, we shall hold the same opinion, as it is in accordance with the true spirit of the law to give every facility for arriving at a just decision on any matter in dispute, and it would manifestly lead to an injustice being done to suitors, if an exception were made in the instance of an interpleader issue.

The decision of a Division Court Judge is made to be final or without appeal, because the jurisdiction being so limited it was assumed that he would be fully competent to form a correct opinion on any subject coming before him, but could never be intended by the Legislature to deny him the power of doing suitors as ample justice, in every case, as they might have in the higher Courts.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, ESQ., *Barrister-at-Law.*

THE CORPORATION OF THE TOWNSHIP OF WHITBY V. HARRISON.

Collector of Taxes—Action against his surety—Delivery to him of roll—Oath of office—Township of Whitby—Division of by 20 Vic., ch. 113

To an action against a surety for a collector of taxes for moneys received and not paid over, defendant pleaded that no roll properly certified was received by the collector, but that he collected the moneys wrongfully and without authority. It appeared that a roll was delivered to him signed by the clerk, but not otherwise certified. *Held* sufficient authority.

Defendant also pleaded that the collector had not taken the oath of office. *Held*, that the proof of such issue lay upon him.

The bond was taken to "the Municipality of the Township of Whitby." and afterwards the Township was divided by 20 Vic., ch. 113, into Whitby and East Whitby. *Held*, that the bond was properly sued upon in the name of the Corporation of Whitby.

This was an action brought by the plaintiff to recover from the defendant, as surety for one Thomas Hodgson, collector for the township of Whitby for the year 1857, a sum of money for rates and assessments for that year collected by the said Hodgson, and not paid over to the treasurer of the municipality.

The case was tried at Whitby, before *Hagarty*, J., and a verdict entered for the plaintiffs for £2,000 debt, and damages assessed by consent at £200, subject to the opinion of the court; and it was agreed that if the court should be of opinion that the plaintiff's were entitled to recover, the amount of damages should be settled by a reference.

C. S. Patterson for the plaintiffs.

Richards, Q. C., contra, cited, *Kepp* v *Wiggett*, 10 C. B. 35; *Webb* v *James*, 7 M. & W. 279.

The facts of the case, and the questions to be decided, are sufficiently stated in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The *nisi Prius* record shews that the plaintiffs took issue on all the defendants pleas. Upon the 1st, 2nd and 3rd pleas the plaintiffs were entitled to a verdict, for they only denied the making of the deed sued on, and the collection of any money, and set up payment of all that was collected, of which payment no proof was given.

Then as to the 4th, 5th and 6th pleas, on which issues in fact were joined.

The 4th Plea is that no collector's roll properly certified under the hand of the clerk of the council, was received by the collector before the time he collected the rates for 1857, or any of them, as in the declaration alleged, nor was any such roll ever delivered to him, but he collected the moneys wrongfully, without having received his collector's roll or any collector's roll for the township, or any part thereof, and without any authority for so doing.

The evidence, it seems, was that the collector did receive the roll signed by the clerk, but not *certified* otherwise than by such signature being placed at the foot of it. We think the substance of that issue was, that the collector received the taxes wrongfully and without authority, which it hardly lies in the surety's mouth to urge, if he did collect and receive them; but however that may be, we think the signature of the clerk sufficiently verified the roll to enable the collector to receive the money, for his signature at the end sufficiently authenticated the roll as that on which he was to make his collections.

The fifth plea is in substance that the collector had never taken the oath of office which he was required to take, and that the defendant had no notice of that omission until long after the money was collected.

It is not stated in the case whether the collector did take the oath or not. The affirmative of the issue was with the plaintiff's, but the burthen of proof, notwithstanding, we think, lay with the defendants, for it would be presumed that the collector did his duty in this respect till the contrary is shewn, * and there being no evidence on the subject, the verdict should be for the plaintiff.

The sixth plea is, that before the County Council had appointed any day later than the 14th of December, 1857, for the return of the collector's rolls, or for paying over the money collected, the collector had failed in collecting the taxes mentioned in the condition of the bond: that on the 19th of December, 1857, the township council authorized by resolution the collector to continue to levy unpaid taxes to the 15th of January, 1858, and that on the 29th of January, and before any other resolution on this subject had been passed, the County Council of Ontario by by-law extended the time for the return of the collector's roll to the 1st of March, 1858, and thereby extended the time for the collectors of municipalities paying over the rates to that day; that the said by-law was passed without the knowledge of the defendant, and that he never consented to the extension of the time given by such by-law.

This plea and the fifth are pleaded as equitable defences.

According to the statements of the evidence contained in this case, the sixth plea was proved, and without regard to its sufficiency the defendant was therefore entitled to a verdict upon the issue on that plea.

An objection was taken, that though the bond was taken to "the municipality of the township of Whitby," it cannot be now enforced in the name of the Corporation of the Township of Whitby, on account of the change made by statute 20 Vic., ch. 113, which divided the Township of Whitby into East Whitby and Whitby, after the making of this bond. That act was to take effect upon the 1st of January, 1858, so that the change was after this bond was executed, namely, on the 16th of November, 1857.

We see no other way that the bond could have been sued upon than as it has been.

* See Tay. Ev., sec. 339; Williams v. East India Company, 3 East 192.

The plaintiffs in our opinion are entitled to have a verdict entered for them on all the issues, except that on the sixth plea, and the defendant should have a verdict on the sixth plea.

THE SAME CASE.

The fact that a collector of taxes received the money without any roll having been delivered to him, and without having taken the oath of office, forms no defence for his surety to an action for not paying over such money.

An extension of time for making the collection without the surety's consent does not discharge him, being expressly allowed, and his liability retained, by the 18 Vic., ch. 21.

The plaintiffs, besides taking issue, demurred to the fourth, fifth, and sixth pleas.

C. S. Patterson for the demurrer. *Richards*, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

As to the fourth plea, we can only understand it to mean that the collector collected or received the money without having any roll furnished to him.

The demurrer, we think, must be taken to admit that, for we cannot infer from the plea what the evidence on the trial proved: that a collector's roll signed by the clerk, though not otherwise certified, was delivered to him.

As the plaintiffs have taken issue upon the plea as well as demurred to it, and as we think the plaintiff's were entitled to a verdict in their favour upon that issue, the costs only of this demurrer are in question. The defendant's counsel relied much on the authority of *Webb* v. *James*, (7 M. & W. 279,) for supporting this plea, but the condition of that bond made it, when coupled with the recitals, much more restricted in its nature than the bond into which this defendant entered. We think this bond makes the surety liable for all rates and assessments for 1857, which should come into the collector's hands, and which he should not pay over.*

The declaration avers that the collector collected moneys of the rates and assessments for 1857, which he did not pay over, but neglects and refuses to pay over. It is no sufficient answer to the declaration to say that no certified collectors roll came to the collector for the rates of 1857, before he received the said moneys, or at any time; for if any person assessed, knowing what he stood rated at on the roll as formerly revised, should voluntarily pay it to him before the clerk had sent him the roll, he would be bound to pay it over; and besides, under 12 Vic., ch. 81, sec. 179, there might be rates which the collector would be bound to collect for 1857, and which would not appear on the certified roll, but would be leviable by the collector under a precept from the sheriff.

The fifth plea assumes it to be a good equitable defence, when insisted on by the surety, that the collector had not taken the oath of office at any time after he was appointed.

The 12 Vic., ch. 81, sec. 127, requires that every collector shall, before entering on the duties of his office, take an oath that he will truly, faithfully, and impartially, to the best of his knowledge and ability, *execute the office of collector*, and, that he has not received, and will not receive any reward for the exercise of any partiality or malversation, or other undue execution of the said office.

No doubt it would be a breach of this oath, which the collector ought to have taken, if he received rates which he did not duly pay over; and it is possible, though not certain, that the defendant when he became surety for the collector, looked upon this oath, which he might have supposed the collector must have taken, or must take, as affording some security for his integrity. We must not suppose that a sworn officer would have more scruples about acting unfaithfully than one who was not sworn, otherwise it would be altogether idle in the legislature to exact such oaths. But we can find no authority that would warrant our holding that the omission to take the oath on the part of the collector furnished a legal excuse to the collector for not paying over money that he had collected, or that it could be set up by his surety as a claim to

* The bond in this case contained no recital, and was conditioned as follows: "The condition of this bond is such, that if the above bounden Thomas Hodgson shall collect all rates and assessments of the said municipality for the year 1857, for which he has been appointed collector, and shall pay all such rates and assessments (or so much thereof as can be collected) over to the treasurer of the said municipality of the township of Whitby, on or before the fifteenth day of December, one thousand eight hundred and fifty seven, then, and in such case, this bond shall be void, or otherwise to be and remain in full force and virtue."

exemption from liability on his part. Then can we hold it to be a defence for the surety in equity more than at law? We think not. It may be truly said that the plaintiffs were negligent in not seeing that the oath was duly taken, and on grounds of public policy they should not be encouraged to think themselves equally secure as if they had done their own duty in that respect, but at the most that was laches on their parts, and in a matter collateral, not in any thing to which the bond or condition refers.

He was collector, though he was not sworn. His receipt for the money, we take it, would bind the municipality so that they could not enforce payment a second time from the parties assessed, who had paid their taxes to this collector; and we should be supported by no authority, we think, in holding that the fact of the collector not being sworn operates in equity as a discharge of the surety. By the 127th section, as amended by the statute of 1850, a fine of £10 is imposed upon the collector if he omits to take the oath, which would hardly be an adequate punishment if the legislature intended that all he had done while he had not taken the oath should be held to be illegal to the extent that he might keep as against the municipality whatever money he had collected.

There are many instances where the surety has claimed in vain to be exempt in consequences of laches in the party taking the security, where the claim for discharge was far stronger, as, for instance in *Sheperd* v. *Beecher*, (2 P. Wms. 288). There was no fraudulent concealment here of a fact which the surety might desire to know. He could easily have learned whether the collector had taken the oath of office. When the act says, as it does, that before entering on the duties of his office the collector shall take the oath prescribed, or in default of his doing so shall pay £10, it does not follow, in our opinion, that his failing to observe that direction renders whatever he does illegal.

As to the sixth plea, the statute 18 Vic., ch. 21. is an answer to any objection on the ground of extension of time, for it authorised the extension, and expressly provides that any such extension should not "invalidate or otherwise affect the liability of the collector or his sureties in any manner whatever."

The plaintiffs we think should have judgment in their favour on all the demurrers.

Judgments for plaintiffs on demurrer.

McIver et al. v. Jacob Dennison.

Note payable to maker's wife—Endorsement by her.

Declaration, on a note made by defendant, payable to D. or order, and by him endorsed to plaintiffs. *Plea*, that D., when the note was made, was, and still is defendant's wife. *Replication*, that defendant made the note with the intent that D. should endorse away the same, and that she endorsed it to the plaintiffs by his authority.

Held, on demurrer to the replication, that the action was maintainable, and the plaintiffs entitled to judgment.

Action on a promissory note for $472 75, made by defendant, payable to Catherine Dennison or order, and by her endorsed to plaintiffs.

Plea.—That the said Catherine Dennison, to whom the said supposed note in the declaration mentioned was made payable, was at the said time of the making of the said supposed promissory note, and at the said time of the said endorsement thereof, and still is the wife of the said defendant; and that the said defendant and the said Catherine Dennison, at the said several times, when, &c., were, and still are living together as husband and wife within Upper Canada.

Replication.—That the said defendant made the said promissory note in the said declaration mentioned, payable to the said Catherine Dennison, or order, as set forth in the declaration, for the express purpose, and with the intent that she should endorse away the same, and that she endorsed the said note to the plaintiffs with the privity, approbation, and consent of the said defendant, and by his authority.

Demurrer on the grounds.—1. That inasmuch as the matter disclosed in the plea shews the instrument declared on to be void and not a negotiable instrument, for want of a legal and sufficient payee, and the replication admits the truth of the plea, the intent and purpose alleged in the replication are insufficient to render the instrument a valuable and negotiable instrument. 2. That the instrument being void from the beginning, the consent or authority of the defendant, as alleged in the replication, could not make the endorsement valid, or give a right of action to the plaintiffs upon such instrument.

The plaintiff joined in demurrer, and took the following exceptions to the plea:—that the defendant having made the said note, as in the said declaration alleged, payable to the said Catherine Dennison or order, thereby gave her authority to endorse the said note, and she having in pursuance of such authority endorsed the same to the plaintiffs, the defendant is estopped from alleging her coverture with him in bar of the action, or from denying her right to endorse the said note. That under the circumstances set forth in the declaration and in the said plea, the plaintiffs being the holders of the said note without notice, the said plea affords no answer whatever to the declaration, or to the right of the plaintiffs to recover on the said note. That the defendant having made his said note payable to the said Catherine Dennison or order, as a feme sole, is now estopped from alleging his coverture with her in bar of the plaintiff's action.

C. S. Patterson for the demurrer. *Richards*, Q. C., contra.

The following authorities were cited—*Smith* v. *Marsack*, 6 C. B. 486; *Easton* v. *Pratchett*, 1 Cr. M. & R. 798; *Hooper* v. *Williams*, 2 Ex. 13; *Gay* v. *Lander*, 6 C. B. 336; *Prestwick* v. *Marshall*, 7 Bing. 565; *Cotes* v. *Davis*, 1 Camp. 485; *Prince* v. *Brunatte*, 1 Bing. N. C. 435; Chitty on Bills, 16.

Robinson, C. J.—I think the plaintiffs are entitled to judgment on this demurrer, on the authority of the case of *Smith* v. *Marsack* (6 C. B. 500) and of *Drayton* v. *Dale*, (2 B. & C. 299,) which latter case is relied on as an authority in *Sanderson* v. *Collman*, (4 M. & Gr. 218.) I refer also to Story on Promissory Notes, secs. 80—88; *Hallifax* v. *Lyle*, (3 Ex. 453); *Braithwaite* v. *Gardiner*, (8 Q. B. 474); *Pitt* v. *Chappelow*, (8 M. & W. 616); *Prestwick* v. *Marshall*, (4 C. & P. 594, S. C. 7 Bing. 567); *Prince* v. *Brunatte*, 1 (Bing. N. C. 435,) and Byles on Bills, p. 155.

McLean, J.—It appears to me that this action is sustainable, and that the defendant cannot set up as a defence that the note declared on was made by him payable to his wife or order, and therefore void.

When he made the note so payable he constituted his wife so far his agent as to give her power, by putting her name on it, to give it currency as a negotiable note. She could not enforce the payment, and the note would have no force so long as it remained in her hands, but by endorsing it and handing it over to the plaintiffs the defendant became bound to pay the amount according to its tenor and effect. If the note had been drawn by the defendant payable to his own order, it would be of no value until endorsed by him, but his endorsement would immediately make it a note payable to bearer; and I cannot see why a note payable to the defendant's wife or order, and endorsed by her in blank, should not equally become binding as a note payable to bearer. The defendant could give his wife authority to make a note in his name, and if she made such a note, and the authority could be shewn, the defendant would of course be liable as the maker. But if he authorised his wife to endorse an instrument by which he promised to pay a certain amount to her order, and the instrument so endorsed is transferred, as alleged in the replication, I think he is estopped from denying his liability on such instrument to the holder of it.

Judgment for plaintiffs on demurrer.

IN PRACTICE COURT.

EASTER TERM, 1860.

Reported by Robert A. Harrison, Esq., *Barrister-at-Law.*

In the matter of the Arbitration between the Corporation of the Township of Eldon and David Ferguson and Israel Ferguson.

Corporations, sole or aggregate, if not disabled, may submit disputes relating to Corporate property, to arbitration, and their successors will be bound thereby.

The authority of the Executive Government to appoint a Commission to enquire into the financial affairs of a Municipal Corporation, does not prevent such a Corporation from suing for money due to them.

Quære—Can the Reeve of the Township affix the Seal of the Township to a submission to arbitration as to property of the Township, without being specially authorised by resolution of the Council so to do?

Arbitrators appointed by a Municipal Corporation, as above mentioned, may examine the accounts of the Corporation, though previously audited, as the Municipal law directs.

Under the special circumstances of this case, it was held that the arbitrators might well make their award against the father of the Township Treasurer, who was really but not nominally the Treasurer, and who was a party to the submission as to the state of the Township Treasurer's Accounts.—(23rd June, 1860.)

In Hilary Term last, Mr. Hector Cameron obtained a Rule calling on the Corporation of the Township of Eldon to shew cause on the first day of the then next Term, why the award made between the parties, should not be set aside, on the following grounds:

1.—That the Corporation had no right to enter into the submission.

2.—That by the Municipal Act, a Commission may be appointed to investigate the financial affairs of a Corporation, and therefore no other mode can be resorted to, to investigate the accounts.

3.—That the deed of reference does not purport to be under the corporate seal, and there is nothing to shew that the reference was duly entered into by the Corporation, under their seal, or otherwise, in a manner obligatory on the Corporation.

4.—That two of the arbitrators acted in a partial and unfair manner, and shewed a determination to favor the Corporation, during the arbitration.

5.—That the arbitrators acted perversely and illegally in going into an examination of accounts which had been duly audited according to the provisions of the Municipal Act, and in reference whereto, the Report of the auditors is made final.

6 —That the arbitrators acted unjustly and with gross partiality, in charging the treasurer with all moneys appearing due by the Collectors' Rolls, for taxes, without evidence that the Collectors had received or paid to the treasurer, the whole of such moneys, and notwithstanding that a Collector stated to the arbitrators he had not paid to the treasurer all such moneys, and also in refusing to receive evidence of, or give credit for sums paid by the treasurer, but not charged in his book as paid.

7.—That the arbitration was unfair in this, that the Corporation appointed two out of the three arbitrators, and refused to arbitrate, except on that condition.

8.—That the arbitrators consulted with members of the Council of the Corporation, as to their award, and what amount they wished them to find, and award for.

9.—That the award was not as it purported to be, the unanimous decision of the three arbitrators,—Jacob Ham, one of the arbitrators, having signed it under a mis-apprehension.

10.—That the award was unjust in this, that it clearly appears no sum whatever was due the Corporation by their treasurer, and that the Corporation admitted that, by levying a tax for payment of a balance due by them to the treasurer.

11.—That the Corporation could not legally arbitrate with Israel Ferguson, he not being responsible to them, and that the award as regards him is void, and there was no liability on his part, to the corporation; or contract between him and them.

12.—Or why the award should not be referred back to the arbitrators, for re-consideration.

The submission was dated the 25th of November, 1859, and made between the Corporation of the Township of Eldon, of the first part, and Israel Ferguson and David Ferguson, of the second part. It recited that David Ferguson was treasurer of the Township, from 1854 to 1857, both years inclusive, and that Israel Ferguson was his deputy, and received and paid out Township moneys for David Ferguson, during his said term of office. It further recited, that disputes had arisen between the parties, and were then depending, touching certain alleged irregularities and omissions in the accounts and books of the said David Ferguson, as such treasurer, as aforesaid, and certain alleged deficiencies on his part, or on the part of the said Israel Ferguson, acting as such treasurer during the said term; and in order to put an end thereto, and to obtain an amicable adjustment thereof, the parties of the first and second parts respectively agreed to refer the same to the award of Alexander A. McLauchlin, Jacob Ham, and George Kempt, arbitrators, indifferently chosen on behalf of the said parties respectively; award to be made before 28th December, 1859.

The indenture of reference witnessed that the said parties, thereto did, and each of them did; and each of the parties of the second part, for himself and the other, severally and respectively, and for his and their respective heirs, executors, administrators, and successors in office, covenant that each of the parties thereto, of the first and second parts, should well and truly obey and perform the award of the arbitrators or any two of them, concerning the premises, or anything in any manner relating thereto; the costs of the arbitration and reference, to be in the discretion of the arbitrators.

The submission was signed by John Morrison, Reeve, [L. S.] written partly on the seal of the Corporation, and by David Ferguson, and Israel Ferguson, and the attesting clause was thus; "In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written."

The award was under the seals of all the arbitrators, and dated the 14th day of December, 1859.

The award, after reciting the submission, and that the arbitrators had taken on themselves the burthen of the reference; stated that they had determined that there was jusly due and owing to the Municipality, from David Ferguson, and Israel Ferguson, £128 15s. 5½d., and £21, interest on the same; and directed that David Ferguson and Israel Ferguson, should pay the said sum of £149 15s. 5½d., to the Municipality, one half in three months, and the balance in six months, with interest, from the day of the publication of the award, and notice thereof in writing given to the said David and Israel Ferguson. The arbitrators also directed the payment the costs of the reference.

There were a great number of affidavits filed, on moving the rule; the general effect of them was that the treasurer's accounts for 1854, 1855, 1856, and 1857, were duly audited and approved, by the auditors appointed by the Township; that the arbitrators acted unfairly, and refused to allow the auditing of the accounts to be considered binding on the Corporation, and in making up the accounts charged the treasurer with the gross amount of taxes payable according to the Collector's Roll, without any investigation of the amount paid to, or received by the treasurer, or remaining uncollected; that divers large sums of money had been paid on behalf of the treasurer, for the uses of the Township, which were not entered in the book kept by Israel Ferguson, but the arbitrators refused to give credit for such sums, because they were not entered, though evidence was offered to prove their payment; and that Israel Ferguson was not treasurer during the four years, the accounts for which, were in dispute; nor was he security for the treasurer, nor did he ever enter into any contract or agreement to become liable to the Corporation for the treasurer, but being his father, and well acquainted with the Municipal affairs of the Township, he usually acted for him.

The parties making the affidavits besides David and Israel Ferguson, were persons who had been members of the Municipal Council of the Township, and officers of the Council, the Clerk, and one of the Auditors. They expressed their opinion, and David and Israel Ferguson stated positively, that they did not owe the Municipality anything. Jacob Ham, one of the arbitrators, who signed the award, stated the same thing, and explained that he thought he was bound to sign the award because a majority of the arbitrators concurred in it. He also spoke of the mode adopted by the arbitrators, to ascertain the amount due, and of their refusal to allow several sums of money proved to have been paid on account of the Corporation by the treasurer, because they were not entered in the treasurer's account or memorandum book.

During last Easter Term, *D. B. Read*, Q.C. showed cause, and filed numerous affidavits, shewing that the mode in which the accounts were made up and allowed by the arbitrators, was by charging the treasurer only with sums for which receipts were produced, and most of these receipts were signed by Israel Ferguson, for David the treasurer, and that all sums that they could show were paid out on account of the Corporation, were allowed; and then the award made for the balance, adding interest. Mr. Read contended that his affidavits clearly answered the case made out when the rule was moved for, and shewed that Israel Ferguson was really the treasurer, and did all the business, whilst during the same four years he was Reeve of the Township; that if it should appear that the Township had lost anything whilst he was filling the two incompatible offices of Reeve and Treasurer of the Township, or Reeve and Deputy Treasurer, and that the monies lost had gone into his hands, there could be no doubt that it would be viewed as

a fraud on his part, and the auditing and approving of the accounts would not prevent his being liable to the Township, and that David must be equally liable either because his deputy had been guilty of fraud in relation to the office, or because he allowed his name to be made use of to allow Israel to fill the office for his own benefit, and therefore he could not set up the auditing, to cover the fraudulent conduct of the real principal. He referred to the affidavit of Geo. W. Millar, who had been one of the auditors in 1855 and 1856. He stated that no Collector's Roll was produced, and no other papers, books, or documents, than the treasurer's books and vouchers, and that Archibald Jackson, his co-auditor, said he had asked Mr. Israel Ferguson, the Reeve, for the Collector's Roll, but that he had said it was only the treasurer's books that the auditors had to audit. He contended that this shewed conduct on the part of Israel Ferguson, further sustaining the view that he had acted fraudulently. That the affidavits filed by him, further shewed that the Bond of David Ferguson, with sureties for the due performance of the duties of treasurer, could not be found. That the Reeve, Israel Ferguson, stated he had given it to the Town Clerk, and this the Town Clerk denied, and that the Bond could not be obtained. He argued that the case raised, had been fairly met, and that the Rule should be discharged.

Hector Cameron, contra. The Corporation seal to the submission is not alone sufficient, it ought to be shewn that the submission was by order of the Corporation, and there should be some By-law or resolution of the Council, authorising it. He referred to Russell on awards, and to Municipal and Con. Stat., sec. 3, 5, 8, sub. sec. 8, and 9. He also urged that under sec. 170, of same statute, the Council having allowed the accounts as audited, their decision was final, and that the arbitrators were not allowed to go behind that allowance. He further contended that the power given by sec. 240 and 241, of the same statute permitting the appointment of a commission, to inquire into the financial affairs of a Municipality, shews that the decision on the report of the auditors must be final. He also urged that there was nothing to warrant an award against Israel Ferguson; besides urging generally, that nothing was due the Corporation from the Treasurer.

RICHARDS, J.—It will be more convenient to dispose of the objections to the award in the order in which they appear in the Rule.

As to the first objection.—It is laid down in Watson, on awards, that "Corporations sole or aggregate, if not disabled, may submit disputes relating to Corporate property, to arbitration, and the successors will be bound,"—He refers to Rolle Arbitr. 2 (A) and Bac. Abr. Arbitr. C. 21, E. 4, 13.

As to the second.—The power conferred is merely one of inquiry, and may be of great advantage to Municipalities, by enabling the Commissioners to enforce the attendance of witnesses, and compelling them to give evidence. There is nothing in the section to prevent a Corporation from suing for money due them. It would be unreasonable to hold that this power to inquire, should deprive the Corporation of resorting to a more speedy and economical mode of investigating their accounts, and obtaining payment of the amount due, when ascertained. I see nothing in this section to prevent the corporation from referring their claim.

Third.—The submission is not under the Corporate Seal. The objection as a whole, may be considered thus, that because it is not under the Corporate Seal, and it is not shewn in any other manner, that the reference was duly entered into by the Corporation, *under their seal or otherwise*, therefore the submission is void. As it is under the seal of the Corporation, the objection seems answered. If it is contended that there is no authority given to the Reeve to enter into the submision on the part of the Corporation, though he has put the seal thereto, then the objection is not taken quite in that form. But if it had been so taken, I would not feel justified in setting aside the award on that ground, for the resolutions of the Corporation, filed, clearly contemplate a reference of this matter, and the Reeve states in his affidavit, that the Council appointed Alexander A. McLauchlin, Esq., as their arbitrator, and that Mr. Kemp was appointed as third arbitrator, at the request of Isaac Ferguson. I apprehend if the Corporation were not bound by the submission, that would be as good a ground for the treasurer to take, on any proceeding to enforce the award, as it is on this application—the objection would be, that the submission is void for want of mutuality. I am not therefore disposed to interfere with the award on this ground, as it will be open to the parties to raise it hereafter, if so advised.

Fourth.—The affidavits filed to sustain the award, establish that the arbitrators took a reasonable course. The affidavits of the two arbitrators, the gentlemen appointed by the Council to go over the books and accounts, shew that they only charged against the treasurer the monies for which his receipts were produced, and they allowed him all sums that appeared by the books, to have been paid out, and what it could be proven were paid out on account of the Corporation. As to the interest, and consulting the Corporation as to its being charged, the arbitrators discussed it among themselves, two of them were inclined to allow interest at six per cent. They finally called on the members of the Council, in presence of all parties, to say if they demanded interest. They said they did, and would be content with interest at five per cent. I see no partiality or unfairness in this.

Fifth.—That the arbitrators should go into the accounts though they had been audited, seems to me to be very natural. The very ground of the dispute was that (although the accounts had been audited,) there were irregularities and omissions in the books of David Ferguson, as such treasurer, and certain alleged deficiencies on his part, and on the part of the said Israel, acting as such treasurer, and these were to be referred, and they bound themselves to abide by and perform the award It was to put an end to the dispute, that the submission was made, and it certainly would not be a satisfactory adjustment if the arbitrators after that kind of a submission, had refused to examine the irregularities, and omissions in the accounts and books, and the deficiencies of their officers. Under the submission, I think any advantage from the auditing and allowance of the accounts was waived.

Even if not, it seems to me to be a monstrous proposition that an officer of the Corporation may wilfully, or even negligently omit to enter the receipt of monies, and because the auditors have not been able to discover this omission, and the Corporation approves of the report, that when the omissions are discovered the officer may set up the audit to cover his own fraud or neglect. In the case before us it was open to the arbitrators to say on all the facts whether the conduct of the Treasurer and Acting-Treasurer was fraudulent or not—and if they thought there was fraud, as they seem to have done, they were quite justified, independently of the special ground of submission, in going into the accounts. I understand there is a case decided in the Court of Queen's Bench here, of the Municipality of the County of Haldimand v. Martin, in which the question is raised, how far the audit of an account prevents the Corporation from suing to recover back money improperly paid on such account. I have not been able to see the case, but have been informed that the Court decided that the auditing and approving of the account by the Corporation was no answer to the action.

As to the *sixth* objection—this seems negatived, by the facts as shown by the affidavits filed in reply. I have mentioned the mode in which the indebtedness was ascertained, in my observations on the four objections, and I also refer to that for an answer to the *seventh* and *eight* objections.

Ninth—As to this there is no doubt that two of the arbitrators did concur in the award, and that is sufficient—that Mr. Ham did not concur, is only shewn by his own affidavit—the other arbitrators were not aware that he dissented, and the affidavits filed in shewing cause, shew that he assented. If it were of any consequence in determining the matter with these contradictions, the fact that he signed the award would prevail.

Tenth—The observations on this fourth objection apply to this

Eleventh—It is shewn beyond all doubt, that Israel Ferguson though Reeve of the Township, transacted by far the larger part of the business of Treasurer; that he gave explanations and statements as to the accounts, and although he acted in the name of David, it might be urged with great force, that he was in truth the Treasurer. The monies for which the Treasurer is said to be in default were almost all, if not all paid into his (Israel's) hands. By his own letter he seems to admit that he had some monies belonging to the Township, in his hands. The bond given by his son David, for the due performance of the duties of his office, had been in his possession. When applied to for it he stated he had handed it over to the Clerk—the Clerk denied that he had re-

ceived it. It does not appear that it has yet been delivered to the Municipality. Under these circumstances the Municipality agree to arbitrate if Israel will become bound with his son, to fulfil the terms of the award. By the submission which recites the fact, that he (Israel) acted as Treasurer, it was agreed to refer the disputes about the omissions, &c., in the Books, and certain alleged deficiencies on David's part, or on the part of the said Israel to the arbitrators, and both covenant to perform the award. Under this state of things I think the arbitrators may well award against Israel.

Twelfth—I see no reason for referring back the award. Looking at all the facts of the case, I see no reason to doubt that the arbitrators have done substantial justice. Israel Ferguson was Reeve of the Township for *four* years; during that period his son was the Treasurer, and as Reeve he would no doubt have influence in the appointment of the other officers of the Corporation. As head of the Corporation, it was his duty to see that all the subordinate officers did their duty; that the Treasurer kept proper books, and entered therein all monies received and paid out on account of the Township. It was also his duty to see that the Treasurer gave good security for the proper discharge of the duties of the office. As Deputy-Treasurer, or as real Treasurer, discharging the duties of the office in his son's name, he undoubtedly omitted to enter some monies which he had received for the Township, and for which he gave the Treasurer's receipt. He contended that he had paid out monies for the Township which amounted to the sum so omitted to be entered by him, and that these sums had not been entered as monies paid out for the Township. One of the persons appointed to look over the accounts, states that the amounts so claimed by him to be allowed were all entered in the Treasurer's books. By thus being connected with the office of Treasurer, he was placed in a position, where, if the Treasurer neglected his duty or acted dishonestly, the Municipality lost the supervision of its head over that officer, for he could not be expected to report his own negligent or dishonest acts to the body over which he presided. When called upon to deliver up the bond of the Treasurer, he does not produce it, but says he gave it to a subordinate officer who denies having received it. By connecting himself with the active discharge of the duties of the office of Treasurer, he incapacitated himself for the proper discharge of his first duty, viz., that of looking after the interests of the Corporation of which he was the head; and whenever the Corporation suffer from the default or misconduct of the Treasurer, Mr. Israel Ferguson has no right to complain if the worst construction is put on all his acts, and that he is made personally liable for any defalcations that occurred in the office, the duties of which he personally discharged, and when the monies claimed to be missing, were paid over to him. Then, where is the bond given for the proper discharge of the duties of the office of Treasurer? If he has improperly retained the possession of this, the presumptions would be still stronger, and against him. Finally, if he has kept the books of the Treasurer, and the accounts of the Municipality in such a confused or improper manner, (when in truth he ought not to have medled with them at all,) so that the intelligent gentlemen who acted as arbitrators, and the others who investigated the accounts of the Corporation, satisfied themselves that there was a large sum of money due by the Treasurer to the Municipality he has no good ground of complaint.

In moving to set aside this award, the Treasurer contents himself with general statements, that the accounts have been audited and allowed, and therefore the award is wrong. If it could be shewn what sums were improperly charged against the Treasurer by the arbitrators, and what they had refused to allow, there would be a greater shew of reason to support the rule. On the other hand, the arbitrators explain that they only charge the Treasurer with monies paid to him for which receipts and vouchers were produced; and that they allowed him for monies paid—shewing how the amount is made up. I cannot say that I have any doubt as to the correctness of the award.

It will be for the Corporation to ascertain, when taking steps to enforce the award, if the proceedings taken by the Municipal Council shew a sufficient authority to the Reeve to enter into the submission on behalf of the Corporation, and whether the obligation as to want of mutuality in the submission, is one that can be urged with success.

Per Cur.—Rule discharged.

QUEEN'S BENCH.

(*Reported by* CHRISTOPHER ROBINSON, ESQ., *Barrister-at-Law.*)

LAZARUS V. THE CORPORATION OF THE CITY OF TORONTO.

Snow falling from roof—Injury thereby—Liability.

There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling.

The defendants, a city corporation, owing land in the city, leased it to one H. upon certain conditions as to building, and he erected a house upon it under the directions of their architect. The lower story was occupied by one S. as lessee of H. and the upper story and garret by defendants. There was no evidence of any fault or negligent construction of the house or roof, nor of any by-law passed by defendants to regulate the removal of snow. The plaintiff having been injured while passing along the street by snow falling from the roof. *Held*, that defendants were not liable.

This was an action brought for injury caused to the plaintiff by the falling of snow from the roof of a house in King Street, in the City of Toronto. The declaration contained two counts.

First count—That the defendants were and are the tenants and occupants of the upper part of a certain house and premises on King Street in the City of Toronto, being part of St. Lawrence Hall, and it therefore became the duty of the defendants to clear the show off the roof of the said house and premises, and to prevent the snow from collecting and accumulating on the said roof in such quantities and in such a position that it became liable to fall and descend therefrom, to the danger of persons passing along the said street; but the defendants wrongfully and injuriously neglected this said duty, and failed and omitted to remove and clear off the said snow from the said roof, whereby a large quantity therefore descended and fell from said roof with great force neglected this said duty, and failed and omitted to remove and violence upon the plaintiff, who was then lawfully walking and passing along the said street in front of the said house and premises, and knocked the plaintiff down, and caused her great and permanent injury by producing congestion of the brain, and destroying the sight of one of the plaintiff's eyes, whereby she was put to great pain and loss, and obliged to pay and expend large sums of money in and for physicians and medical attendance, and was prevented from following her usual occupation as governess, and has been rendered permanently unable to follow her said occupation or profession.

Second count.—That the defendants, being the owners of a certain lot of land on King Street, in the City of Toronto, caused to be built and erected thereon a certain house, being part of the buildings knows as the St. Lawrence Hall, upon and adjacent to a certain highway and public thoroughfare in the said city, know as King Street, and therefore it became and was the duty of the defendants to build and construct, and cause to be built and constructed, the roof of the said house in such a skilful manner that the snow collecting thereon should not fall and descend with force and violence in a large mass in and upon the said street, to the danger and injury of persons lawfully passing and going over and along the said highway and thoroughfare; yet the defendants, contrary to their duty in that behalf, so negligently and unskillfully caused the roof of the said house to be constructed, that the snow which collected thereon suddenly and with great force and violence descended and fell on the plaintiff, then lawfully passing along the said street or highway in front of the said house and premises, and knocked the plaintiff down, &c., as in the first count.

Pleas.—1. Not guilty. 2. That before and at the time of the committing of the said alleged grievances the defendants were the owners in fee of the said lot or piece of ground on which the said house was standing, and that long before the said time when, &c., by a certain lease made by the defendants under their corporate seal, the said lot or piece of ground was let for a term of years, which had not at the time when, &c., nor has yet expired, to one Thomas Hutchinson, and that the said Thomas Hutchinson at the same time when, &c., occupied the said house as the tenant thereof under the said lease to the defendants, and as such tenant it was

the duty of the said Thomas Hutchinson, and not of the defendants, to remove and clear away the accumulation of snow from the roof of the said house, at the same time when, &c.

Replication, to the second plea.—That the said defendants, before and at the time of the committing of the grievances in the declaration mentioned, became and were the tenants and occupants of the upper part, and that part immediately under and next to the roof of the said house and premises in the first count of the said declaration mentioned, whereby it became and was the duty of the said defendants to clear away and remove the snow, as in the first count alleged.

The trial took place at Toronto, before *Draper*, C. J., when a verdict was given for the plaintiff, and £100 damages, subject to the opinion of the court on the law and evidence, the court to determine the plaintiff's legal right to recover on the evidence given.

The facts of the case are stated in the judgments.

Hector Cameron for the plaintiff, cited Broom Leg. Max. 330; *Fay* v. *Prentice*. 1 C. B. 828; *Regina* v. *Watts*, 1 Salk. 357; *Bishop* v. *The Trustees of the Bedford Charity Estate*, 33 L. T. Rep. 27; *McCallum* v. *Hutchinson*, 7 C. P. 508; *Barnes* v. *Ward*, 9 C. B. 392.

Cameron, Q. C., contra, cited *Holden* v. *Liverpool New Gas Company*, 3 C. B. 1.

Robinson, C. J.—The evidence given upon the trial, proved that the plaintiff was walking on the 7th of December, 1858, in the street, along the front of Sargant's store, which forms part of the building called St. Lawrence Hall in Toronto, and on the same side of the street; that a quantity of snow slid down from the roof of Sargant's store and struck her on the head, throwing her down, and occasioning her very serious injury, from which at the time of the trial in October last she had not fully recovered.

The defendants own the land on which the building is erected from which the snow fell. They leased to Mr. Hutchinson a piece of ground adjoining what is properly St. Lawrence Hall, upon certain conditions as to building. Hutchinson gave a bond to buid such a building as the corporation would approve of, and he built his house under the directions of the city architect.

The defendants occupy the garret of that building, and the floor next below it, over Sargant's store.

The city are bound by their lease from Hutchinson to repair the premises occupied by them. The only way of getting on the roof from the inside is through the garret occupied by the defendants, but Mr. Hutchinson stated that he did not know that there was any access to the roof from that part. The roof over Sargant's store slopes at two angles, the lower part of the roof being more precipitous than the upper part. The roof of the St. Lawrence Hall is higher than the other. The two roofs are covered with slate.

It was sworn by Mr. Hutchinson that he had seen snow fall from the same roof occasionally, but had not known of any damage being done before.

The defendants contend that if the injury did occur in the manner stated in the declaration, and if in consequence the plaintiff had a good cause of action against any one, it could only be against the owner or tenant of the house from which the snow fell, not against the defendants, who were the sub-tenants only of the upper part of the house; that the evidence shewed a faulty construction of the roof, rather than a neglect to clear off the snow; that it did not sustain the first count, for it did not shew that the snow came from the building mentioned in it, but the snow may have fallen from St. Lawrence Hall: that as to the second count, which charges that the roof was negligently constructed, it was not the defendants who built the house mentioned in it, but Hutchinson; and although he may have been obliged to build it under the superintendence and direction of the defendants' architect, still that cannot make the defendants liable to a third party, as if they had built the house.

The Municipal Act 22 Vic. ch. 99, sec. 290, sub-sec. 12, provides that the municipal council of every city may pass by-laws for compelling persons to remove the snow from the roofs of the premises owned or occupied by them. It was not shewn that any by-law had been made by the Corporation of Toronto, and that the defendants had infringed it, and I do not see in the evidence such proof of negligence as should render the owner or occupier of the house from which the snow fell liable to an action. What occurred here was such an accident as may occasionally happen, and be attended with serious results, but I do not think that in the absence of any public regulation on the subject people are compelled to keep the roofs of their houses clear of snow, or to detain the snow on the roofs so that the snow cannot slide from them into the street. There may be in a particular case something so evidently faulty in the construction of a roof as to make it more likely to occasion accidents from this cause than roofs in general are, but I do not see any proof that such was the case here.

If that had been shewn, however, then on whom would it be incumbent in this case to make compensation?

In both counts the defendants are charged as liable for the snow falling from the house along the front of which the plaintiff was walking: that is, from the shop referred to in the declaration.

The principles of law which govern the remedy against the owner or occupier of property on which a nuisance has been created or exists is very fully gone into in the case of *Rich* v. *Basterfield* (4 C. B. 783), in which a great number of authorities are cited. The first count in this declaration charges the defendants with neglecting to remove the snow from the building in question; but as owners of the land merely they had no such duty incumbent on them, and they are not charged on that ground, but because they occupied the upper part of the house. No case has been cited for the position that a tenant of part of a house has the duty cast upon him of taking care that the building generally is not the cause of injury to others. If any one would be liable to this action by reason of occupation, it must be, I think the lessee of the whole building. The defendants have no particular charge of the roof because they occupy the room next below it.

As to the second count, it does not appear to me to have been proved that there was anything unskilful and negligent in the construction of the building, and if there was, there was nothing in the evidence, as it seems to me, that would make the defendants liable as if the house had been built by them, or for them, which it was not, but by Hutchinson, under the conditions of his lease. The defendants were the owners of the soil. They did not let it with the house in question built upon it, nor did they afterwards build the house upon it, but their tenant built it; and though it was done under the superintendence of the defendant's architect yet that does not, I think, establish that the defendants built the house, and unless they either built, or own, or occupy a house which is necessarily a nuisance, and not merely from want of care in the owner or occupier of the building, they cannot be liable in this action.

In my opinion the *posted* should go to the defendants.

Burns, J.—There is not any evidence to support the second count, for the building from which the snow fell upon the plaintiff was not erected by the defendants. The defendants owned the land in fee, but had leased it for years of those who erected the buildings, and though it appears the buildings were erected according to a plan furnished by the defendants, yet that fact cannot make them the builders or create any duty upon them. What the plaintiff desires to make out as supporting that count is that the centre being the St. Lawrence Hall had its roof constructed in such a way as the snow slid from that roof to the other, the roof of the latter being constructed at right angles, or at an angle which caused the snow resting upon the latter to slide into the street. If the fact had been as suggested by the plaintiff, still it would have been a question whether the defendants were liable under the circumstances, but the facts were not proved as suggested, there being no evidence whatever that the snow first fell upon the St. Lawrence Hall and then slid upon the other roof before again falling into the street. All this part of the proposition advanced by the plaintiff rests upon theory only. Perhaps the theory might be quite correct if applied to rain falling in such quantities that the gutters or appliances to carry off the water from the St. Lawrence Hall were insufficient for the purpose, but I apprehend that the same rule cannot be held with respect to snow, which we know blows and drifts about in every way the eddies of the wind carry it. The fact of the St. Lawrence Hall being so much higher than the adjoining building would I think of itself furnish very strong evidence that snow would not and could not in the nature of things

rest in any quantity upon the roof of the higher building, that is St. Lawrence Hall, so as to slide that way. I know of no law which would render a person liable to a stranger because he builds his house higher than his neighbour adjoining him, by means of which eddies are created in the atmosphere, drawing more snow to one locality than another.

The first count charges the defendants with the duty of cleaning the snow off the roof of the building from which the snow fell into the street, merely because the corporation were the tenants of the upper rooms. The building is divided in separate tenements, and the defendants occupy the upper suite of rooms, and the lower part is occupied as a store or shop. Suppose that both set of tenants were or that they were separately liable, and that an action might either join all or be brought against each, the question would be whether there is such a duty as that alleged in this count. I am not aware that any common law duty is attached to the owners of houses to clear the snow from the roofs. This case is different from those cited by the plaintiff's counsel. In each of those we find that the owner or proprietor has done something *actively* upon his premises, which either directly causes the injury, or neglecting to do something which he should have done to guard against his act, an injury has been sustained. In this case the tenants have done nothing actively; they are the *passive* subjects of the elements. If there had been no house built upon the land at all, I apprehend that the owners were not by any common law duty bound to have removed the snow which fell upon the land. And if the snow had slid upon the ground, and thereby caused an injury, it could have been considered in no other light than the operation of nature, of which every one must take his share, and no one would be answerable for the consequences. Instead, however, of allowing the land to remain in a state of nature, the proprietor covers it with a house, which of necessity must be constructed so as to render it habitable and therefore a roof required.

I find the law stated upon this subject in Domat better than any where else. "He who, in making a new work upon his own estate uses his right without trespassing either against any law, custom, title or possession, which may subject him to any service towards his neighbours, is not answerable for the damage which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others, without any advantage to himself. For in this case it would be a pure act of malice, which equity would not allow of. But if the work were useful to him, as if he made in his estate any lawful repairs to secure it against the overflowings of a torrent or river, and his neighbour's grounds were thereby the more exposed to the flood, or suffered from thence any other inconvenience, he could not be made answerable for it." (Dom. C. L. Sec. p. 581, by Strahan.)

There was no evidence offered in this case to shew that the roof of the building was improperly constructed, or different from the roofs of other houses in the city, so that it was a nuisance to people passing and re-passing. The evidence shews that snow was seen occasionally to fall from the roof, but not to do any damage. I suppose we must take judicial notice of the general character of the weather at the different seasons of the year, and I know that snow while the thermometer is below the freezing point will be apt to remain some time where it may be deposited by the atmosphere. I know of no obligation imposed at common law, where people use their property in a manner similar to all others, to do any act to guard other persons against the acts of nature. This count assumes, from the fact of snow having fallen from the roof, and the plaintiff having sustained a severe and serious injury, that it was the duty of defendants to have removed the snow from the roof of the house. It is not complained against the defendants that they have done anything which creates a nuisance, and no evidence of any injury having been sustained from a like cause has been given, except in this one instance.

It is said in the civil law, if tiles fall from the roof of a house which was in good case, and by the bare effect of a storm, the damage which may happen by such fall is an accident for which the proprietor or tenant of the house cannot be made accountable. But if the roof was in a bad condition, he who was bound to keep it in repair may be liable to make good the damage that has happened, according to the circumstances.

It may be inconvenient to people living in cities to be subject to snow falling from the roofs of houses, but what is claimed in this declaration would apply as a duty all over the province, and I imagine the people living in the country or scattered vilages would think it very strange if they were told it was their duty to clear the snow off the roofs of their buildings, when it is a well-known fact that they depend upon the melting of the snow which lies upon the roofs for water for many domestic purposes during the winter.

The best proof, however, that it was considered necessary there should be some law enacted upon the subject of removing snow from the roofs of houses in cities, is that the authority to do so is conferred by the 12th sub-section of section 290, of the Municipal Corporation Act, 1858, but I do not find there was any specific mention of such authority before that. The accident in this case is stated to have occurred in December, 1858, which would be after the act of parliament came into force, but we have not been informed whether the city council has ever passed any by-law upon the subject, and before such by-law be passed there is no duty existing upon people living in cities more than in the country.

I do not see that we can help the plaintiff in any way upon this record, or by assistance of the evidence given at the trial, and therefore I think that the *postea* must go to the defendants.

McLEAN, J., concurred.

Judgment for defendants.

CHAMBERS.

GREATOREX ET. AL. v. SCORE ET. AL.

Bill of Exchange—Rate of Exchange.

Action on sterling bill drawn by plaintiffs in London, upon defendants, in Upper Canada, accepted by defendants in London, (one of them being at the time in London,) payable in London. *Held*, that plaintiffs entitled to recover the current rate of exchange.

January, 1860.

This was an application made by *H. B. Morphy*, in Chambers, to prevent plaintiffs from recovering more than 24s. 4d. in the £ sterling, (being the par rate of exchange,) as the value of the bill on which action brought. The bill was in these words:—

"£279 15 6 London, Feby. 2nd, 1859.

Six months after date pay to our order, two hundred and seventy-nine pounds, seventeen and sixpence, value received."

BRADBURY, GREATOREX & Co.

To Messrs. SCORE & BRAYLEY, Toronto.

(Endorsed,)

BRADBURY, GREATOREX & Co.

Accepted payable at the Bank British North America in London.

SCORE & BRAYLEY.

Mr. Morphy contended that plaintiffs were not entitled to receive more than 24s. 4d. in the £ sterling, and cited *Foster et. al.* v. *Bowes*, 2 U. C., Prac. R. 257.

McLennan—Contra, referred to Story Conflict of Laws, secs. 308 to 319.

Robinson, C. J., Held, that plaintiffs were entitled to the current rate of exchange at the time bill became due, and discharged the summons.

COUNTY COURTS.

In the County Court of the United Counties of Frontenac Lennox and Addington, Before MACKENZIE, J.

BENJAMIN HARPELL v. HENRY COLLARD.

Contract—Construction—Parol evidence.

The plaintiff sued defendant for two cultivators with wheels upon the following contract signed by defendant, "good to B. Harpell (plaintiff) for two cultivators, and Robert Leakey's note for $22 7 to him or bearer when called for—value received." *Held*, that defendant had satisfied the obligation of his contract by tendering to plaintiff two cultivators without wheels, and that under the contract plaintiff was not entitled to recover any other description of cultivators than that tendered. (July 18, 1860.)

This was an action for the non-delivery of two cultivators, and on the common counts.

Pleas—1. Denial of the contract; 2. Denial of the breach of

contract; 3. Tender of the two cultivators to the plaintiff. To the common counts, the defendant pleaded, never indebted and satisfaction.

The plaintiff was not entitled to recover anything on the common counts. The main issue was that joined in the plea of tender. The action was brought on the following agreement:

"Kingston, Feb. 15, 1860.

"Good to B. Harpell, for two cultivators, and Robert Leaky's note for twenty-two dollars and seven cents, to him or bearer when called for value received.

"HENRY COLLARD."

At the trial it was proved that the plaintiff called upon the defendant to receive two cultivators, in the month of February last, after the making of the above agreement. The plaintiff refused to receive them, contending under the agreement, he was entitled to two cultivators with two wheels. That the defendant offered him two cultivators, but without side wheels, This the defendant denied. The question for determination was, whether under the agreement in question, the plaintiff was entitled to two cultivators with side wheels, or without them.

At the trial, the counsel for the defendant offered parol evidence to show the wheels formed no part of the cultivator, and to show what was meant by the word cultivator. The learned Judge refused to receive this kind of evidence, as he thought that no parol evidence could be received to vary, limit or explain the written agreement. The defendant then put in evidence a Patent he had from the Crown as the inventor of improved cultivators. The Judge held that the description in the patent must prevail, and that the plaintiff was entitled to get two cultivators, such as are described in the patent; and he thought, according to the description in the patent, the plaintiff was entitled to get two cultivators with side wheels, and so directed the jury.

Britton for the defendant, took exception to the Judge's charge. The jury found for the plaintiff $66 damages.

In July term, *Britton* obtained a rule Nisi for a new trial, on the grounds that proper evidence had been rejected—that the jury had been misdirected, and that the verdict was contrary to the weight of evidence, and to amend the verdict upon the common counts.

Snook showed cause.

MACKENZIE, CO., JUDGE.—I am of opinion that the oral testimony offered at the trial was properly rejected. It was offered with a view to explain, vary and limit the written contract between the parties, which is contrary to rules of evidence, as now understood.

I am, also, of opinion, that the direction given to the jury in reference to the oral testimony—namely, that they should exclude it from their consideration, the oral testimony which was offered to explain what was meant by the word cultivator, was correct. Under this view of the case, the description of a cultivator given in the defendant's patent must prevail.

The defendant obtained a patent from the Crown, on the 19th day of December, 1859, as the inventor of an 'Improved Cultivator,' securing to him the exclusive right of making, constructing and vending the same for the term of fourteen years. The two cultivators now in question were constructed by the defendant under the patent, and as the patentee of the Crown for the making of such cultivators. The cultivator is described in the body of the patent, specifications and description, as well as a mapped drawing, are annexed to the patent and declared to form part of the patent. The description in the patent is as follows: "An Improved Cultivator, which may be shortly described as follows, that is to say: Reference being first had to the hereto annexed specifications and drawings, which form part of these presents. It consists in its being used with large wheels, connected together by axle No. 7, as described—in its having a small wheel No. 5 to guide it and support the front part—in its being capable of cultivating different depths of soil, by simply raising or lowering the part with the teeth, by means of lever No. 6 and chain—in its not being so liable to sway or slue, on account of the large wheels keeping the machine firm." The specification and description of the invention are set out more at large in the paper annexed to the patent, and are as follows: "Specifications and description of an Improved Cultivator, invented by H. Collard, October, 1859. The Cultivator is made so that it may be used with the hind wheels of a common waggon, or with the wheels of a cart, or wheels may be permanently attached to, and furnished with the cultivator if required, and is intended to be drawn by a team of horses or cattle, or by one horse." The drawing annexed to the patent have figures and letters on it, to point out and explain the various parts of the machine—such as the teeth, axle, tongue, front wheel, handle, bar and plate of iron and the like—but there are no figures or letters on the side wheels, although the small front wheels has the figure five on it, to point it out as a part of the machine.

After having carefully examined the drawing annexed to the Patent; and after having attentively read over the description of the cultivator in the Patent, and the more enlarged one in the specification annexed, and comparing the one with the other, I am bound to acknowledge that the side wheels form no part of the cultivator itself, but are only appendages to it.

The absence of explanatory letters and figures on the side wheels, as exhibited on the drawing annexed to the Patent, indicate to a certain extent that the side wheels were not to form an integral part of the machine itself. The descriptive language contained in the specification, placed the matter beyond doubt, although that contained in the body of the Patent is not so certain.

If my attention, at the trial, had been directed to the description in the specification, in all probability I would have ruled differently. The describing words, contained in the specification, are as follows:—'The cultivator is made so that it may be used with the hind wheels of a common waggon, or with the wheels of a cart, or wheels may be permanently attached to it and furnished with the cultivator, if required, and is intended to be drawn by a team of horses or cattle, or by one horse.' The words, 'The cultivator is made so that it may be used with the hind wheels of a common waggon, or with the wheels of a cart,' indicate in plain and intelligent terms that the cultivator is one thing and the side wheels, by which it is to be used, another thing.—When a person purchases one of those cultivators to be used with the hind wheels of a waggon, the wheels will be common to the cultivator and waggon—they may be used one day with the waggon, and another day with the cultivator—but can they be said to form an integral part of the one or the other? They certainly cannot. The words, 'or wheels may be permanently attached to, and furnished with the cultivator if required,' demonstrates, in my opinion, with an unerring certainty, that the side wheels form no part of the cultivator itself, but one of the mediums or agencies by which it may be worked.

Under the Patent, the purchaser has the right to contract for a cultivator to be worked or used with the hind wheels of a common waggon—the wheels of a common cart, or wheels may be permanently attached, if required by the purchaser. The attaching of permanent wheels to the cultivator is something done over and above the cultivator itself. The words used in reference to the drawing of the machine—namely: 'and is intended to be drawn by a team of horses or cattle, or by one horse,' have as extensive a signification in reference to the drawing of the cultivator, as the words 'may be used with wheels' have, in reference to the manner in which it may be used.

There would be as much logical property under the Patent, in saying that the team of horses, or cattle, or the one horse by which the cultivator may be drawn, form a part of the machine itself, as to say that the side wheels by which it may be used, form a part of it.

The Patent describes the cultivator itself as an entire machine, which may be used by three kinds of wheels, at the option of the purchaser. Under this view of the case, it is clear then that an agreement of the Patentee to furnish a cultivator simply, does not include an engagement on his part to furnish side wheels.

In the case of *Smith* v. *Jeffreys* 15 M. & W. 561, the Court of Exchequer held, 'where several classes of goods, of superior and inferior quality are comprised under one general name, and a written contract is made to supply goods of that name, the contract will be fulfilled by a supply of any goods to which that name is appliable; and parol evidence will not be received to show that the parties intended that goods of the superior class should be

supplied. In that case the contract was to sell plaintiff 60 ton of 'Ware Potatoes. At the trial, it appeared in evidence, that, in the neighbourhood, three qualities of potatoes were known by that name. The defendant at the time of the sale had two kinds, known as the 'Regent's wares' and 'Kidney Wares,' the inferior potatoes. The plaintiff insisted on getting the 'Regent's Wares,' the best potatoes, and offered parol evidence to show the best were intended. The court, very properly rejected the parol evidence, and held that the parties were bound by their written contract, which was fulfilled by the tender of any potatoes to which the generic term 'Ware Potatoes' was applicable.

If the present plaintiff wished to secure to himself a particular kind of cultivator, he should have it so expressed in the contract. The present defendant, in the agreement now under consideration, has merely engaged to deliver to the plaintiff two cultivators, when called for. The Patent under which the defendant constructs cultivators, contemplates that the machine may be used in three ways, that is to say, by the hind wheels of a waggon—the wheels of a common cart, or by wheels permanently attached to the machine. The plaintiff insists that he is entitled to two cultivators of the class—namely: with wheels permanently attached to the body of the machine. I am of opinion, now, that the agreement put in evidence, entitles the plaintiff only to two cultivators without wheels, and that he could only secure himself the right to have permanent wheels attached to the body of the cultivator by the defendant, by an express stipulation to that effect in the contract. Under this view of the case, the verdict is wrong, as the defendant tendered to the plaintiff, long before the commencement of the present action two cultivators, according to his undertaking, when called for.

The plaintiff claims more than two cultivators, he claims appendages which defendant has not undertaken to furnish in his agreement. The issue on the plea of tender should have been found for the defendant. Therefore there must be a new trial, and as the verdict is contrary to law, and there was misdirection, the new trial must be without costs.

Rule absolute for new trial, without costs.—[See *Macdonald et al* v. *Longbottom*, 2 L. T. N. S. 606.—EDS. L. J.]

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

KINGSTON, 3rd August, 1860.

GENTLEMEN,—Referring to the letter of your correspondent J. F., on page 165 of your July issue; allow me to call your attention to the judgment of Chief Justice Robinson, in the case of *De Forrest et al* v. *Bunnell*, 15 U. C. Q. B. Reports 370.

"As to those objections which apply to the affidavit made by Miller, the Mortgagee, one is, that the second christian name of Miller in the body of the affidavit, is not written in full but the initial letter only is given. This is not fatal. There is nothing in the Act, or in any *other Act* or *Rule of Court*, which makes an affidavit, for any purpose, inadmissable on that ground." Yours truly, A. T. K.

[We are obliged to our correspondent for directing our attention to the case of *De Forrest et al* v. *Bunnell*. The language of Robinson, C. J., in that case, apparently conflicts with the language of Campbell, C. J., in *Richardson* v. *Northope Tay*, U. C. R. 452, and with the decision of *Westover* v. *Burnham*, MS. R. & H. Dig. Arrest I. 29, to which our correspondent was referred, but is, we think, notwithstanding, reconcileable with them. The cases to which our correspondent J. F. was referred, decide that it is necessary for an affidavit to hold to bail, to contain all the christian names of deponent, while Robinson, C. J., speaking of the description of the deponent in *De Forrest* v. *Bunnell* says, "One christian name is given in full and *we are not to know* that the M. after Ebenezer stands for *another* christian name. It may be intended for nothing more than to *distinguish* the deponent from another Ebenezer Miller." It is not said that if deponent were shown to have two christian names, it would be sufficient to give the initial of one only, but that the Court will not presume that the single letter is the initial only of a name. We repeat that, in general, an affidavit should set forth the deponent's names in words at length. This is the rule, and it is much safer, under all circumstances, to adhere to, than to depart from it.—EDS. L. J.]

To the Editors of the Law Journal.

COLLINGWOOD, Aug. 24, 1860.

GENTLEMEN,—I notice in the *Law Journal* for August remarks on the "Law of Registered Judgments." Would it not be useful to a number of your readers to extend them to lands *not yet patented?*

Your opinion on the following case would much oblige.

1. A. has a Location Ticket to a certain Lot. B. obtains judgment against him and issues *fi. fa.* lands. The Sheriff sells the interest of defendant in the land and conveys the same to the purchaser who registers his deed. In the meantime A. sells his right to C., who makes the payments to the Crown Office and takes out the patent. Who has the land—the purchaser at Sheriff's sale or C.?

2. What effect would B.'s registering his judgment before the sale to C. have?

3. Or suppose the Patent is issued to C. before the sale?

By answering the above you will confer a favor on

Yours respectfully,

A LAW STUDENT.

[Our correspondent will find some cases in our Reports showing that judgments do not bind unpatented lands. *Dougall* v. *Lang* (5 U. C. Chan. 292) is express on this point. In that case, the plaintiff had purchased at Sheriff's sale all the interest of a bargainee of the Crown, and then leased the land to the defendant as his tenant. The sheriff's sale was not recognized by the government, and the lots were offered for sale and bought by the defendant as the then occupier, he concealing the nature of his holding. The Court held him a trustee for the plaintiff, and ordered him to convey. In giving judgment, ESTEN, V. C., remarked: "The plaintiff, in fact, had *no title*, as the sole ground of his title was the sheriff's sale, which conferred *none*." In *Casey* v. *Jordan* (5 U. C. Chan. R. 467), it was held that the Registry Acts do not apply to instruments executed previously to the grant from the Crown, and by analogy it follows that registered judgments are of no avail until the issue of a patent in the name of the judgment debtor. The Crown Lands Act (22 Vic. c. 22) provides that the original locatee or bargainee of the Crown may assign and register in the Crown Lands office his right, and that priority of registration shall convey title. And by the Assessment Act special provision is made for the sale of such right for taxes, and the recognition of such sale by Government.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. BARKER V. ALLAN AND OTHERS. Dec. 7.

Joint Stock Company—Contract of Directors--Resolution at Board meeting—Contract when complete—Guarantee.

At a meeting of the Directors of a Joint Stock Company, it was resolved that they should accept the resignation of the Manager and pay him arrears of salary, and further, as follows: "At the same time, the members of the Board will jointly relieve him of his shares, and guarantee him against all calls thereon. The Directors being desirous that this matter should be definitely settled, request that Mr. B. (the Manager) will reply to the offer now made to him by next board day, the 4th of September. Unless the terms of arrangement now proposed are accepted by that date, the Directors are to be no longer bound by them." This being communicated to B., he answered by letter on the next board day, that he accepted the offer, adding "It may be arranged as speedily as you can wish, and in fact I accept the offer as one to be carried out; and then, on receiving the guarantee as to the shares, in which I presume your chairman, Mr. C., concurs, I advise that the sum fixed is paid in to my account or L's, my resignation shall be at once forwarded." At the meeting held on the same day, a resolution was passed, which was communicated by the secretary to B., as follows: "The Board, having heard B's letter read, accept his resignation, and request the secretary to get the guarantee prepared by the solicitor, and to take other steps to carry out the negociation."

Held, that there was a complete contract on the part of the Directors who attended the Board meetings to guarantee B. against calls, and that they were liable in action for breach of such contract for not indemnifying him, B. It was contended that the matter was in negociation until the settlement of the terms of the guarantee. This, however, was overruled. Further, that as all the members of the Board were not shown to have concurred, but only the defendants or record, that the contract was incomplete. This also was overruled.

REVIEW.

THE MUNICIPAL REPORTS, CONTAINING REPORTS OF CASES ARISING UNDER THE MUNICIPAL AND SCHOOL LAWS OF UPPER CANADA; Edited by Robert A. Harrison, Esq., B. C. L., and Thomas Hodgins, Esq., L. L. B., Barrister-at-Law, Toronto; Printed and published by Maclear & Co.

We have received from the Publishers, the third number of these Reports; each number contains sixty-two pages, and is replete with matter useful not only to the profession but essential to the correct understanding and proper working of Municipal and School Law by those to whom these great interests are entrusted. No Municipality—no School Section should be without these Reports. The subscription, we believe, is only $5 per annum. The number before us contains the Reports of no less than nine decisions of Municipal and School Law, besides a variety of notes, which add much to the value of the publication. Mr. Harrison is the Editor of the Municipal Manual, and Mr. Hodgins Editor of the Educational Manual—both works now well known in every part of Western Canada. Judging from what each has already done in his own department, we should imagine that the Reports of Municipal and School cases in which they unite their exertions, should be worthy of the patronage of those for whose use the Reports are more especially designed.

A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE, BY WILLIAM HENRY RAWLE, Third Edition, Revised and Enlarged. Boston: Little, Brown and Co. 1860.

We greet this volume with much satisfaction. It is the third edition of a work of very great merit. Its success is conclusive evidence of its value. The work is now so well known to our readers that little comment is necessary to explain its real utility to the profession. The author has performed his task with credit to himself and advantage to the members of the legal profession in Great Britain, the United States and Canada.

To those who know not the work, we may say that it commences with a short chapter on ancient warranties, and the introduction of covenants for title—a chapter essential to the correct understanding of what follows. The author then treats of the covenant for seizin; for good right to convey; against encumbrances; for quiet enjoyment; for further assurance of warranty; the extent to which covenants for title run with land; the operation of covenants for title, by way of estoppel or rebutter; implied covenants; the covenants for title which the purchaser has a right to expect; the persons who are bound by, and who may take advantage of covenants for title; the purchaser's right to recover back, or detain the purchase money, after the execution of the deed.

The style of the author is eminently practical. He expresses his meaning in a forcible as well as clear manner. He uses not a word unnecessarily, and so has succeeded in compressing a great deal of learning within a convenient compass. His references to authorities while exceedingly numerous, are unusually correct, and with a view of attaining the greatest possible accuracy in the last mentioned particular, he states that in the preparation of the edition now offered to the profession, he has re-consulted every authority previously cited in the work.

Each chapter of the work is an interesting and concise essay upon the subject of which it treats. The peculiarity and attributes of each covenant, together with its form, definition, scope, and measure of damages are severally considered. In the first place, the author in general refers to the law of Engiand on the subject in hand. He then examines in what respect it is varied, if at all, in the several States of the Union. In the next place, where there is a conflict, he endeavours to deduce the correct rule, and to support his position as much by common sense, as authority. All this is done in a very able manner.

We would suggest in a future edition of the work, that some attention should be paid to Upper Canadian decisions. They might be incorporated in the work, with as much benefit to the work, as the decisions of Maine, New Hampshire, Massachusetts, or any other State of the Union. Besides, such a plan if adopted, would make the publication of increased value to the profession in this Colony, and so call for increased support. While reading the remarks of the author on leading cases in the different States of the Union, leading cases in our own country, suggested themselves to our mind, and we were forced to think that the absence of all mention of them, in places where they would be mentioned, of much utility, is a defect in the work, at least so far as this Colony is concerned. We make the suggestion in the most kindly spirit; it would not be at all difficult to adopt it. Mr. Rawle, who we believe is a lawyer of Pennsylvania, could as easily master the decisions of the Courts of Upper Canada, as of Maine, or any other State or country in which he is not accustomed to practise. In fact, on many points, the decisions of our Courts are more in unison with the decisions of the Courts of his State, than those of South Carolina, and other States that we might if necessary name. The foundation common to all, is the common law of England. With this starting point it is only necessary to note the points of divergence, and to comment upon them in whatever manner his judgment may dictate. We are convinced that the reasoning of our Courts upon some points about which the author appears to be in doubt, would carry conviction to his mind, and if embodied in his work, would greatly enhance its value.

The edition before us is from the well-known establishment of Little, Brown and Company of Boston. It is only necessary to name that firm to make known the fact that the present edition is as regards mechanical execution, unsurpassed by any law book published in England or America. By a slight reduction in the size of the type, and by throwing parts of the former text into notes, the writer has been enabled to present much new matter to his readers, without increasing the size of the volume. The present edition is very creditable, not only to author and publishers, but to the United States of America, where it was published.

THE WESTMINSTER REVIEW, No 145, JULY 1860; New York: Leonard, Scott and Co.

The New York publishers of these sterling periodicals, issue the reprints with unerring exactitude and exemplary expedition. It is really wonderful to think, that the number before us was issued in New York about the same time that the original was issued in London. Messrs. Leonard, Scott and Co., having made an arrangement with the London publishers as honorable to themselves, as satisfactory to the latter, are enabled to print the Reviews, sheet by sheet, as they issue from the London Press. This coupled with the fact that their facilities for republication are in other respects equally satisfactory, gives us the secret of their great success. The present number is the commencement of a new volume, and offers a good opportunity to intending subscribers. The contents of it are as follows: Strikes; their tendencies and remedies: The Mill on the Flos: Rawlinson's Bampton lectures for 1859: The Post Office monopoly: Ary Scheffer: The Irish Education question: Germany; its strength and weakness: Thoughts in aid of Faith: Grievances of Hungarian Catholics: The French Press: Contemporary Literature. All disposed to questions of Politics, Social and Political economy, Theology, the Fine Arts and Education, will find here laid out an ample repast.

BLACKWOOD'S MAGAZINE, AUGUST 1860: Leonard, Scott and Co., New York.

Blackwood is always gladly received by us. Its unobtrusive appearance entitles it to a cordial reception, and a cordial reception is always followed by much entertainment. It lays no pretension to the solid character of the Reviews, but courts patronage rather because it is light and entertaining as compared with them. A person tired of the arts and sciences, or with difficult questions of political economy, is sure to be relieved by an indulgence in the reading of Blackwood. The following are some of the most entertaining articles in the number before us. Lord Macaulay and Dundee: the Pursuit of Tantia Toppee: the Great Earthquake at Lisbon: Norman Sinclair, an autobiography: Wycliffe and the Huguenots: Domine Quovadis.

THE LONDON QUARTERLY, No. 215, July 1860: Leonard, Scott and Co., New York.

Contents:—The Missing Link and the London Poor: Joseph Scaliger: Workman's Earnings and Savings: the Cape and South Africa: Ary Scheffer: Stonehenge: Darwin's Origin of Species: the Conservative re-action. In this number, Political Economy and Natural Philosophy hold a conspicuous place. The reader of the four great English Reviews, has the advantage of considering questions of Political Economy viewed from very different stand points. The articles which appear in these periodicals, are not the newspaper squibs of a day, read only to be forgotten, but the results of deep research, great reflection, and great talent. No scholar, and certainly no man of any public position, can afford to be without the English Reviews. They discuss not only questions of the hour, but questions of lasting importance to the progress of civilization. The price of each Review is only three dollars a year, or the four Reviews and Blackwood may be had for the marvellously low price of $10 a year. The Number of the London Quarterly now before us like that of the Westminster, is the commencement of a new volume.

THE EDINBURGH REVIEW, No. 227, JULY 1860: Leonard, Scott and Co., New York.

The articles in this number are not only very numerous but of great interest. Their titles are as follows: Chevalier on the probable fall in the value of gold: Diaries and Correspondence of George Rose: D'Haussonville's Union of France and Lorraine: Sir R. Murchison's latest Geological searches: The Patrimony of St. Peter: Dr. Vaughan's Revolutions in English History: Mrs. Grote's memoir of Ary Scheffer: Prince Dalgoroukow on Russia and Serf emancipation: Correspondence of Humboldt and Varnhagen Von Ense: M. Thier's Seventeenth Volume: Cardinal Mais Edition of the Vatican codex: Secret Voting and Parliamentary Reform. Subjects of the most vital moment in the political, and of the greatest possible interest in the literary world, are here discussed with moderation and ability such as not to be found in any other publications of the age. The number before us, we notice commences a new volume.

THE NORTH BRITISH REVIEW, No. 65, AUGUST 1860: Leonard, Scott and Co., New York.

Though we notice this the last, it is not the least of the Reviews. It is the youngest of the four, and by many considered the most erratic, if not the most talented. The papers which it usually contains, are noted for their vigor as well as boldness. What is meant is said, and what is said is intended. The following are the contents of the number before us: Present discoveries in astronomy: Dr. Brown's Life and Works: Scottish Nationality: Colonial Constitutions and Defences: Recent Poetry: M. Thier's history of the Consulate and Empire: Imaginative Literature: La Verité sur la Russie: Recent Rationalism in the Church of England: Present theories in Meteorology. The number just received commences a new volume.

THE ECLECTIC MAGAZINE OF FOREIGN LITERATURE; New York: W. H. Bidwell, Editor and Proprietor.

The number for September is received. It fully sustains the reputation of the Eclectic, and is the third volume for the present year, or fiftieth of the series. It opens with a portrait of Thackerey, true to life. We have seen the original, and can testify to the truthfulness of the Portrait. Next, we have portraits of Cranmer, Ridley and Latimer. The letter-press is varied and instructive, as usual.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

FREDERICK FRASER CARRUTHERS, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted August 11, 1860.)

GEORGE H. DARTNELL, of Whitby, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted August 11, 1860.)

CORONERS.

WILLIAM HODGE, Esq., to be a Coroner in the Provisional District of Algoma.—(Gazetted August 11, 1860.)

TO CORRESPONDENTS.

E. S. WHIPPLE—Under "Division Courts," p. 205.

A. T. K.—A LAW STUDENT—Under "General Correspondence," p. 214.

J. HOLGATE.—Received, but too late for insertion in this number.

DIARY FOR OCTOBER.

1. Monday.....	Last day for notice of Examination in Chancery, Hamilton and Brockville. County Court and Surrogate Court Terms begin.
2. Tuesday.....	Chancery Examination Term, London and Belleville, begins.
6. Saturday.....	County Court and Surrogate Court Term ends.
7. SUNDAY.....	*18th Sunday after Trinity.*
8. Monday.....	Toronto Fall Assizes. Last day for notice of Examination in Chancery, Barrie and Ottawa.
9. Tuesday.....	Chancery Examination Term, Brantford and Kingston, begins.
14. SUNDAY.....	*19th Sunday after Trinity.*
15. Monday.....	Last day for notice of Examin. in Chancery, Barrie & Ottawa.
16. Tuesday.....	Chancery Examination Term, Hamilton and Brockville, begins.
21. SUNDAY.....	*20th Sunday after Trinity.*
22. Monday.....	Last day for notice of Examination in Chancery, Goderich & Cornwall.
23. Tuesday.....	Chancery Examination Term, Barrie and Ottawa, commences.
28. SUNDAY.....	*21st Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

OCTOBER, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60." *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The* "60" *has reference to the year, and not to the amount represented as due.*

BILLS OF SALE, &c.

Description of Chattels intended to be conveyed, &c.

As our law now stands, every sale, as well as every mortgage of goods and chattels, not accompanied by an immediate delivery and an actual and continued change of possession of the goods and chattels sold or mortgaged, must be in writing; and that writing is required to be a conveyance, under the provisions of the act entituled "An Act respecting mortgages and sales of personal property." (Consol. Stat. U. C. cap. 45, p. 452.)

Every conveyance under the act, whether for the sale or the mortgage of goods and chattels, is required "to contain such full and sufficient description thereof, that the same may be thereby readily and easily known and distinguished." (Sec. 6.) Each word of this clause is pregnant with meaning, and yet it is most difficult in practice to give effect to the meaning intended.

It is not only necessary that the description should be *full* and *sufficient*, but it must be *such* a full and sufficient description that the goods and chattels intended to be conveyed may be *thereby* readily and easily *known* and distinguished.

Had the requirement been merely that the description should be "full," much difficulty would have been experienced in giving a proper definition of the word as applied to the description of goods and chattels in a written document; but when the description must not only be full, but so full that the goods and chattels may be thereby readily and easily known and distinguished, the difficulty is increased. The idea conveyed in the word "full," is generally that of quantity; but in order that the particular quantity of articles may be *known* and *distinguished*, we must have not simply quantity but quality, and not simply quantity and quality but in many cases nature and value in addition.

Let us take an example. Suppose goods and chattels to be described as "10,000 feet of lumber." Certainly we have quantity, but in what manner is this quantity of lumlumber to be readily ("easily" we take to mean the same thing, and therefore drop it) known and distinguished? How can we distinguish it from other lumber without describing its quality?

Inasmuch as the *nature* of the commodity, namely, lumber is described, we are able to distinguish it from all other commodities of a different kind, but the question arises how are we to distinguish it from all other commodities of a like kind? *Id certum est quod certum reddi potest.* If a reference to locality were in the description some of the difficulty would disappear. Suppose the description to be "10,000 feet of white lumber in the lumber yard of C. D., on the north side of King Street, in the City of Toronto." In this case any one in doubt as to the actual lumber conveyed could by an examination of the article itself the better enable himself to know it and so distinguish it from other lumber of a like kind. Even if this were done however there would be still uncertainty. It is quite as difficult to distinguish one plank from another as to distinguish one log from another even by personal inspection. We are driven to the conclusion that no positive rule can be laid down as to the correct interpretation of the enactment in question. All that can be done is in every instance to describe the articles intended to be conveyed

with the greatest possible certainty, and this cannot better be done than by a use of *locality, nature, value, quantity* and *quality*.

Let us now bring under review such decisions of the courts as tend to aid in the construction of the enactment which we have made the subject of these remarks.

1.—"All and singular his (the assignor's) stock-in-trade, wares, merchandize, goods, chattels, and effects whatsoever belonging to him, and *now being in and about his warehouse on Yonge Street and Wellington Street in the City of Toronto*, and all his household furniture, goods, chattels and effects whatsoever, (the personal apparel of himself and family excepted), *now being in and about his dwelling house and premises on Wellington Street aforesaid*, and all bonds, bills, and securities for money, leases for years, Provincial Insurance stock, Northern Railroad stock, mortgages, trust *and other property, personal estate and effects whatsoever and wheresoever belonging, due or owing to him the said party of the first part.*" (*Harris et al* v. *The Commercial Bank*, 16 U. C. Q. B., 437). As to this description, it was held, that the stock-in-trade and household furniture showing locality was sufficient, but that nothing passed under the words "and all other property, personal estate and effects whatsoever and wheresoever." In delivering judgment, the Chief Justice of Upper Canada said:

"Does it, in the first place, contain a sufficiently particular description of the goods, as required by the fourth clause of the act? I cannot say that, if any one were at any time to see in another place any of the goods which at the date of this assignment were 'in and about McDonell's warehouse, in Yonge street and Wellington street,' he would be able readily and easily to distinguish them from other goods, or from the goods of other parties, so as to know, by means of the description given in this deed, that the particular goods in question had been transferred by this assignment. But at the same time, I confess I do not find it easy to understand how a stock of goods in a shop, or furniture in a dwelling house, are to be otherwise described than as they have been in this case, unless by taking a minute list of every article; and even that would not enable us to distinguish such articles from others of the same kind, unless there happened to be something peculiar about the thing by which it could be identified, as you might enable people to identify living animals, by age, and size, and peculiar marks.

"I think we must hold that the goods in and about the particular warehouse, and the furniture, &c., in and about the dwelling house on Wellington street, are sufficiently described, so as to admit them to pass.

"I do not take the fourth clause to require a particular description of bonds, bills and accounts, or of railway stocks, and things of that kind; but as to that clause in the deed which professes to assign 'all other personal estate and effects whatsoever and wheresoever' belonging to the grantor, I do not consider that any goods and chattels can pass under that form of words, for otherwise we should be giving no force or meaning whatever to the fourth clause of the act."

2.—"All and singular the stock-in-trade, wares, merchandize, household goods, furniture, (not saying *where*), implements, chattels, goods, debts, sum and sums of money, books of account, notes, and other things due and owing to him Wilson, and all his personal estate whatsoever and wheresoever, and all his estate and interest therein." (*Howell* v. *McFarlane*, 16 U. C., Q. B., 469). As to this description the Court, though unnecessary to determine the point, expressed a strong opinion against its sufficiency. Nothing could be more general. It will be observed that it wants even the redeeming element of *locality*.

3.—"All and singular the stock-in-trade of the said R. D. Wilson, situate on Ontario Street, in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle, and also all bonds, bills, notes, debts, choses in action, terms of years leases, securities for money." (*Wilson* v. *Kerr et al*, 17 U. C., Q. B. 168.) It was held as to this description that the goods and chattels were not sufficiently described by stating them to be situated on Ontario Street, without saying that they were *in the shop or on the premises of the assignor situate on that street*, and as to anything other than the stock-in-trade it was held that there was really *no description at all*. In the first place, then, the description as to the stock-in-trade was held to be insufficient because of the want of locality (house, shop, &c.), and as to the remainder of the articles intended to be conveyed, because there was really neither quantity, quality or value. We cannot do better than quote some of the instructive remarks of Mr. Justice Burns in delivering judgment:

"According to the wording of the deed the case presents two questions; first, with respect to the *stock in trade*, and next, with respect to *all other goods, chattels, furniture, household effects, horses, cattle, and also all bonds, &c.* The latter cannot be held a compliance with the provision that they are so to be described, that the same may be thereby readily and easily known and distinguished. Where all or any of these things then were, or were to be found, the deed is silent. Of course it could not be expected that every chair or table must be so described that by reading the description in the deed a person could go and identify them, but surely the legislature meant something when the enactment was made. If it would be inconvenient to describe each article or each set of articles, either as to numbers or quantities, marks, or otherwise, that they might be known, yet a description by locality might be given which would enable a person to go with the deed in his hands and point out the goods transferred. No one, however, on reading this deed, could possibly say that any of these *other* things mentioned, could either be readily or easily known or distinguished. *Quoad* these things the plaintiff's case must, I think, fail.

"Then with regard to the stock in trade. This is a term very well known in bankruptcy matters, and I should find no fault with that expression if we had further information to tell us what it was that was assigned. There is an attempt in this to give information as to locality, but it is very vague. The deed simply says, the stock in trade situate on Ontario street, in the town of Stratford. What part of the street we are to look for it the deed does not tell us. Further, we are not informed what description of stock in trade it is; there is nothing on the face of the deed to give us the slightest idea whether it was the stock in trade of a dry goods dealer, a grocer, a distiller, a brewer, or of any kind of business which the assign-

ors carried on. The deed is singularly silent with respect to any information from which a person reading it might even draw an inference, except that the assignor is himself described to be a merchant. Without that term used in describing him we should not know what he was; but will that do from which to draw an inference that the stock in trade assigned was that of a merchant? It does not appear to me that that would be a compliance with the act of Parliament. The term merchant with reference to the business carried on, is as convertible as that of stock in trade. The proper definition of the term is applicable to one who traffics or carries on trade with foreign countries, as an exporter or importer. The popular usage of the expression is to apply it to any trader, or one who deals in the purchase of goods. There are wheat merchants, timber merchants, lumber merchants, and a thousand others, as well as a dealer in cottons, calicoes and what not. I do not see that we are helped at all in finding out what the stock in trade was by being told that the assignor was a merchant. To be sure we discover it by reference to the evidence; but the question is, whether this information should not exist on the face of the deed. The statute says it shall contain such efficient and full description thereof, &c. It does not appear to me this deed does contain such efficient description as that any one can possibly say what the stock in trade was that was transferred. If we had been told in what house it was, or on what premises the same might be found, that perhaps might have helped, but here we are told the stock in trade will be found *on* the street in Stratford. To take this literally the public would have the opportunity of helping itself, or the corporation might complain of a nuisance. I think we should scarcely look for the goods upon the street, but the parties might have told us better where to find them."

The case was subsequently carried into appeal, and the decision of the court below as to the insufficiency of the description was confirmed. Draper, C. J., in delivering the judgment of the Court of Error and Appeal, is reported as follows:

"As to all other property, except the real estate, the only description is, 'all his other goods, chattels, furniture, household effects, horses and cattle, and also bonds, bills, notes, choses in action, terms of years leases, securities for money.'

"What the statute requires is, '*such efficient and full description*' of the 'goods and chattels' sold or mortgaged, that the same 'may be thereby readily and easily known and distinguished.' The first part of the sentence above quoted, commencing 'all his other goods,' &c., contains no other description of the matters intended to be conveyed, except that they were '*his*,' the assignor's. The residue of the sentence is not, except by inference, even as precise as the first part; it purports to convey 'all bonds,' &c., not even saying in words whose the bonds were.

"If the words of the act have any meaning, this can never be held to be an efficient or full description of goods or chattels. No locality is given, no description, except the *nomen generalissimum*, which will include any and every description of goods, hardware or groceries, dry goods or liquors. The words 'furniture and household effects,' if more definite, cannot help in this case, because the question as to them is disposed of on a ground which admits they may have been sufficiently described, and as to horses and cattle there is the general description, but nothing particular, no marks, colour, or other individual characteristic. What description more *general* could have been used? or how can this be deemed efficient or full?

"As to the bonds, &c., there is nothing by which one bond can be distinguished from another, neither name of obligor, date, sum, or other thing secured by a condition, if there were a condition. As to bills and notes, the character in which the assignor holds them, whether as drawer or payee or endorsee, the sums, whether due or not; in short, not a particular which would distinguish is given, and such is the case with regard to each of the other kinds of property mentioned."

4.—"All the goods, chattels, furniture, and household stuff therein particularly mentioned and expressed, that is to say, seven horses, three lumber waggons, one carriage, one pleasure sleigh, all the household furniture in possession of the said party of the first part, *and being in his dwelling house.* All the lumber and logs *in and about the saw mill and premises* of the said grantor; and all the blacksmith's tools *now in the possession* of the said party of the first part; six cows, and four stoves:" (*Rose* v. *Scott*, 17 U. C., Q. B. 385.) In this case the court, in conformity with *Harris et al* v. *The Commercial Bank*, held that the household furniture, lumber and logs were sufficiently described, but that the horses, lumber waggons, carriage, pleasure sleigh, blacksmith's tools, cows, and stoves were not sufficiently described. The court said: "If Mr. Fraser owned more of any such articles of property than the number set down in the deed, it would be impossible to tell which of the class were intended to be assigned." As to the blacksmith's tools, the Chief Justice said:

"We have hesitated in respect to the blacksmith's tools, because the mortgagor does say of them 'all the blacksmith's tools now in possession of the said party of the first part;' but on consideration that is not more particular than saying 'all his blacksmith's tools,' not describing them as those which he commonly used, or which he had in any particular place; and if that description be good, then an assignment of all a man's flour or pork, or cattle, would be equally good, and would include all that the assignor had of the article, for he must be regarded as being in possession of all the tools that he owned of which no one was holding possession against him. This would seem to be treating the act as meaning nothing, for there is really nothing specific in such a description."

5. "All and singular the stock in trade, wares, merchandize, fixtures, goods, chattels, and effects of him, the said Roberts, *situate or being on or upon the shop, store and premises connected therewith*, now in the occupation of the said Roberts, *situated in the village of Oakville;* and all other the goods, chattels, and personal property *whatsoever of him*, the said Roberts, *wheresoever situated;* and all the books, money, bills, bonds, mortgages, and choses in action whatsoever, either at law or in equity, of him, the said Roberts:" (*Hutchinson* v. *Roberts*, 7 U. C., C. P. 470.) The sufficiency of this description was doubted, though the decision of the case turned on another point. So far, however as the Chief Justice spoke of the description, we shall quote his language:

"If the claimant's right depended altogether upon the assignment as an effectual instrument under the statute, I should require further time for consideration before I could hold that a full and effectual description of the goods intended to be conveyed is given by such words as 'all my stock-in-trade, goods, wares, and merchandise in my store situate at,' &c. I cannot

at present see that an instrument so drawn would contain a *full* and *efficient* description of such goods. It appears to me the statute must mean that by reading the instrument itself, or at most aided by a schedule attached to it, such a description should be obtained as to convey to the reader, at least a knowledge of the general character of what was meant to pass, whether it was flour or whiskey, ploughs or penknives, an assortment of millinery or a quantity of cables and anchors.

"Under such an assignment it would be indispensable to make an inventory, to take the stock in order to know the nature, quantity, quality, and value of the goods assigned; and I confess I feel it difficult to hold that in the absence of these four elements how a description can be called full and sufficient. All that can be said is, that the case falls within the maxim, *id certum est quod certum reddi potest;* but that was the law before the statute; and we must suppose that the legislature intended to require a greater degree of certainty than might have sufficed before."

6. "All and singular the goods, chattels, furniture, and household stuff now in Swords' Hotel, Toronto, *or* particularly mentioned and expressed in a certain schedule, marked A, hereunder written or hereunto annexed; and also all debts, dues, notes, and demands due to the said Swords, and all books relating thereto:" (*Kingston* v. *Chapman*, 9 U. C., C. P. 13.) The sheriff seized, on an execution against Swords, subsequent to the date of assignment, certain goods and chattels which were in Swords' Hotel at the time of the assignment, but not mentioned in the schedule annexed to the assignment; and the court held that the sheriff was justified in so doing.

These are all the decisions, pertinent to our enquiry, that we have been able to collect. They all have, more or less, relation to the first decided case of *Harris et al* v. *The Commercial Bank*. In that case a general description of the stock in trade and household furniture, with exact locality, was held to be sufficient. The Court of Queen's Bench, in subsequent cases, has upheld that decision, but refused, as in *Rose* v. *Scott*, to extend its operation. The Court of Common Pleas, without expressly doubting the authority of *Harris et al* v. *The Commercial Bank*, shows, so far as we understand the cases of *Hutchison* v. *Roberts*, *Kingston* v. *Chapman*, a reluctance in adopting it. So long, however, as the decision of *Harris et al* v. *The Commercial Bank* remains unreversed, we presume it must be looked upon as the law.

The meaning of the Legislature to be gathered from the reading of one whole act is, that in all cases, whether of mortgages or sales, there shall be either an actual, immediate or continued change of possession, or that the assignment shall be made in conformity with the act. The object, where the assignment purports to be in conformity with the act, is to enable third parties to ascertain what is intended to be assigned. If there has been an actual delivery, followed by an actual and continued change of possession, the assignment need not comply with the provisions of the act. If good at common law, the title will pass, whether the statute has been complied with or not. (See *Hutchison* v. *Roberts*, 7 U. C., C. P. 470.)

CODIFICATION AND CONSOLIDATION.

We republish, from the *Solicitor's Journal*, an article headed "Codification of Law in America." The writer of it contrasts the success of legislators in America in the work of consolidation and codification, as compared with the little done in that direction by the legislators of England. He does not omit to point out what Canada has done in consolidating its public general statutes, applicable to the whole Province, and to the upper section of it.

So far as the writer of this article argues in favor of consolidation, we coincide with him; but when he advocates codification of the law of England, we must be allowed to say that in our humble opinion he advocates an impossibility. The law of England consists of two parts—the *lex scripta* and *lex nonscripta*. Codification of the *lex scripta* or statute law is possible, but codification of the *lex nonscripta* or common law is, we think, for all practical purposes, impossible, and that the attempt would be imprudent.

The principles of the common law are not to be collected and engraved on the statute book by any body of men. The elasticity of the common law is its great feature; and if ever deprived of that, to be confined in the four sides of a page of the statute book, the result will be not only unsatisfactory, but most pernicious. Before the Legislature of England attempt a codification of the common law—that is, to make the *lex nonscripta lex scripta*—let them give to England, if possible or deemed advisable, a written constitution. The latter would be infinitely more feasible than the former, and the one without the other would be a hopeless incongruity.

The Legislature of Canada are endeavoring to codify the laws of Lower Canada, which, as to civil rights, are the French laws before the Revolution, and as to criminal rights the law of England. The experiment is most costly, but may be in the end successful; because the substratum does not consist of the common law of England, but of the elements of the Code Napoleon, and the code of Louisiana its duplicate. There is something in the common law of England that eludes the grasp of a mere law-moulder, and there is something in the people that causes them to adhere as strongly to their old common law, with all its uncertainty, as to their constitution, which, though unwritten, is the admiration of the world.

We shall watch the experiment as regards Lower Canada with much interest. In that section of the Province we sincerely hope that it will be successful. The profession there, with the strange mixture of French and English

laws, find themselves in an endless state of perplexity. When the profession complain of such a matter, the cause of complaint must be so general, and so deep-rooted, as to affect every man, woman and child living under the laws. One result of a codification of the laws of Lower Canada, though imperfect, will be the assimilation of the laws of Upper and Lower Canada, and so far as Canada is concerned, a great national boon. At present, the laws of Lower Canada as to civil rights, differ as widely from those of Upper Canada, as the laws of Louisiana from those of New York, or, in fact, as the laws of France differ from those of England.

We happen to know that the codification of the laws of New York, so far as it has proceeded, is met with the censure of some very eminent public and legal men in that State. They find only uncertainty where certainty was fondly expected. They miss all old land marks of every kind, and are left to grope about in darkness and in doubt. More than one practitioner in that State has expressed to us his hearty disapprobation of what has been done, and his well-founded fears concerning what is to be done. In Massachusetts, we believe that the codification of the Common Law, as a whole, will never be attempted. That State has the report of her own gifted Story against the practicability of such a measure. (See Story's Miscellaneous Writings, 698.)

JUDICIAL STATISTICS.

We devote in this number more than ordinary space to some well-timed observations, from the *Law Times*, on Judicial Statistics. We are not yet in Upper Canada sufficiently alive to the importance of judicial statistics as aids to sound legislation. In Lower Canada there is a statute intitled "An Act to provide for Annual Statistical Returns of Judicial matters" (23 Vic., cap. 58). It appears to be an elaborate and comprehensive measure, and if properly carried into effect, will be productive of much good. We do hope that the Attorney General for Upper Canada will see fit to add a measure as to judicial statistics to the many useful law reforms, of which he is the author, in Upper Canada. The machinery need not be very complicated. Let each clerk or other officer concerned in the issue of judicial process, or other legal procedure, make periodical returns, in a given form, to some one public officer, whose duty it shall be to digest the mass and make it public, or ready for publication, at stated intervals. This is the machinery of the Lower Canada Act. The forms given appear to be numerous and practical. Mr. Cartier, the Attorney General for Lower Canada, deserves great credit for this bold and comprehensive enactment.

WARNINGS.

Our contemporary the *Legal Intelligencer*, of Philadelphia, in a late number, addressed some strong common sense remarks to its professional readers, which we copy under the above heading.

The advice is directed against the sin of members of our profession applying to their own use money of their clients. Though we are proud to say that in Upper Canada this evil is much less frequent than in other countries, still we must admit that it is the rock upon which many a fair reputation is split and destroyed.

The enormity of the evil in England has given rise to grave inquiries as to its cause, with a view, if possible, to its entire extirpation.

The temptation to evil to which members of the legal profession are subjected is much greater than in any other profession or calling among men. But the greater the temptation the greater the necessity of refusing to yield to its slightest approach. To parley with conscience on the eve of such a temptation is to yield the citadel of conscience an easy prey to the enemy.

The great secret of avoiding scandal and ruin in such matters is to pay over promptly, and, in the case of trust moneys, to keep them as distinct as possible from one's own. In Upper Canada, members of the profession are little troubled with trust moneys, but every member of the profession is more or less concerned in the collection of money for clients. To all such we say,—do not allow the money of your clients to stick to your hands one moment longer than necessary. Pay it over at the earliest minute, and thus preserve your reputation and acquit your conscience. To make any use whatever of the money of a client, without his knowledge and against his consent, is, morally speaking, to steal it. No member of the profession would like to be branded as a thief, but every man who contravenes the strict standard of morality in this respect is nothing less than we have described.

LEGAL DESPATCH.

The Lord Chancellor, in his review of the law reforms of the session of the Imperial Parliament just closed, among other things said as follows:

"It used to be said that Chancery suits never came to an end. As a specimen of the despatch with which business is now done, let me mention a single case, one in which the Westminster Palace Hotel Company was concerned. That joint-stock company have an hotel, part of which was let to Sir C. Wood, the Secretary of State for India, for the purpose of conversion into a Government office for a time. That arrangement was objected to by certain of the shareholders, and on the 10th May in the present year a bill was filed by which this Chancery suit was begun. The cause was heard before Vice-Chancellor Page Wood on the 31st of the same

month, and a decision given in favor of the defendants. There was an appeal from that judgment to the Lords Justices, which was heard on the 11th June. The Lords Justices were divided, and, therefore, the decision of the Vice-Chancellor remained undisturbed. There was then an appeal to the House of Lords, which came on to be heard on Monday, the 6th August. It was heard on that day, and on the 7th (or the very next day) it was finally disposed of. Thus the entire litigation was begun and ended between the 17th May and the 7th August of the same year. That state of facts, I think, scarcely justifies complaint of the tardiness of judicial proceedings.

EX PARTE PUBLICATIONS OF LEGAL PROCEEDINGS.

In Upper Canada there is nothing more common than for an insurance company, when sued on a policy of insurance, to print and publish what they are pleased to describe as "a report of the proceedings," and to spread copies of this report broad-cast throughout the Province. Of course if the publication be *bonâ fide*, and be after the final determination of the suit, there may not be much objection to it; but when, as has happened more than once, a second trial has become necessary, the publication between the first and second trial is open to much animadversion. No company or other litigant has a right, during the pendency of a suit, by publications or otherwise, to attempt to prejudice the public mind against the opposing litigant. On this branch of the law we refer to *Coleman* v. *West Hartlepool Harbour and Railway Company*, in other columns. The case will be read with much interest, as being a decision most important to the due administration of justice.

CODIFICATION OF LAW IN AMERICA.

(*From the Solicitors' Journal.*)

In a review of the New York political code, which will be found in a recent number of this Journal, we took occasion to give some account of the progress of the codification of the law in that State. The principle of codification is making great advances throughout all the United States of America, and is likely in a short time to supersede entirely the piecemeal manner of legislation of the old world. The subject, therefore, seems well worthy of some further consideration.

The constitutional law of all the States has, as a matter of necessity, been laid out in the form of a written code; but many of them have also made great progress towards a like systematic arrangement of their civil law. The State of Lousiana has administered its civil and criminal law under the authority of a code for the last thirty years; and, according to the opinion of the judges, with a very beneficial result. The State of New York, the leading State of the Union, commenced operations upon its statute law, and a consolidated, revised, and, to a certain extent, codified edition of the statutes came into force in 1830. It is now engaged on a complete codification of the whole body of the law of the State, including both the common law and the statute law, with the view of establishing its whole law in the form of one statutory code. The codes of civil and criminal procedure have already been completed, and are now in force. The remainder of the law is to be comprised in three codes, to be called respectively the political code, the civil code, and the penal code. The political code has been published, and presented to the Legislature; and the civil and penal codes are promised shortly.

The important State of Massachusetts has also, since the year 1835, enjoyed the benefit of a revised code of statutes. After the lapse of twenty years, the subsequent legislation of that State had so accumulated as to require incorporation with the code; and a commission was appointed for that purpose, the result of whose labours has just been enacted, under the title of "The General Statutes of the Commonwealth of Massachusets, 1860." Most of the other States of the Union have, we believe, attained a like advanced stage in the simplification of their laws.

A movement is now being made to apply the same process to the statutes at large of the Federal Union, which have hitherto been left in the raw and undigested state in which they were originally passed. It is felt to be a great and unnecessary grievance that the statutes of the Union should fill eleven large octavo volumes, seven of which only contain public statutes, the rest being filled with private acts and treaties. It is calculated that with proper revision and consolidation the public laws in force could be reduced to two volumes of a reasonable size. The senate of the United States have recently agreed to a resolution "for the appointment of a commissioner to revise the public statutes; to simplify their language; to correct their incongruities; to supply their deficiencies; to arrange them in order; to reduce them to one connected text; and to report them thus improved to Congress for its final action, to the end that the public statutes, which all are presumed to know, may be in such form as to be more within the apprehension of all!"

It may also be here noticed that the Legislature of Canada has just completed a consolidated statute book in two parts. The one containing the public general statutes which apply to the whole province of Canada, and the other containing those which apply exclusively to Upper Canada. This new statute book has become law too recently to allow of much experience of its operation; but it presents a very simple and convenient appearance. The Canadian statutes are not merely consolidated, but also revised and classified. They are arranged under general titles according to the subject matter; and are accompanied with a copious index of the particular topics referred to.

It thus appears that amongst the States of America, the revision and consolidation of statute law is an accomplished fact. Their revised editions of statutes have in all cases worked with the greatest ease and efficiency. The solution of the more difficult problem of the codification of the common law is still pending. The civil code of Louisiana, the law of which State is derived from French sources, is for the most part a republication of Roman law; but the law of New York, and of most of the States, being of English origin, cannot be codified without reducing into a fixed and regular form all the principles and maxims of the common law. The shortly expected civil code of New York will therefore be looked for with the greatest interest, comprising, as it must, all the fundamental principles and varied developments of the common law.

It may be regarded as the crucial experiment of the capability of the common law to be registered in the form of a written code. If successful, it will doubtless be imitated and adopted in all States of the Union whose laws are of the same origin. It is said that there is at present an inclination in those States to prefer the system of the Roman law, the capacity of which for codification has been so well established; but it is probable that no state which has lived under, and been accustomed to the free spirit of the former law, would exchange it for the latter, even though it may combine the additional advantages of a code.

The progress of law amendment in the new world is calculated to give rise to much serious reflection in the English mind. England has hitherto maintained a pre-eminence in all matters relating to practical law and legislation. Alone of all modern nations, she has known how to render the highest development of law consistent with the largest degree of in-

dividual liberty. Her laws have commended themselves by their intrinsic excellence to the voluntary acceptance of the most active, energetic, and freest race of men which the world has known. The Anglo-Saxon race has everywhere carried with it its birthright of English law; and from the most remote parts of the earth has continued to look to England for the progressive extension of that law in the paths of equity and justice. The effect of an available code of English common law would entirely obviate this dependence on the law of the mother country. It would sever the connection of the common law with its original source, and establish it on an entirely new and independent foundation. The code which was found useful for one colony would soon be adopted by others. Every independent colony would be ruled by its separate statute-book. It would no longer draw its current of law from the fountain head, but would, for the future, depend on its own resources for the maintenance and advancement of its laws. Our colonies, have lost the connecting link which has hitherto preserved a unity in their institutions, might be expected to diverge rapidly into every variety of form characterized by the divers peculiarities arising from local position, climate, manners, and occupations. It is vain, however, to speculate on the important changes which might thus be wrought by the development of distinct nationalities, in the future destinies of the world; we desire rather to revert to the prospect of our affairs at home.

Notwithstanding the undoubtedly great influence which we have long exerted through our laws on those of all States colonized from this country, the present state of our law is not such as can be regarded with complacency, or, as is calculated to attract imitation. Indeed, it may be reasonably suggested that the state of complication in which our laws have become latterly involved, forms the principal motive of other states to rid themselves of an influence which is found to be more burdensome than beneficial. The volumes and statutes in which our laws have to be sought, accumulate so rapidly that the later generations of lawyers appear in danger of being overwhelmed with the richness of their inheritance, and have been accused of renouncing in idleness and despair at once the burdens and the blessings of their birthright. Mr. Hallam has thus represented the difficulties of our position:—"We accumulate statute upon statute, and precedent upon precedent, till no industry can acquire, nor any intellect digest, the mass of learning that grows upon the panting student; and our jurisprudence seems not unlikely to be simplified in the worst and least honourable manner, a tacit agreement of ignorance amongst its professors." Every-one familiar with the administration of our law will admit the truth of this description of its state, though he will probably reject the imputation on its professors as a calumny. Infinite labour, learning, and talent has been successfully expended in digesting and arranging the mass of materials, and adapting it for practical purposes. Our practical text-books are surprising monuments of accumulated industry, and it is no exageration to say, that without their aid, the traditionary mode of administering the English law in its present advanced state would be impossible.

It is, indeed, full time that the Legislature of this country was awakened to a sense of the important duty of promulgating the law in an intelligible and accessible form, a duty second only to that of providing laws sound and efficient in substance. The progress made in the simplification of the law in America naturally leads us to consider what would be the prospects of success of similar attempts in England.

At the outset, there appear such important differences between the political condition of England, and that of any of the States of the Union, that the complete conversion of the law of those States into the form of codes, even if successful, would form a very imperfect measure of comparison for a similar undertaking in this country. The process applied to our constitutional law seems altogether out of the question; it would amount to a complete revolution. The essential principle on which the sanction of the whole of that law depends is the authority of precedent. The terms constitutional and unconstitutional in the United States refer to the strict letter of the written code. With us they are understood to point to an accordance with the old established and customary modes of proceeding. A distinction is thus made between the strictness of formal law, and the practice of the constitution. For instance, it is said to be unconstitutional for the House of Lords to refuse to pass a Bill repealing a tax; though their strict right to do so in point of form cannot be disputed. Hence, to establish our constitutional law on a fixed written basis would subvert the constitution itself. The Parliamentary history of England is our text book of constitutional law; and it would be found impossible to embody the instruction and experience of ten centuries in the few pages of a written code.

The other branches of our law are more amenable to the process. It has long been recognized that our statute book requires both a reduction in bulk and a simplification in matter. Here the "Revised Statutes" produced by numerous States of America prove beyond all question that there is no inherent obstacle to render such a work impossible. Their statutes are in all respects similar in matter and style to those of this country. The difference of the work is one only of degree; the greater bulk of our statute book demanding greater toil, longer time, and more money for its compression. The difference in the quantities of these necessary elements required in the two cases might even be calculated with some exactness, on the supposition that the machinery employed in the two cases was equally simple and effective. But in truth the costly and cumbrous commissions for consolidating the statute law, which have been found so useless and unmanageable in England, present the greatest contrast with the simple instruments employed for that purpose in America. The general plan there adopted has been to intrust the whole work to the unrestricted discretion and exertions of three commissioners, selected for their knowledge of law, who have in all cases been able in a short time to report a perfect result of their labours. The machinery which has operated so successfully upon the statute law in America is well worth the attention and study of our law reformers in all its details; for it seems most probable that the whole secret of the success in that country, and the failure in this, will be found to consist in the difference in the manner of setting to work.

In matters of social and economical policy, codification seems peculiarly appropriate. In such matters, our modern consolidated statutes already supply us with something equivalent to a code; and it may be doubted whether they could be made abbrievated or simplified without a sacrifice of completeness or perspicuity.

In one point there appears a precise resemblance between codification in the United States and in England. In civil rights the common law of England applies to both countries, and being independent of the country, and of the complicity of its institutions, the magnitude of the task of codifying its principles in each case would be equal. Indeed, the difficulty of such task may reasonably be thought greater in America than here. Our common law has been described as a mixture of the laws and customs of the Romans, Picts, Saxons, Danes, and Normans; but an additional element is infused by the genius and wants of the American people. The codification of the common law as it appears in America, has, as we have seen, been attempted in the State of New York, and we shall look forward to the appearance of the civil code of that State with the greatest interest, as a fair test of applicability of the process of codification to our own common law institutions.

The great experiment of codification now in progress in America, cannot, indeed, fail to be an object of attention to every one who feels any concern in the progress of law and civilisation. The philosophical lawyer will observe with interest the effort of a free people to apply to their living laws the same process which a former age of the world was success-

fully imposed by a despotic emperor upon a body of settled law from which the vital self-creating spirit had departed; and will naturally be induced to speculate on the important consequences which would result in the present state of the world from a compact and serviceable code of English common law. The practical law reformer will observe with attention the mode of carrying out such a project, and the various steps taken in the progress of it; watching carefully their effective bearing results, and above all will examine minutely the details of the machinery by which it is proposed to accomplish so vast a design.

JUDICIAL STATISTICS.

(*From the Law Times.*)

Only those whose daily duty it is to deal with Law Reform by suggestion and criticism can rightly appreciate the importance of Judicial Statistics. During the eighteen years that we have been recording the progress of the Law and the Lawyers, scarcely a week has passed without discovering the need for some positive facts by which to support the plans it has been our business to propose or promote. Hence it was that we so pertinaciously urged the demand for the statistics of the law and its administration in this country. Foreign Governments had long ago recognised their utility; but here they had been utterly neglected, and it was impossible to test the excellence of reform accomplished by any better evidence than conjecture. In devising his great projects of Law Reform, Lord Brougham early experienced the same deficiency of information, and with him to discover a defect was always to make an endeavour to remove it. Successive governments were appealed to, but in vain; sometimes he was met with promises, sometimes with objections. At length he took the question into his own hands, and framed an elaborate Bill, which was submitted to the house of Lords, to compel the collection of a complete series of Judicial Statistics in the forms prescribed by the schedule. This brought matters to a crisis. The government was compelled either to adopt Lord Brougham's Bill, or to undertake the task themselves. They preferred the latter alternative, and having resolved so to do, it is but fair to say that they fulfilled their promise. They sought for the best man for an office requiring great intelligence, and they found the very man for the purpose in Mr. Redgrave. His work was confided to him, we believe, with no other instructions than to do it in the best manner, and with all the aid that the Government offices could give to him. Mr. Redgrave commenced his labors three years ago. All was new to him. He had to learn what information was required, and where it was to be found. The first report was consequently defective in some important particulars. The second introduced many improvements, from Mr. Redgrave's own experience or suggested by others, and he has been ever desirous to receive and ready to adopt the practical hints of those who were engaged in the work of legislation. The third year of his labours has produced a third report, improving upon its predecessor as that was an improvement on the first. His own experience and the suggestions of others have been employed, and the result is a collection of figures relating to the law and its administration, now almost perfect, from which already much useful and still more curious knowledge is to be extracted, but the value of which, for the purposes of legislation, will grow year by year, for it is only by comparisons, extended over considerable periods of time, that the results of changes in the law can be ascertained.

As in the two former years, it is our purpose to bring the most interesting of these results under the notice of our readers, and we prefer to do so in the form of a series of articles, rather than in a mere reprint of the report, because it will be instructive to comment upon the facts as we go along, and indicate such lessons as they may appear to teach. The true value of statistics lies not so much in the mere figures as in the recognition of the facts which those figures indicate.

The business of the three Superior Courts of Common Law may be thus stated:

	Q. B.	C. P.	Ex.	Total.
Writs of Summons	27,851	21,445	36,974	86,270
Appearances entered	8,241	6,312	9,209	23,762
Entered for trial	1,219	782	1,208	3,389
Actually tried	—	—	—	1,939
Of these were—				
Defended	358	280	327	965
Undefended	21	64	82	167
Withdrawn and struck out	384	278	375	1,037
Judgments	10,687	6,943	14,188	31,819
Executions	7,414	5,114	10,350	22,878
Motions for new trial	170	154	207	531
Other special motions	199	222	220	641
Causes referred to Masters	205	84	261	550
Amount of fees	£22,519	£12,964	£23,418	£58,902

The Registrar notes that there was a decrease in the amount of litigation to the extent of 16·5 per cent. on a comparison of writs of summons issued during the last and preceding year.

It will be observed that the same singular inequality prevails in the number of actions brought in the several courts. Still the Exchequer is favored by the Profession, and still the Common Pleas is avoided. It is a wonderful instance of the effect of prejudice long lingering after the cause of it is removed. The preference for the Exchequer arose long ago, when the costs were taxed in that court on a more liberal scale than in the other courts. No such reason exists now, or has existed for many years, and yet by mere force of habit the attorneys contiuue to flock thither. So the Common Pleas still suffers from the aversion to it felt by the Profession when its Bar was monopolised by the Serjeants, and consequently the choice of counsel restricted and the costs increased. This objection has long ceased; but yet the prejudice lingers, and the court is still shunned without reason.

Nearly three-fourths of the actions brought are settled without an appearance being entered—only one in nineteen is entered for trial; only one in eighty is actually tried. As about one in three proceeds to judgment, it may be presumed that nearly two or three are settled in the preliminary stages; but it is remarkable that more than one-half of the judgments issue in executions.

The most startling fact, however, if it be true—and we cannot but suspect some mistake in the returns—is that motions for new trials follow in one-fourth the cases tried; the total of trials being 1939, and the motions for new trial 531. If this be correctly stated, how can any man dare assert that juries and judges, so fallible in civil causes that one-fourth of their decisions should be disputed, are infallible in criminal cases, and require no revision?

The number of cases tried on each of the circuits was as follows:

Home	277	Western	135
Midland	120	South Wales	33
Norfolk	49	North Wales	35
Oxford	143	Lancashire, C. P.	235
Northern	182	Durham, C. P	30

It appears from this that the business is more equally disturbed among the circuits than is commonly supposed. Who would have thought that the Northern Circuit, to which counsel throng, actually produces less civil business than the Western or the Oxford Circuit; and that the Midland is more profitable than either?

The results of trials are shown by the following figures :

	Q. B.	C. P.	Ex.	N.P.	Total.
Verdicts for plaintiff	248	244	281	673	1445
Do. subject to special case	6	5	6	13	30
Do. by consent with refer-	28	11	9	71	119
Do. for defendant	71	59	68	145	343
Jury discharged without verdict	7	12	6	3	28
Juror withdrawn	10	4	11	43	68
Nonsuit	10	8	28	34	80
Stet processus, record withdrawn, &c	—	1	—	128	129

Thus it will be seen that the plaintiff obtains the verdict in nearly four cases out of five. This is as might have been anticipated: for the plaintiff being the moving party in litigation, the presumption is that he would not resort to it without at least having the apparent right on his side; whereas defendants resist from pride, obstinacy, unwillingness to recognise unpleasant and inconvenient truths, and other weakness of human nature. But it would be as well for all who contemplate defending an action to know that the chances are just five to one against them.

The Registrar remarks the singular preferences for particular courts, and still more singular cause of them; but he observes also that, although there is so great a difference in the number of writs, the proportions largely decline in the more onerous business, and are again almost equalised; thus, although the writs of summons are in the Q. B. 32·3, in the C. P. 24·8, and in the Ex. 42 9, per cent., in the causes tried the proportions are Q. B. 35·5, C. P. 30·4, Ex. 36·1 per cent.

There are no means for obtaining the sums for which suits were commenced in the Superior Courts; but the following were the amounts for which verdicts were obtained:

Above £5000		11	£300 and above	£200	68
£5000 and above	3000	6	200 " "	200	149
3000 " "	2000	6	100 " "	50	232
2000 " "	1000	22	50 " "	20	378
1000 " "	500	52	20 and under		841
500 " "	300	56			

Total amount recovered	£324,388
Without reference	116,443
With reference	54,680

The executions by writ of *fi. fa.* were 14,052; by *ca. sa.*, 8,142; by writ of possession, 583; by *elegit*, 42; by *exegi facias*, 53; by *capias utlagatum*, 6.

The *New Trials* appear thus:

Refused	30	35	38	103
Rules Nisi granted	75	54	96	225
Rules absolute	30	35	22	96
Rules discharged	25	28	51	104
Court divided	1	2	—	3

Thus only 2 per cent of all the actions brought are tried by a jury, and it may be assumed that these represent very nearly the number in which there was any question really in dispute between the parties.

The remainder are merely proceedings for enforcing undisputed claims and rights.

We shall return to these valuable papers frequently during the vacation.

JUDICIAL STATISTICS.

The large number of suits commenced in the Superior Courts of Common Law, and what became of them up to trial and execution, was shown in the last paper on the subject. Of all this multitude only a few were remanets at the end of each term, and of these few at least one-third were made such by consent or other reasons than want of time to try. It is not necessary to copy the figures as given for each quarter; it will suffice to state that on December 31 the only remanets were as follows:

Queen's Bench—	
By consent	20
By injunction or decree	8
For want of time to try	48
Common Pleas—	
By consent	11
By injunction or decree	5
For want of time to try	...
Exchequer—	
By consent	9
By injunction or decree	...
For want of time to try	2

We pass now to the business of the Court of Error. There were

Proceedings of the Court of Error—	
Notices and writs of error	34
Set down for argument	32
Writs affirmed	11
Writs reversed	2
Remanets	5
Appeals from the Court in banco—	
Notices of appeal	44
Set down for argument	20
Affirmed	14
Reversed	4
Remanets	5

It will be seen from this that in half the cases in which parties under the first flush of disappointment at defeat give notice of appeal, their courage oozes away, or more prudent counsels prevail before the time comes for setting them down for argument. And even after this process of elimination only one judgment in four is reversed on the hearing. The solicitor may therefore calculate the chances of appeal as four toone against him, and he ought so to inform his client.

The amounts paid to the Suitors' Fund by the several courts are thus stated :—

	£	s.	d.
Paid in during the year by—			
Queen's Bench	45,963	17	4
Common Pleas	24,252	17	11
Exchequer	40,433	7	4
Total	£110,650	2	7
Paid out during the year—			
Queen's Bench	44,963	7	5
Common Pleas	22,598	18	8
Exchequer	44,724	18	8
Total	£112,286	18	11
Fees levied by the masters—			
In the year 1859	58,902	1	0
Disbursed for salaries, &c	38,057	7	10
Balance	£20,844	18	2

On the first of January 1859 the Suitors' Fund amounted to 38, 659*l.*, and this steadily increasing as compensation charges die out.

In addition to the above there is the business in chambers, now not the least part of the labour of the judges. Here, too, the Exchequer exhibits the largest amount of business. We present the totals, without specifying the courts :

Summonses	41,315
Common orders	34,024
Special orders	10,846
Certificates, special cases, special verdicts trials, &c	2,085
Affidavits, affirmations, &c	28,300
Affidavits filed	17,636
Approbations for taking affidavits or special bail	582
Acknowledgments by married women	542
Office copies (number of folios)	10,667
Recognizances	62

Writs of Error	1
Bail	55
Committals	257
Exhibits before judge	4,147
Producing judge's notes	123
Bills of exceptions signed by judge	2
Attendances in any court on subpœna	38
Attendance as a commissioner to take affidavits	53
Reports on private Bills	4
Attendances by counsel (each side)	3,545
Appointment of Commissioners	853
Admissions	360
Justification of bail	1
Summons and order to try issue before sheriff	3

We turn now to the statistics of the County Courts. During the year 1859 there were—

Plaints entered, 714,623.

Of these 373, 657, or about one-half, were determined, 988 with a jury, and 372,690 without a jury.

Thus in one case only in 372 was a jury demanded, although it was at the option of either party to have obtained this boasted privilege, had the actual litigants the same regard for it as theoretical writers and orators. No amount of rhetorical flourish can explain away the fact that where an option is given to the litigants, only one in 370 choses to submit his cause to a jury rather than to a judge. What better test of public estimation can there be than this? In truth, a jury *is* the very worst contrivance for the settlement of a dispute, although it is the very best contrivance for the trial of a criminal charge; and the instinct of the suitors in this particular coincides with the judgment of common sense.

Now comes another curious fact. Out of the 373,657 cases determined, no less than 355,707 issued in favour of the plaintiffs, and only 17,950 in favour of the defendants; and of these 8,861 or one-half, were by way of non-suit.

Thus, in the County Courts, the chances are 25 to 1 against the defendant.

The total sum for which plaints were laid, was 1,754,971*l.*; of which 851,732*l.* was given to the plaintiffs by judgment on the original hearing; the costs upon the proceedings being 37,628*l.*, and the fees received, 215,623*l.*

Executions against the goods were issued in 98,589 cases, but of all this number only 3,776 proceeded to actual sale; that is to say, in but one case in 180 was sale under execution necessary.

The judgment-summonses, issued where defendants do not obey the order for payment, and preliminary to commitment, were 118,873. Half of these appear to have attained their object without more, for only 55,982 were heard. These hearings resulted in 27,284 warrants of commitment, or just half the cases heard. But the mere order for commitment seems to have produced its desired result in two cases out of three, for only 9003 were actually committed.

At this point we again pause.

WARNINGS.

The profession in England has been recently shocked by an extraordinary case of professional misconduct on the part of a Mr. Evans—an eminent London barrister. It appears, from the report of the proceedings of Court of Bankruptcy, held before Mr. Commissioner Goulburn, that an application was made on behalf of Mrs. Caroline Payne, a creditor of Evans for 16,000*l.*, and by five other creditors, to prevent the issuing of a certificate of bankruptcy to the defaulter. Their counsel, in introducing the application, stated that Evans had been guilty of as gross a series of frauds as were ever brought before the court. Without any capital of his own, the bankrupt had speculated in building to the extent of 20,000*l.*, upon the money of his clients with which he was intrusted. By the exercise of certain influences over Mrs. Payne, he got himself appointed trustee over property valued at 20,000*l.*, He then sold out consols, and left the estate damaged to that amount, besides transmitting to his client an obligation to appear in nine or ten Chancery suits.

A number of labouring men had been defrauded of their little earnings, and were thrown upon the world without a shilling to bless them. In one transaction, the bankrupt had actually cut the seal from a deed, the effect of which was to commit a gross fraud to the amount of 700*l.*, by making himself the first instead of the second mortgagee.

It is believed in England that such crimes, on the part of solicitors, are increasing, and the legal journals have directed of late, their serious attention to the cause, and to the remedy of the mischief.

It is not a little remarkable, that many of these fraudulent failures have been on the part of practitioners of the highest professional and social standing—men whose reputations have always stood at "high-water mark," and in whom the community have had the most unbounded confidence. Mr. Buckle and the school of positive philosophers, would, perhaps, say that this peculiar form of social disorder is governed by a certain, fixed law, which it would be folly to attempt to countervail. It would seem that moral diseases, like physical, are sometimes epidemic. Suddenly the community is aroused by the story of some such case as the one we have just alluded to, and before the wonderment ceases, another, and still another, are brought to light. Countries, separated by mountains or oceans, are contemporaneously afflicted by similar enormities, as if the Spirit of Evil were bent upon some peculiar mission against the hearts and consciences of men. Whatever the philosophy of them may be, the instances of professional delinquency that have happened of late in England and in our own community, should not be permitted to be forgotten, without a reference to the moral that may be drawn from their history. If the record—the sad and secret record—of each case were spread before us as it is before the All-Seeing Eye, we should doubtlessly find that temptation began its work slowly and gradually—that resistance to its encroachments was, at first, powerfully and manfully made, but that, after each submission to its influence, the effort of resistance became feebler and feebler, until at last, a breach effected in the ramparts of conscience and morality, the whole moral man was at the mercy of opportunity and avarice.

He who accounts himself the bravest and the strongest may fall the lowest. Circumstances, over which he can have no control, may suddenly present themselves, when nothing but a life-long devotion to principle and the sternest sense of integrity will enable him to resist temptation; and if many of those, who have gone down to dishonoured graves, covered with infamy and the reproach of defrauded victims, or who are now lost to themselves and to society, wandering through the world for a hiding place and a refuge, were permitted to speak to us, with what burning emphasis they would utter the pregnant words—*avoid—fly from temptation.*

There are two rules, for the government of his professional conduct, that every young lawyer ought to adopt, and invariably obey. First, he should never permit his client's money to remain longer in his possession than may be absolutely necessary; and secondly, he should keep every dollar that may come to his possession in a fiduciary capacity, separate and distinct from his own. Money, or the representatives of money that do not belong to him, should be sacred. They should be put far from him, that he may never be able, even for one moment, to look upon them as his own. A separate bank-account, or drawer, or pocket-book, would have saved many a reputation. It is the habit, we have been told, of a gentleman of our own bar, of great eminence—whose name it would scarcely be good taste to mention—immediately upon the receipt of money belonging to a client, to inform him of the fact. His practice is—adopted, too, early in life, upon the example and counsel of his own preceptor—not to permit the sun to set without writing and mailing a letter to the client, whose money

has come into his possession. We would earnestly recommend this plan to our younger professional readers, and would urge them to adopt it. If the habit were once formed, it would be as difficult to break through it, as it would be, for one who grown gray in loose and careless business conduct, to acquire this precious habit of accuracy and care in relation to the property of clients.

We inculcate the most rigid and iron exactness in the administration of property that comes to you professionally, and is not your own. You owe it, primarily, to yourself; you owe secondarily, to the profession you are a member of. The reputation of the whole body of lawyers suffers with that of every brother. That word "*brother*," so often used in our public intercourse, has great significance in this connexion. We are members of one family—our brother's sins are surely visited upon our head. Confidence in any of us once impaired, faith in the integrity and honor of our brotherhood is invariably shaken—however slightly, still shaken. The utmost sedulousness and particularity in guarding others' property can never be useless, or without its good effect; for as the habit of looking carelessly and callously upon your client's money—of making use of it when there cannot be the possibility of a doubt that every farthing of it will be returned—often leads in the end, under peculiarly tempting circumstances, to positive fraud, so the other extreme of conduct will engender a strong and resolute moral purpose which no temptation, however powerful, will be able to destroy or affect. Thus only is the remark of Tennyson true, that man is "*master of his fate.*—*From the Philadelphia Legal Intelligencer.*

LEGAL CONFLICT.

Many have been the attempts of ingenious conveyancers to evade the Mortmain Act; but all have failed, because the courts have persisted in construing the law according to its spirit and intention, and not by the strict letter. The latest endeavour will be found in a case of extreme importance and interest, *Jefferies* v. *Alexander*, 2 L. T. Rep. N.S. 748, in which the H. of L. once more rescued the law from defeat. The attempt was extremely ingenious. The donor executed an indenture purporting to be made between himself and certain trustees, who, however did not know of it, or of the existence of the deed until after his death. The deed, which was not enrolled as required by the Mortmain Act, and contained no power of revocation, witnessed that B. covenanted that his executors should, within twelve months after his death, subject to his debts and to any legacies and annuities given or to be given by any will or deed of the covenantor, invest £60,000, and pay the annual proceeds for the behoof of certain poor persons. The legacies and debts were of trifling amount, and the bulk of the assets consisted of mortgages of freehold and copyhold land, which formed the only fund out of which the £60,000 could be paid. This deed he kept in his own possession until his death.

The question was, whether this constituted a charge payable upon the chattels real of the covenantor, there being no other assets from which payment could be made?

The difficulty of the question thus raised may be gathered from the division of opinion among the judges. The case was first heard by the M. R., who held it to be a gift of incumbrances affecting the realty. But the Lords Justices, and Erle and Wightman, JJ., who had been called in to their aid, reversed this decision. In the House of Lords the question was twice argued; the law lords present on the first occasion having been equally divided. On the second hearing six of the common law judges were present, and were likewise equally divided; but of the five law lords present three were of opinion that it was a charge upon the realty, and it was ultimately so determined, exhibiting most remarkable conflict of opinion.

For its being a charge upon the realty, were the Master of the Rolls, the Lord Chancellor, Lords St. Leonards and Kingsdown, and Blackburn, Willes and Williams, JJ.

Against its being such a charge, were the Lords Justices, Erle, C.J. and Wightman, J., Lords Cranworth and Wensleydale, and Pollock, C.B., Wilde, B., and Byles, J.—*Law Times.*

THE CONFESSIONAL.

(*From the Jurist.*)

At the Spring Assizes of Durham, in the present year, a case arose involving a moot and rather difficult point in the law of evidence, which has attracted considerable attention, and given rise to a bill in Parliament by Sir G. Bowyer. We allude to the case of *Reg.* v. *Hay*, where the question arose as to whether, and how far, a Roman Catholic clergyman is privileged from being compelled to disclose, in a court of justice, matters confided to him by a penitent in confession. It was said at the time that Hill, J., denied the existence of the privilege, and committed the priest for contempt of Court for refusing to make the disclosure. A report of the case has now appeared in the recently published part of the Reports of Messrs. Foster & Finlason, (*Reg.* v. *Hay*, 2 Fost. & F. 4,) which puts the matter in a very different light, and the report is accompanied by a learned note by the latter gentleman. The case is as follows:—

William Hay was indicted for stealing a watch. An inspector of police stated, that from information he received he went to the house of the Rev. John Kelly, a Roman Catholic priest, from whom he received a watch, which the prosecutor identified as his. The Rev. Mr. Kelly was then called, and objected to take the oath, saying, "As a minister of the Catholic Church, I object to the part that states that I shall tell the *whole* truth." Hill, J., said—"The meaning of the oath is this: it is the whole truth touching the trial which you are asked—which you legitimately, according to law, can be asked. If anything is asked of you in the witness-box which the law says ought not be asked, you would be entitled to say, 'I object to answer that question,' and the law would sustain the objection. You can, therefore, have no objection, as a loyal subject, and in duty to the laws of the country, to answer the whole truth touching the case which may be lawfully asked. Therefore you must be *sworn*." The witness was then sworn, and deposed that he received the watch produced; and on being asked from whom, answered, "I received it in connexion with the confessional."

His Lordship.—"*You are not asked at present to disclose anything stated to you in the confessional;* you are asked a simple fact—from whom did you receive that watch which you gave to the policeman?"

Witness.—"The reply to that question would implicate the person who gave me the watch; therefore I cannot answer it. If I answered it, my suspension for life would be the necessary consequence. I should be violating the laws of the church, as well as the natural laws."

His Lordship.—"I have already told you plainly I cannot enter into this question. All I can say is, you are bound to answer, 'From whom did you receive that watch?' On the ground I have stated to you, *you are not asked to disclose anything that a penitent may have said to you in the confessional.* That you are not asked to disclose; but you are asked to disclose from whom you received stolen property. Do you answer it, or do you not?"

"Witness saying he really could not, was adjudged guilty of contempt of Court, and committed accordingly.

Previous to this case it was the common opinion that a confession to a clergyman of any denomination was not privileged from disclosure; for which several cases were usually relied on, especially *Rex* v. *Gilham*, (1 Moo. C. C. 186), which we cannot help thinking has been much misunderstood. With respect to Roman Catholic clergymen in particular, the right

was expressly denied by the Irish Master of the Rolls in 1802, in a case of *Butler* v. *Moore*, (McNally's Ev. 253). The authorities on this subject will be found on the treatises on Evidence. Now, in the case before us, Hill, J., draws a marked distinction between what is disclosed to the priest in confession, and any act done by or to him in consequence of that confession; holding the former privileged but the latter not. As, however, Hill, J., does not assign any reasons for his decision, Mr. Finlason, in the note in question, proceeds to assign reasons, for him, some of which seem sound, while others are open to much question.

Mr. Finlason begins by assuming, we believe rightly, that, previous to the Reformation, confessions to a priest were protected from disclosure, except perhaps when the matters disclosed amounted to high treason. This privilege, he contends, applied only to *sacramental* confession, accompanied by sacramental absolution. He then argues that the privilege, not having been taken away by any statute, necessarily subsists still, so far as regards clergymen of the Church of Rome, and also those of the Church of England. On this latter subject, however, it will be better to let him speak his own language: —"Although it is a common idea that the Church of England denies that confession is a sacrament, that is an error; for the answer in the Catechism as to the number of the sacraments, 'two only [as] generally necessary to salvation,' does not amount to a statement that there are only two sacraments; nor even that only two are ever necessary to salvation, but that only two are generally so. And it has been held, that, according to our law, marriage is a sacrament, (*Richards* v. *Dovey*, Willes, 622); and it seems, from some decisions, to follow that confirmation is so." We much regret that Mr. Finlason has not given these latter decisions; for the former part of the above sentence will not bear much examination. In *Richards* v. *Dovey* the question was, whether a custom, that every man inhabiting one parish, who marries by license in another, shall pay a fee to the rector of the first, as if the marriage had been solemnised there, is good. The Court, consisting of Willes, C. J., Abney, Burnett, and Birch, JJ., held that it was not; and Abney, J., says, "Marriage is a sacrament, and therefore no fee ought ought to be paid for it." For this proposition he refers to six authorities, the two first of which —Lyndw. Prov., and a canon, A.D. 1222—were before the Reformation; and the rest are as follows:—*Anderson* v. *Walker*, (Lutw. 1030), where a prohibition was awarded to the Ecclesiastical Court, in which a party was libelled for not paying a fee for *baptism*, according to an alleged custom in a certain parish; *Topsall* v. *Ferrers*, (Hob. 175), where it was held that custom in a parish that a passenger dying there should pay *burial* fees there, though buried elsewhere, is void; *Burdeaux* v. *Dr. Lancaster*, (12 Mod. 171; 1 Salk. 332), where it was held that by the common law no fees are due for *baptism*; and *The Dean and Chapter of Exeter's case*, (1 Salk 334), that by the common law no fees are due for *burials*—a frail foundation for the assertion that "it has been held that marriage is a sacrament;" and, indeed, to be consistent in their argument, Abney, J., and Mr. Finlason must contend that "burial" is so too. The language of the Church Catechism, to which Mr. Finlason refers, we should have thought sufficiently explicit on the subject; but the Twenty-fifth Article of the Church of England puts the matter beyond question, for it says, "There are two sacraments ordained of Christ our Lord in the Gospel; that is to say, Baptism and the Supper of the Lord. Those five commonly called sacraments—that is to say, Confirmation, Penance, Orders, *Matrimony*, and Extreme Unction—are *not* to be counted for sacraments of the Gospel." There are some other theological matters in this note, into which we deem it needless to enter.

If Mr. Finlason is right in his notion, that the privilege from disclosure arises solely from the sacramental character of the confession, it follows, as an inevitable consequence, that a confession to a dissenting minister of any persuasion is not protected; and where the confession is made to a clergyman of the Church of England, the Court, before deciding the question of privilege, must determine the the theological one, whether confession in the Church of England is necessarily *sacramental*. For our own parts, without undertaking to say positively what the law *is* upon the general subject, we cannot help thinking that a good suggestion is to be found in the following provision in one of the statutes of New York:—"No minister of the Gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination." It is a maxim of law—"Quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest." In early times, when no religion but the Roman Catholic was tolerated by law, it was only with respect to the ministers of that religion that questions of this nature could present themselves. But at the present day, when all forms of Christianity are tolerated by law, and it is a well-known principle of them all that there are cases in which the spiritual advice of a minister of religion may properly be sought, the above maxim indicates that it should be allowed freely, and with safety to both parties, without entering into a theological inquiry as to the consequences which, in the eye of that particular creed, may be supposed to follow from it.

In the latter part of his note Mr. Finlason refers to some analogous cases of privilege which seem to support the ruling of Hill, J. To these may be added, that it has frequently been held, that although, when a prisoner has made a confession after an illegal inducement to confess has been held out to him, the confession is inadmissible, yet any discovery made in consequence of that confession—*e. g.* the finding of stolen goods —is perfectly admissible.

The judgment of Hill, J., on the first objection made by the witness in *Reg* v. *Hay*, is also worthy of notice, as it may serve to remove a difficulty with respect to the form of oath administered in our courts of justice which has frequently presented itself to the minds of well-intentioned, but ignorant or unreflecting persons. Such parties labour under the impression that the oath binds them to tell everything—all they know, have heard, believe, think, or conjecture—respecting the matters in dispute. Not so—it only requires that the "evidence" which they give "shall be the truth, the whole truth, and nothing but the truth." Now, the question as to what is legal evidence it determined by the judge, not the witness, who is, therefore, only bound to speak the truth with relation to all matters which the judge adjudicates to be legal evidence in the cause.

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal Barrie P. C."

All other communications are as hitherto to be "The Editors of the Law Journal Toronto."

OFFICERS AND SUITORS.

SEIZURE UNDER EXECUTION IN THE DIVISION COURTS.

(*Continued from page* 203.)

The 176th section of the Division Court Act enables a landlord, where his tenants goods are taken on execution under process of the court, to place in the hands of the bailiff making the levy his claim for rent in arrear, not exceeding in any case a year's rent. And section 177 directs that in case of any such claim being made, "the bailiff

making the levy shall *distrain* as well for the amount of the rent" claimed and costs, as the money he is directed to levy under the warrant, and section 178 provides what costs shall be charged "for every additional *distress* for rent in arrear."

The exemption act relates only to goods seized under process of execution. The words of section 4 are: "the following chattels are exempt from seizure *under any writ, out of any court whatever* in this Province," &c.; and the 151st section of the Division Court Act as altered by the act of last session is to the same effect.

Now under a distress by a landlord for rent in arrear, the goods mentioned would be liable to be distrained, and the question arises, would a bailiff of a Division Court, after making a levy under a writ of execution upon the premises leased by a defendant, and on receiving after such levy, a claim for rent from the landlord of such premises in proper form under the 176th section of the act, be justified in distraining the chattels exempted under section 4 of the act of last session, to satisfy the rent so claimed? Our opinion is that he would. The bailiff's authority in distraining for the rent is *not the writ of execution* but the written *claim* made *by the landlord.* Indeed, such claim is only another name for an ordinary landlord's warrant. The 180th section of the D. C. Act provides in effect, that the landlord's claim shall be first paid, and postpones the judgment creditor. And there seems to us nothing in any of these enactments that takes away the right of general distress which the landlord undoubtedly has in the ordinary way in cases where the bailiff levies under execution.

Replevin in the Division Courts.

(*Continued from page* 205.)

We gave in our last issue a sketch of the usual proceedings and course of a Replevin suit, and a correspondent furnished us with the two most necessary forms to be used by the officers of Division Courts, or suitors, which we also published.

We will now advert to cases which would take officers out of the ordinary routine of proceedings in suits of this nature, and which although of rare occurrence are nevertheless necessary to be understood.

After the bailiff has replevied the property, or such portion of it as he can find, he must then and not before serve a copy of the writ on the defendant, personally, if he can be found; but if not, by leaving the copy at his usual or last place of abode, with his wife or some other grown person, *being a member of his household or an inmate of the house wherein he resided.* It will be observed that personal service is not absolutely necessary, but care should be taken where the service is not personal to ascertain that the person to whom the writ is given comes within the description given above in italics and in the words of the Statute.

If the property or any portion thereof be concealed or secured in any dwelling house or building or enclosure of the defendant, or of any other person holding it for him, the bailiff should publicly, or in presence of two or more persons, demand from the defendant or other owner or occupant of the premises a deliverance to him of the property to be replevied, and if it be not delivered to him within twenty-four hours after such demand he may break open such house, building or enclosure, for the purpose of replevying such property, or any part thereof; or if the property be concealed about *the person* or on the premises of the defendant, or of any person holding the same for him, a like demand can be made, and if not complied with he may search and examine the person and premises of the defendant or of such other person.

The Statute does not say that the demand should be in writing, but it would be advisable that it should be so, especially in the instance where it was intended in the event of non-compliance therewith to break open any house or building. The bailiff should keep a copy of such notice, and the property claimed or the portion thereof secured or concealed ought to be specified therein.

There is a distinction made between cases where property is secured or concealed in a house, and where it is known to be on the person or premises of the defendant or other person holding it for him. In the first instance, 24 hours must elapse after demand made before any further action can be taken, whereas in the second a search may be instituted if the demand is not at once complied with—that is within a reasonable time. Great care should be taken by the bailiff in either of such cases to satisfy himself that the property was so concealed or secured, as he would not by any means be justified in availing himself of the powers conferred on him by the statute without good reason for doing so, and too much caution cannot be exercised in dealing with such matters.

Before the act of last session it was not necessary to obtain a judge's order in any instance before issuing a writ of replevin, but the cases in which it may now be issued without such order are made the exceptions, and we now come to refer to them.

The form of affidavit given in the last number is that to be used on application to the judge, but where it is necessary for the protection or security of the claimant to obtain the writ without a judge's order it must be stated in the affidavit, in addition to any general facts as set forth in the form given before, "that the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession within two calendar months next before the making of the affidavit, and that the deponent is advised and believes that the claimant is entitled to an order for the writ, and that there is good reason to apprehend that unless the writ is issued without waiting for an order the delay would materially prejudice the just rights of the claimant in respect to the property."

The only other exception to the rule is where the property was distrained for rent or damage feasant, "in which case the writ of replevin may issue without an order if the affidavit states" (in addition to the general facts as before) "that the property was distrained and taken under color of a distress for rent or damage feasant;" and the writ issued in such case shall state "that the defendant hath taken and unjustly detains the property under color of a distress for rent or damage feasant (as the case may be)."

Where the writ thus issues without an order, the claimant is not entitled to obtain possession of the property replevied, but it must remain in the custody of the bailiff until he (the claimant) obtains an order from the judge to have it delivered to him. The bailiff, before parting with the pro-

perty, should obtain this order, or if only a copy of it was given him, should take care to see the original and satisfy himself that all was right.

If within 14 days from the time of his taking possession of the property and serving the defendant with a copy of the writ as before mentioned the claimant does not obtain and serve him with a judge's order, directing him how the property is to be disposed of, he may re-deliver it to the defendant—but this provision does not apply in case of a distress for rent or damage feasant.

We have now given the substance of the acts relating to Replevin, so far as they apply to Division Courts, under the late act, and an outline of the duties which Clerks and Bailiffs will have to perform in relation to this new and important jurisdiction of these Courts. We will probably again recur to the subject, as we are conscious of having by no means exhausted it, and in the meantime we would be glad to hear from any officer of Division Courts who may have any information to ask for or suggestions to make on the subject.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—I have been very much troubled by Clerks in other Counties not making regular returns of summonses sent to them for service, sometimes they are sent after the Court, and quite recently I received a couple of summonses two days after the Court at which they were returnable, although from the time the affidavit of service by the Bailiff was made they could have reached me at least five days before the Court.

Is the Clerk in these cases entitled to the fees?

Your obedient servant, M.

[It is the duty of Clerks receiving foreign summonses to return them promptly when served, and in the case put, not only is the Clerk in default not entitled to the fees, but he and his sureties would be liable in an action by plaintiff (the party injured) to make up in damages for the injury sustained by the delay. Moreover this is such a breach of duty as the judge would feel bound to notice, and if the plaintiff made a proper representation of the facts no doubt summary and effectual redress could be obtained.—EDS. L. J.]

To the Editors of the Law Journal.

Milton, 18th August, 1860.

GENTLEMEN,—The attention you bestow, and the information afforded from time to time, on the subject of Division Court practice, though the columns of the "*Law Journal*" deserve the acknowledgments of all connected with such courts; I observe in the number for the current month, some practical information and remarks, on the extension of protection afforded to chattels of defendants under execution, by an act of the last session, a very important alteration indeed, amounting almost to an exemption, nearly tantamount to the "snuffing out" of Division Courts.

With your permission, I beg to make a few remarks, with a view to elicit your opinion on the present position, and future prospects of Division Courts. Whether or not the opinion and remarks I am about to make are justified by the facts of the case, as well as to elicit practical remarks on the subject from others, your correspondents.

With deference, I would state as my opinion, that, *under existing arrangements*, Division Courts, as an institution, will, before two years are past, have faded out, and, it may possibly be better for the country at large if it should be the case; I hope my brother Clerks will not think I speak treason in saying so. I have always differed from those who have advocated the abolition of these Courts, on principle, as well as policy, because I could not see with them, that the courts were the *cause*, (as the abolitionists have alleged) of the credit system, which has done so much injury to the province; but, I always considered them as the *consequence* of the credit system—therefore, at the worst a "necessary evil" consequent upon the extent of indebtedness which the credit system had forced upon the country, but under the present law for protecting the defendants goods from execution, it is a question with me, if one-tenth part of the debts likely to become Division Court suits can be collected: under which circumstances the efficiency of such courts to collect debts is so seriously affected, as virtually to amount to their abolition; and I only give expression to the opinion of our Legislators as contained in the act of last session, when I venture a conditional opinion to this effect, or, if you will, I make a virtue of necessity.

"A burnt child dreads the fire." I cannot think there will be a tithe of the indebtedness in the country which existed four years ago, and this is what has fed Division Courts, and made the revenue of some few Clerks, say, those of cities and large towns, sufficiently plethoric to excite the indignation of those desiring the abolition of the courts: this evil has corrected itself to a great extent, and it is likely to be kept within safe and much circumscribed bounds for the future. This state of things coupled with the reservation under execution will have the effect of producing the result I have ventured to anticipate, unless some wholesome and important amendments are introduced in the interim. Two years hence Division Courts will be numbered among "the things that were," and the officers thereof will have to say will Othello, "*our occupation is gone.*" If a mode of collecting small debts is to exist, let it be as efficient as possible, but, it appears to be the intention of the Legislature that small amounts shall not be recoverable by law, though we have nominally a small debts court. As matters now stand, if Division Courts are to exist, I think their jurisdiction should be extended, making the maximum amount collectable through them at least $150, and the minimum say $40, with an amended tariff of fees to suit such extension, and the item of a "counsel fee" added to the tarriff. This, I think, would be an alteration suitable to the extension of protection accorded by the recent Act, and at the same time preserve the efficiency and integrity of Division Courts, which, as things now are, we cannot expect. In the meantime, I do not see how the present staff of Clerks and Bailiffs can manage to hold on to their present positions—we shall have to submit to a reduction of our numbers: it is certain that, in many Divisions, the income is so much reduced as to make it a very insufficient return for the responsible nature of the duties which the position involves, and, better would it be, that a smaller number of officers receive a fair and decent remuneration, than that, say, three fourths of the whole should receive a pittance, so small, as to discourage any good business man from entering upon such employment; in which view of the case, I think, the number of Divisions in each county should be reduced, reduce the number of officers, by extending the area of each Division, thereby ensuring to each incumbent something like an equivalent for the attention given to, and the responsibility assumed in the duties of their respective offices, for in the present and prospective position of the country taken in connection with the alteration in the law before mentioned, the incomes of Clerks and Bailiffs are, and will be reduced so much that, unless other and additional occupations can be obtained, the position of either will not be worth the acceptance of men fitted for the duties.

Submitting these few observations to your consideration,

I remain, Gentlemen, respectfully yours,

JOHN HOLGATE,
Clerk 1st Div. Court, Halton.

[We cannot agree in the gloomy anticipations of our correspondent, and the remedy he proposes we fear would not answer, nevertheless there is a good deal to be said on both sides, and we shall not at present commit ourselves to any decided opinion.

Just now we prefer to allow our correspondents to speak, and would be glad to hear the opinions of other officers on the subject. There has from the first been a *mis-move* in establishing too many divisions in each County, owing we believe more to the eagerness to multiply offices than to any urgent demand from the general public. It may not be too late to rectify this evil—at all events it may be arrested.

We threw out the suggestion whether a criminal jurisdiction for summary convictions might not with great advantage to the public be conferred on Division Courts, and if we are rightly informed some measure of the kind was either introduced or spoken of last session.

Now is the time to discuss the matter—will our friends favor us with their views?—Eds. L. J.)

To the Editors of the Law Journal.

Warwich, 16th Sept., 1860.

Gentlemen,—May I request you will give your opinion whether a bailiff is entitled to mileage on an execution which he has to return *nulla bona?* There appears to be different opinions on the subject. If they are not, it is a great hardship that they should travel several miles for nothing, especially since the exemption law is in force, which makes half the executions to be returned "No goods."

I remain, Gentlemen,
Your obedient Servant,
James F. Elliot,
Clerk 2nd Div. Court Co. Lambton.

[Our correspondent will find his question answered in the negative more than once before in this journal.—Eds. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by Christopher Robinson, Esq., *Barrister-at-Law.*

Scott v. The Trustees of Union School Section No. 1, in Burgess, and No. 2, in Bathurst.

School trustees—Execution against—Sale of school house.

Held, that land conveyed to school trustees for the purpose of a school, could not be sold under execution against them on a judgment obtained for the money due for building the school house.

Ejectment for half an acre of land of the rear part of No. 12, in the 10th concession of Burgess.

At the trial at Perth, before *Richards*, J., a deed from John Allan to defendants, dated 17th June, 1856, was put in and execution admitted.

This deed was made between the said John Allan of the first part, Ann Allan, his wife, of the second part, and the trustees of the united school sections No 1, of the Township of Burgess North, and No. 2, of the Township of Bathurst, both in the County of Lanark and province aforesaid, of the third part; and by it, in consideration of 5s., the said John Allan conveyed to the said parties of the third part and their successors in office for ever, the land in question, "in trust for the use of a common school in and for the united school sections No. 1, of the Township of Burgess North, and No. 2, of the Township of Bathurst, both in the County of Lanark, and Province of Canada aforesaid. Provided always, and it is the true intent and meaning of these presents, and of the parties hereto, that if the said above described lands and premises shall at any time hereafter cease to be used for common school purposes for the space of three years at any one time, then and in that case the same shall immediately revert to the said party of the first part, his heirs and assigns, and he, she, or they shall and may enter in and upon, and the same shall and may occupy and enjoy, as fully to all intents and purposes as if these presents never had been made; the said trustees or their successors in office being allowed to remove any building or erections thereon before the expiration of said three years." Then followed the usual covenants for title, and bar of dower.

A judgment in favour of the plaintiff against defendants, entered in the Common Pleas on the 15th March, 1858, for £171 2s. 2d., was also admitted, and the issuing and return of execution against goods; and writs of *fi. fa.* and *ven. ex.* against lands were produced, and a deed from James Thompson, sheriff, to the plaintiff of the *locus in quo*, dated the 5th of September, 1859.

It was objected that the interest of defendants under the deed to them was not one that could be seized and sold under a *fi. fa.* against lands, and a verdict was taken for the plaintiff, subject to the opinion of the court on that point.

Richards, Q. C., for the plaintiff.

Deacon, contra, cited *Simpson* v. *Carr*, 5 U. C. Q. B. 326; *Doe Hull* v. *Greenhill*, 4 B. & Al. 684; *Roe* v. *Peggie*, 4 Dougl. 309; *Scott* v. *Scholey*, 8 East, 467; *Baxter* v. *Brown*, 7 M. & Gr. 198; Hill on Trustees, 239; Grant on Corporations, 511, 512.

The statutes bearing upon the question are referred to in the judgments.

Robinson, C. J.—The plaintiff having a claim upon the defendants, the school trustees, for building a school house for their union section, obtained against them in the Court of Common Pleas an execution thereupon for £171 2s. 2d., and taking out a writ against the lands of the trustees of the said school section had the site of their school house and the house itself sold at sheriff's sale, and the plaintiff in the action bought it at the sale for £50, and on the 5th day of September, 1859, the sheriff made a deed to him of the land.

The judgment and execution were against the trustees in their corporate name.

A copy of a deed, dated the 17th of June, 1856, by which John Allan and his wife conveyed the site of the school house to the trustees of the united school section, "*and to their successors in office*," is given in the case stated, from which it will be seen that the trustees (that is, for the time being) were to hold the land in trust for the use of a common school in and for the united school sections.

The first question is, whether the land was subject to be sold, as it was, to satisfy Scott's debt, due to him by the trustees for building the school house, as it is admitted by the parties? I think it was not so liable.

The school trustees are a board for taking care of and managing (among other duties) the school house in which the common schools are to be kept for the benefit of the inhabitants. They are in the light, I think, of trustees for the inhabitants as regards the school houses and the sites on which they are built. If they were individuals against whom a judgment had been entered for a debt due by them jointly, any property which they held as trustees for others could not be sold to satisfy the judgment.

The case was argued as if the question were rather whether the property could not be sold under the 10th section of the Statute of Frauds, 29 Car. II., ch. 3, but that is a provision applying only to judgments against persons *for whom lands*, &c., are held by others in trust, that is, upon a naked trust for their benefit, when no special confidence is reposed in the trustee, but he is merely to pay over the rents and profits to the *cestui que trust* against whom the judgment has been rendered. This is clearly no case of that kind. The inhabitants of the school division are the *cestuis que trust* in the case. The defendants are not in that position.

But it is argued, and not unreasonably, that the debt in this case being due to the plaintiff for building the school house which he desires should be seized in execution, it is not unjust that he should be able to seize the building in execution to pay the debt. If we look, however, to the extent to which such a claim might be pushed in similar cases, we should see the embarrassment that would ensue.

In this case, to say nothing of the site, the school house itself cost £150 or more, and the whole has been bid off by the plaintiff

for £50. The school acts appear to have made special provision for raising by assessment the moneys necessary for *building school houses*, as well as for defraying other school charges, and in some cases the trustees are made personally liable, so that we cannot conclude that there is no remedy in the power of the plaintiff but seizing and selling a property held in trust for the inhabitants of the section, and given by the donor upon the express condition that it should never be used for other than school purposes.

I refer to the statutes 13 & 14 Vic., ch. 48, sec. 12, sub-secs. 3, 4, 7, 9, 16, and sec. 18, sub-sec. 1; also, to 16 Vic., ch. 185, secs. 6 & 17.

In my opinion, a verdict should be entered for the defendants.

BURNS, J.—The question presented by this case is one of great public importance, for if the school houses and lands thereto attached throughout the province are liable to be sold upon execution at the suit of any one who has obtained a judgment against the corporation for a debt due, the same principle should hold good against the corporations of counties and cities, and we should have creditors claiming to sell the public court houses and gaols upon writs of execution. I have been unable to find any direct authority upon the subject either one way or the other in England, but I think the history of the proceedings of Mr. Robert Hennings Parr against the Corporation of Poole does throw some light upon the question. Upon the passing of the statute 5 & 6 W., IV., ch. 76, the Municipal Corporation Act, Mr. Parr was dismissed from his office of town clerk of the town and county of Poole. He claimed compensation, and the corporation awarded him £4,500, for which the corporation gave a bond payable by instalments out of the funds of the borough. The payments not being all made he brought an action against the corporation and recovered judgment by default, and upon the judgment he caused an *elegit* to be extended, and thereupon brought an action of ejectment to recover a piece of land used as a meat market, together with the Guild-hall and other erections and buildings thereon, then used and occupied by the corporation for the public purposes of the town. Previous to this some of the rate-payers filed an information to restrain the town council from paying Mr. Parr, and to test the legality of imposing a rate for the purpose; and Mr. Parr also applied to the Court of Queen's Bench for a mandamus against the mayor, aldermen and councillors of the town, to compel them to impose a rate to pay the demand. In the ejectment a rule for judgment was obtained unless the persons in possession should appear and plead. On behalf of the mayor, aldermen and councillors an application was made to the court to be permitted to defend without confessing possession, and the ground of asking to defend was that the Guild-hall was the only place in which they had been accustomed to transact the public business, and that the sessions for the borough were held in the Guild-hall, and the same was used by the justices for public purposes only. Lord *Denman*, in giving judgment upon the application, said the court was not called upon in that stage of the proceedings to decide whether their property, applicable to public purposes only, was liable to be taken in execution; but he said the court wished to be understood as not giving any countenance to the supposition that corporate property, though applied to public purposes, was protected from the lawful claims of persons having demands upon the corporation. See *The Attorney-General* v. *Corporation of Poole* (2 Keen 190, 4 M. & Cr. 17,) *Regina* v. *Ledyard* (1 Q. B. 619), *Parr* v. *The Attorney-General* (8 Cl. & F. 409 and 6 Jur. 245), *Doe Parr* v. *Roe*, (1 Q. B. 700).

It will be observed in Parr's case that there was other property, such as the meat-market, and other erections and buildings besides the Guild-hall, which latter was used for public purposes and the courts, for which the action was brought, and the defendants sought to defend the action inasmuch as the Guild-hall was used for those purposes.

In the case before us it is the school house and the land belonging to it used for the purposes of the school which has been sold, and we are called upon to say whether that can legally be done. The statute 13 & 14 Vic., ch. 48, sec. 12, sub-sec. 3, enables the trustees to acquire and hold as a corporation, by any title whatsoever, any land for common school purposes until the power should be taken away or modified, and to apply the same according to the terms of acquiring or receiving them. By the terms of the conveyance to the trustees of the land in question it was to be held in trust for the use of a common school for the united sections; provided, and it was, as the instrument expresses it, the true intent and meaning of the deed of conveyance, that if the premises should at any time cease to be used for common school purposes for the space of three years, then the said premises should revert to the grantor. Now, if the plaintiff can be at liberty to sell the premises upon his judgment and execution, and buy it, and then can dispossess the trustees, so that the same can no longer be used for common school purposes, the plaintiff's act can neither be beneficial to himself nor the corporation. But independent of the terms upon which this particular school house and premises are held, I think it is against public policy to permit the public property of this description to be sold upon execution.

By the 7th sub-section of the section of the act quoted, it is the duty of the trustees to provide for the salaries of teachers and all other expenses of the school in such manner as the majority of freeholders or householders of the section may desire; and if the sums be insufficient to defray all the expenses, the trustees shall have authority to assess and cause to be collected any additional rate in order to pay the balance.

It is not for us in this action to point out to the plaintiff what remedy he may have in order to procure payment of the debt for which he recovered judgment against the corporation, or indeed to say whether he has any remedy. It is admitted that the debt due the plaintiff was for building the school house, and in such case we see that for the erection of the school house, the 6th section of 16 Vic., ch. 185, enables the trustees to assess the section for that purpose. The 16th sub-section of section 12 of 13 & 14 Vic., ch. 48, enacts that in case any of the trustees shall wilfully neglect or refuse to exercise such powers as are vested in them for the fulfilment of any contract or agreement made by them, they shall be personally responsible for the fulfilment of such contract or agreement.

Looking at the whole of the school acts, and the objects and intents for which the same have been enacted, and the duties imposed upon the trustees with regard to the fulfilling of contracts made by them, and the power given them enabling them to do so, the liability and responsibility cast upon them individually if they neglect to perform their duty, I think the effect is to create these corporations for public beneficial and charitable purposes, and that the property should be held and administered for the ends and purposes for which it was given and held.

It is sufficient to hold, in this action of ejectment, to recover the school house, that it is contrary to public policy to hold that property which is held for such purposes as this can be sold upon execution against the corporation. The corporation possibly may hold property the uses of which would be for the public, or the profits of which might be appropriated to the maintenance of the school, and which it would be right to hold might be sold upon execution, but that is different from selling the school house itself which is as much in daily use for the children of the section as the court house is for the holding of the courts, or the prisons for confining prisoners of the counties, and I apprehend it could not possibly be held that these latter are liable to be sold upon execution.

I think the *postea* should therefore be given to the defendants.

MCLEAN, J. concurred.

Judgment for defendants.

THE CHIEF SUPERINTENDENT OF SCHOOLS (*Appellant*).

IN THE MATTER BETWEEN WILLIAM MILNE (*Plaintiff*) AND GEORGE H. SYLVESTER, PHILLIP WIDEMAN, AND ROBERT JOHNSON, TRUSTEES OF UNION SCHOOL SECTION NO. 2, IN WHITCHURCH, AND NO. 7, IN MARKHAM (*Defendants*).

Suit by teacher against trustees—Reference to arbitration—Appeal.

Where an action in the Division Court by a school teacher against the trustees was referred to arbitration by order of the judge, with the consent of the parties. *Held*, that the decision of the arbitrator could not be appealed from under the 16 Vic., ch. 185, sec. 24.

Remarks as to the defendants remedy by prohibition.

APPEAL from the second Division Court of the United Counties of York and Peel.

The plaintiff was engaged as teacher in the above school section (of which the defendants are trustees) from the 3rd of January to

the 18th of February, 1859, at £85 per annum. About the first day of February, 1859, a cheque was given him by the local superintendent of Whitchurch, on the order of the trustees, and he endorsed it to Sylvester. After his dismissal he brought an action in the above Division Court against Sylvester for the amount of the cheque. At the trial it was objected that Sylvester could not be made individually responsible, as he was only one of the trustees, and had received no consideration. The judge then asked if the other trustees would be added as defendants, to which they agreed. Some objection being made to the legality of trying the case before the judge, and the clauses of the School Acts relating to arbitration between trustees and teachers being spoken of, the judge overruled the objections, and after some discussion endorsed on the summons the following order: "Ordered to be referred to the award and final determination of the Rev. J. S. Hill, to decide the matters of difference, as well as this suit between the parties. By consent." The clerk of the court afterwards drew up an order of reference, which directed that the award when made might be entered as the judgment in the cause; and the award having been made in favour of the plaintiff, he endorsed on the summons: "By award of Rev. Mr. Hill, judgment for plaintiff for £25, with costs, ordered to be paid in twenty days.

The appellant, treating this as a decision within the 16 Vic., ch. 185, sec. 24, appealed from the judgment, on the following and other grounds: 1. That the court below had no jurisdiction in the matter. 2 That even if it had, the award (now entered as judgment) is bad, being against the trustees individually, and also against parties whose responsibility was not proved. 3. That the contract with the teacher was not under the corporate seal.

Hodgins for the appeal. *Cameron*, Q. C., contra.

BURNS, J., delivered the judgment of the Court.

We do not think this is an appealable matter under the 24th section of 16 Vic., ch. 185. That section contemplates that there may exist cases triable in the Division Court against and between superintendents, trustees, teachers, and others acting under the provisions of the Common School Acts; and to provide for uniformity of decision an appeal to either of the superior courts of law is given to the chief superintendent of schools. When the appeal is properly initiated, the judge of the Division Court is to certify under his hand the summons and statement of claim, and other proceedings in the case, together with the evidence and his own judgment thereon, and all objections made thereto. Now, instead of doing this, the judge in this instance certifies to the summons and statement of claim, and the proceedings to refer the matter to arbitration, with the judgment of the arbitrator, and without any evidence whatever. The legislature never meant that this court should be an appellant court from the determination of an arbitrator appointed by the judge of the Division Court. For all that appears upon the face of the summons and statement of claim in the Division Court, the case would seem to be that of one of an ordinary character. The judge had, under 4th section of 16 Vic. ch. 177, power, with the consent of both parties to the suit, to refer the matters in dispute in the suit between the parties, as also matters not in the suit, to arbitration, in such matters as he might think reasonable and just. The section provides that the award shall be entered as the judgment, and shall be as binding as if given by the judge. This case seems to have been a case of that kind, from the endorsement made by the judge on the summons of the reference by consent, the award of the arbitrator, and the judgment entered upon the award. A case of that kind is not one contemplated by the 24th section of the School Act of 1853, that is, chapter 185 of 16 Vic.

If the case in the Division Court was of that nature that it came under the provisions of the 17th section of the School Act of 1850, as amended by the 15th section of 16 Vic. ch. 185, so that the remedy was by arbitration, and that no action should be brought in any court of law or equity to enforce the claim, then the defendants' remedy would have been to have applied to the superior courts for a prohibition. The only thing to be said against such a course would be that, perhaps, before the defendants could have applied for and obtained the writ of prohibition, the case might be tried and disposed of in the Division Court in the meantime. We do not seem to have as speedy a remedy in that respect as they have in England, certainly, but still I do not think it is any argument against the course to say that there may be delay. The act in England, 12 & 13 Vic. ch. 109, gives parties a speedy means of obtaining the writ, and if the writ be improperly or improvidently issued, the courts have power to set aside the writ. See *In re Baddeley* v. *Denton* (4 Ex. 508). If the defendants appeared to the matter, by reason of want of jurisdiction, the judge might of the writ of summons, and contested the right of the judge to try course try that question and give judgment upon it, and if he should decide wrongly in respect to it, I should, at present, be inclined to say that judgment would then be an appealable matter under the 24 section of ch. 185. But if it were not so, I still think the case would be one to apply to the superior courts for a writ of prohibition, for in such case the defendants would not be submitting to or acquiescing in the judge entertaining the suit because he had jurisdiction. I should say the defendants might, in an application after judgment, take the opinion of a court of superior jurisdiction whether the inferior had jurisdiction. The point was raised in the case of *Roberts* v. *Humbly*, (3 M. & W. 120,) but was not necessary to be decided, for the want of jurisdiction was apparent upon the face of the proceedings. Baron Parke said, if it had been necessary he should have wished to consider whether a party is to be bound by the judgment of an inferior court, where he has had no opportunity to dispute its jurisdiction. Alderson, Baron, however, said he thought the court had a right to interfere, and even to grant the writ of prohibition after execution, and he says, all the cases where it has been held otherwise have turned on the acquiescence of the party. The passages quoted from 2 Coke's Inst., 602, I think are decisive on the point, and reason is in favour of it.

In the present case, however, I have not adverted to the rights of the defendants, with any view of encouraging them to try the experiment of applying for a prohibition. If they did make the application they might be met with the answer that they had given their consent to a reference of all matters in the suit, as well as all other matters, and under the section alluded to in the Division Court Act of 1853, the judge had the power to make such a reference.

The case, so far as we have now to deal with it upon this appeal of the chief superintendent of schools, is clearly not one coming within the meaning of the provisions giving an appeal to this court, and therefore must be dismissed.

Appeal dismissed.

IN CHAMBERS.

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*

CHARLES WATTS v. WILLIAM LITTLE, JOHN HUNTER, JOSEPH LONEY, AND HENRY KIRKLAND.

CHARLES WATTS v. JOSEPH LONEY AND HENRY KIRKLAND.

Amendment—Terms—Setting aside judgment in ejectment—Terms.

Upon the application of plaintiff, the following amendments were allowed by a judge in chambers, upon terms of paying costs. 1st. The insertion in a judgment roll of the date of its entry. 2nd. The insertion in the roll of the amount of taxed costs in the cause. 3rd. The insertion in the roll of the aggregate amount of debt and costs recovered in the cause. 4th. The statement in a *fi. fa.* lands of the true amount of debt and costs, an amount being therein erroneously stated. 5th. A similar amendment in a *ven. ex.* lands and *fi. fa.* residue.

Where, in an action of ejectment, defendant was a few minutes too late in the entry of appearance to the writ, and afterwards promptly applied to set aside the judgment, upon an affidavit of merits, showing the merits in detail, the application was allowed, upon the terms of entry of appearance and payment of costs within a month, otherwise summons to be discharged.

Where the summons to shew cause why the judgment in ejectment should not be set aside was discharged with costs, and leave granted to make a second application for the same purpose, the second summons was made absolute, only on the terms of paying the costs of the judgment, and of both applications.

(Chambers, 31st August, 1860.)

The first of these causes was an action of ejectment, brought to recover possession of a parcel of land in the township of Burford; and judgment was entered for want of an appearance.

The defendant, Joseph Loney, advised with an attorney (Mr. D. G. Miller) who thought he had no defence at law, but seemed to think that he might maintain his possession by the aid of a court of equity, in restraining proceedings at law; and so he

delayed entering appearance to this action of ejectment, but at the last moment made up his mind to enter an appearance, and sent the proper instructions to his agent at Brantford.

The agent went on the last day, and found that judgment by default had been signed about five minutes before he reached the office.

Then defendants' attorney moved to set aside the judgment by default, on an affidavit of merits, upon the usual terms of paying costs. The merits he shewed were these: That defendant had been owner of this land, and was still in possession of it: that plaintiff claimed title as purchaser from one Daniel Murphy, vendee of the sheriff of the county of Brant, under an execution against the lands of defendant and one Kirkland, at the suit of the said Daniel Murphy: that that was a judgment in the Queen's Bench for about £40 damages and costs, the true debt being about £17; but at the sheriff's sale the land was bid off by one Alfred Watts for £10: that the sale was brought about by a fraudulent collusion between the plaintiff, Murphy, and the sheriff of Brant; and that there were various irregularities in the proceedings by execution for sale of the land, which irregularities were specified.

On shewing cause against the summons to set aside the judgment by default in the ejectment, on which a writ of *hab. fac. pos.* had been issued, but was not executed, the plaintiff shewed that he claimed not only under the sheriff's sale in Murphy's judgment —which sheriff's sale was made on 31st January, 1860—but also as purchaser from Alfred Watts (son of plaintiff) who was vendee of the sheriff of the county of Brant, at a sale by the sheriff made on 7th February, 1860, upon a *fi. fa.* on a judgment obtained by this plaintiff, Charles Watts, against defendant, Joseph Loney, and Kirkland.

Upon this cause being shewn (the debt in this judgment being £500 and upwards, and obtained by confession) Mr. Justice Richards, before whom the summons to set aside the judgment in ejectment was heard, discharged the summons with costs, but allowed defendant, Joseph Loney, to renew his application to set aside the judgment, if he could shew any merits as against plaintiff claiming under this double chain of title.

The second application was heard before the Chief Justice of Upper Canada: the defendant, however, not having paid the costs of the first application.

The judge (Burns, J.) who granted the latter summons, granted at the same time a summons in the second-named cause, on the application of the plaintiff, Charles Watts, on the defendants, Joseph Loney and Henry Kirkland, in the case of Charles Watts against them, to satisfy the judgments in which case the land was sold, to shew cause why the judgment roll in that cause should not be amended as of the day when the judgment was entered.

1st. By inserting in the roll the date of the entry of said judgment, viz., 14th May, 1857.

2nd. By filling up the blanks left in the roll for that purpose, the sum of £3 15s. 5d., the amount of taxed costs.

3rd. And also filling in the aggregate amount of damages and costs, being £1003 15s. 5d.; which sum was in the roll left blank.

4th. To amend the *fi. fa.* against goods, by making it correspond with the judgment and prœcipe; and directing the writ to the sheriff of the county of Brant, instead of the sheriff of Wentworth (to whom it was erroneously directed.)

5th. To amend the *fi. fa.* against lands in the same manner—the same error having been committed in it.

6th. To amend the said writ against lands, by inserting £1,003 15s. 5d., instead of £3003 15s. 5d., erroneously inserted therein.

7th. To amend a similar error in the writ of *venditioni exponas* against lands, and *fi. fa.* for residue.

8th. And to amend any other errors or imperfections in any of the said proceedings, arising from the mistake or oversight of the officer of the court.

The defendant, Joseph Loney, besides relying on these errors, or some of them, as rendering the sheriff's sale invalid, under which the plaintiff, Charles Watts, claimed, filed an affidavit also, in which it was sworn that he believed that the judgment debt of Charles Watts was satisfied before the sale—by a chattel mortgage which defendants had given to him of all their stock in trade, and their goods—and by assignment of a mortgage made by a third party to defendants. And he shewed that while these applications were pending, that he had filed a bill in Chancery against the plaintiff to compel him to account for what he received under a power of sale given to him in the chattel mortgage.

Carroll, for defendants, among other things, contended that the judgment was satisfied before the land was sold under it, and produced a verified copy of a bill filed in the court of Chancery against plaintiffs at the suit of defendants.

Harrison, contra, cited Har. C. L. P. A. 131, note *a*, 605; *Tay* v. *Hall*, 18 L. J. Q. B. 13; Chit. Forms, 7 Edn., 478, and 9 Edn., 1461; *Wright* v. *Landell*, Tay. U. C. R. 416; *Edison* v. *Hogadone*, R. & Dig. "Amendment," III. 14; *Doe d. Spafford* v. *Brown et al*, 3 U. C. O. S., 92; *Doe d. Boulton* v. *Ferguson*, 5 U. C. Q. B., 515.

ROBINSON, C. J.—As to the summons obtained by the plaintiff for amending. The accumulation of errors in the judgment and subsequent proceedings in the case of Charles Watts against Loney and Kirkland, is something quite surprising and unaccountable; so great indeed as to make one hesitate to exercise a discretion in amending proceedings which may be called a mass of mistakes. And I must at least take care not to incur the risk of possible injury to any third party by curing such defects.

I allow the 2, 3, 6 & 7 amendments asked for, which will cure the imperfections in the judgment of omitting to shew the amount of the taxed costs, and the aggregate amount of damages and costs; and will also correct the errors in stating the amount in the *fi. fa.* against lands, and in the *venditioni exponas* and *fi. fa.* for residue to be £3003 15s. 5d., instead of £1003 15s. 5d., as the amount will stand in the judgment roll when amended.

In all these amendments there is something to amend by: the errors are apparent, and no one, as it appears to me, can be injured by them.

I grant the first amendment moved for, of inserting in the judgment roll the day when the judgment was entered, which was very heedlessly left blank; though I have some hesitation in doing so, from an apprehension that it may possibly lead to inconvenience or loss, from the effect it may have in regard to the time of land being bound by the judgment.

I decline to allow the writs of execution to be amended by now addressing them to the sheriff of Brant, instead of Wentworth, after the sheriff of Brant has acted upon them without authority. The plaintiff, however, has my permission to apply to the court for those amendments. (*a*) I do not feel clear in allowing them.

If the title of the purchaser will not be affected by the irregularities in the writs against goods and against lands, which founded the *venditioni exponas* and *fi. fa.* for residue on which the sale took place, then the refusal to allow the amendment will not signify. If, on the other hand, there is in those extraordinary errors, anything fatal to the title, under the circumstance of the plaintiff on the writs being himself the purchaser at sheriff's sale, then I am not satisfied that I could properly make such amendments.

The amendments which I allow are to be made on payment of costs.

Then as to the defendants' application to set aside the judgment by default, on the affidavit of merits; and, of course, on the common terms of paying costs of the judgment, and execution issued upon it, and the costs of opposing the application. It is to be observed, on the one hand, that in the bill which the defendant has filed in Chancery, and which he has himself brought before us, in order to shew that he is in earnest in seeking a remedy on the ground of the judgment being satisfied before the land was sold upon it, the defendant himself has stated that he has no defence at law to the ejectment; and I confess I am much inclined to believe that his attorney thought so, and on that account omitted to appear to the writ till he was too late to save his time.

If one could clearly see this, certainly it would be a strong argument against interfering with the judgment. But Mr. Miller's affidavit states the case somewhat differently; and besides, when the defendants' appearance was in fact taken to the proper office only a few minutes after the judgment was signed, it would be too rigid, I think, to refuse to allow an opportunity of defence,

(*a*) Subsequently upon the application of the Plaintiff to the full court, these amendments were also allowed, (*Watts* v. *Loney et al*,) C.P., T.T., 1860.—EDS. L.J.

when the application was made so promptly after the judgment, and a trial has not been lost.

I shall make the summons to set aside the judgment absolute on condition of paying costs, viz., the costs of the judgment and proceedings upon it; the costs of opposing the first summons, which was discharged with costs; and the costs of opposing this summons. And unless these costs shall be paid, and appearance entered, within one month, then this summons to be discharged with costs.

HARVEY TERRY v. JAMES W. COMSTOCK.

Consol. Stats. U. C., cap. 22 sec. 31, p. 191—Arrest—Application for discharge—Intention to quit Canada.

Where defendant made application under and pursuant to sec. 31 of Consol. Stats U. C. cap. 22, to be discharged out of custody, on the ground that when arrested he had no intention to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular, or for any other purpose; and it appeared that the debt for which he was arrested had been created through fraud; that he had no more ties in Canada than anywhere else, where he would not be criminally responsible for his acts of fraud—the application was refused.

(Chambers, 13th January, 1860.)

This was a summons calling upon plaintiff, among other things, to shew cause why the writ of capias issued in this cause, the arrest of the defendant thereunder, and all proceedings subsequent thereto should not be set aside, on the ground that both the plaintiff and defendant were, at the time of the issue of the writ, citizens of a foreign country; or why the arrest should not be set aside, and the defendant altogether discharged from custody, on the ground that the defendant had not, either at the time of the making of the affidavit to arrest the issue of the writ of capias thereon, or the arrest of the defendant thereunder, any intention to quit Canada, with intent to defraud his creditors generally, or the plaintiff in particular, or for any other purpose.

The affidavit of plaintiff, on which defendant was arrested, stated that on 2nd July, 1849, defendant applied to him for a loan of $3,950, security to be given by a bill of exchange at six days, on a Mr. Haggard, of Buffalo, and on warehouse receipts for 600 barrels of flour and 3,000 bushels of wheat: that defendant, in order to put Haggard in funds to meet the bill, had agreed to consign to him flour to the amount of the bill: that before the bill matured, defendant called upon plaintiff and said he would not consign the flour as he could do better with it, but would be sure, notwithstanding, to meet the bill: that when the bill matured, defendant paid to plaintiff $1,000, and offered a bill of exchange, drawn at thirty days, for $3,000, upon a Mr. King, of Buffalo, to whom he said he had consigned flour to that amount—the warehouse receipts to be held by the plaintiff in the meantime: that King had no flour consigned to him by plaintiff, and in consequence the draft for $3,000 was protested: that, on enquiry, plaintiff discovered that there were not in warehouse either the 600 barrels of flour or the 3,000 bushels of wheat called for by the warehouse receipts: that defendant had committed a gross fraud on the plaintiff: that on the 29th August he absconded from Milwaukie to defraud the plaintiff, and to avoid being arrested for fraud: that on the 28th October plaintiff had recovered judgment against defendant for the amount of his said debt: that, for the reasons aforesaid, "he verily believed that the said James W. Comstock will quit Canada, unless forthwith apprehended."

Corroboratory affidavits were filed by Mr. Haggard and others mentioned in the plaintiff's affidavit.

The defendant filed an affidavit, in which he swore that both himself and plaintiff were citizens of a foreign state; in general terms denying the alleged frauds: and alleged that in Milwaukee it is customary for merchants to advance money at usurious rates on fraudulent warehouse receipts, and to threaten criminal prosecution in the event of refusal to pay the usurious rates. Other affidavits, made by Hon. Cicero Comstock, a member of the Senate of the United States and a brother of defendant, and by Patrick George Norris, his attorney, were filed by the defendant. In the former, the alleged law of the State of Wisconsin as to fraudulent warehouse receipts, was fully stated; and in the latter, certain facts were adduced to show that the defendant never had any intention to quit Canada, knowing, as he did, that if he returned to the United States he would be prosecuted criminally.

Various affidavits were filed by plaintiff in reply, corroborating the affidavits of plaintiff, and strongly denying that it is the custom in Milwaukie, as alleged by defendant, for commercial men there to advance money on fraudulent warehouse receipts.

The contents of the affidavits, both of plaintiff and defendant, are in other particulars more fully noticed in the judgment of the court.

Harrison, for defendant, as to both plaintiff and defendant being citizens of a foreign state, cited *Cozens* v. *Ritakie*, Dra. Rep. 176; *Rayner* v. *Hamilton*, M. T. 2 Vic. M.S.; R. & H. Dig. "Arrest," IV. 2; *Frear* v. *Ferguson*, 2. U.C. Cham. R. 144; *Brett* v. *Smith*, 1 U. C. Prac. R. 309; *Romberg* v. *Steenbock et al*, *Ib.* 200; *Blumenthal* v. *Solomon*, 2 U.C. Prac. R. 51; but relied rather on the second ground of the application, viz., for the discharge of the defendant, on the ground that when arrested he was not about to quit Canada for the purposes sworn, or for any purpose. As to this he cited Consol. Stat. U.C. cap. 22, sec. 31 p. 191; *Talbot* v. *Bulkeley*, 16 M. & W. 196; *Bullock* v. *Jenkins*, 1 L.M. & P. 645; *Pegler* v. *Hislop*, 1 Ex. 437; *Burness* v. *Guiranoorch*, 4 Ex. 520; *Stammers* v. *Hughes*, 18 C. B. 527; *Hargreaves* v. *Hayes*, 5 El. & B. 272; *Robinson* v. *Gardiner*, 7 Dowl. P.C. 716; *Walker* v. *Lamb*, *Ib.* 131; *Gibbons*. *Spalding*, 11 M. & W. 191.

J. B. Read, contra.

DRAPER, C. J.—In this application to set aside the defendant's arrest, and discharge him from custody, the only point for decision is raised on this objection—that the defendant had not, at the time of the granting the order, the issuing of the capias, or the making of the arrest, any intention of quitting the Province of Canada with intention to defraud.

It was not pressed upon me to review the decision of the learned judge who made the order for the arrest, upon any suggestion of the insufficiency of the affidavit before him to sustain such an order. The application was based entirely on the new matter disclosed upon affidavits. Had the former course been taken, I should have referred the matter to the full court.

It is, however, necessary to refer to those affidavits, in order to apply the affidavits filed on this application.

The plaintiff discloses a gross fraud in obtaining an advance of money on the security of a bill of exchange and two warehouse receipts, the bill drawn at Milwaukie, in the State of Wisconsin, where the plaintiff and defendant both resided at the time, on a party in Buffalo, by whom acceptance and payment were refused; and the warehouse receipts, purporting to represent the defendant to be possessed of a large quantity of flour and oats, which he had not. The defendant absconded from Milwaukie about the time the bill matured, and came to London, in this Province, and the plaintiff recovered judgment against him there, but no satisfaction.

The plaintiff swears that he believed the defendant had with him a large sum of money, of which he defrauded plaintiff and other creditors in the State of Wisconsin: that plaintiff only resided in London for the purpose of avoiding plaintiff and other creditors: and that "defendant will abscond from Canada the moment he learns that plaintiff has discovered his residence." This affidavit is strongly corroborated, in material parts, by affidavits of other parties.

The defendant's own affidavit does not deny any fact alleged by the plaintiff as to his indebtedness. It goes further, and shows that, by the laws of the State of Wisconsin, the giving such warehouse receipts, where there is no such property in the giver's possession as the receipts represent, is a criminal offence, subjecting the offender to not less than one nor more than two years' imprisonment in the States' prison. It further avers that the defendant left Milwaukie and came to London, not to defraud plaintiff—which intention is wholly denied — but to avoid criminal prosecution: that defendant left real estate which he valued at four thousand dollars, and personal property valued by him at sixteen hundred and twenty-five dollars, in the city of Milwaukie; that all the money he brought with him was two hundred and six dollars: that he would not leave the Province, as he knows he would be arrested on these warehouse receipts if he returned to the United States: that a few days before his arrest he was told by a police officer that the plaintiff had gone to Toronto to get a judge's order for his arrest, but he told the officer he would remain at London, whether the plaintiff got the order or not. He also stated that it was a common thing among business men in

Milwaukie, and plaintiff knew it, to give such warehouse receipts in violation of the law. The Honorable Cicero Comstock, a member of the Senate of Wisconsin, and a brother of defendant, confirmed this latter statement. The defendant's attorney swears that some days previous to the arrest, the defendant told him what he had heard from the police officer, and that he (defendant) had made up his mind to remain in the city of London, as he knew he would be arrested on a criminal prosecution if he returned to the United States.

The plaintiff filed affidavits in reply, shewing that defendant had been indicted in the State of Wisconsin for this fraud—(the indictment charges the offence to have been "wilfully, feloniously, and fraudulently committed:") that defendant had obtained several thousand dollars from various banks or parties, not long before he absconded, sums amounting to $30,000, which are under his control, if he did not bring them with him to Canada. That his personal property left behind sold for about $730, and his real estate was not worth, above incumbrances, over $1,500. These affidavits also deny the existence of such a system of giving fraudulent receipts, as is sworn to by defendant and his brother.

I am glad that I can, with a conviction that I am acting in the true spirit of our law, refuse this application.

The defendant's ground of application amounts to little, if anything, more than this: I dare not go back to the United States, lest I should be arrested for feloniously defrauding the plaintiff, and, therefore, I can have no intention of leaving Canada. In the face of this, he denies an intention of defrauding plaintiff, in the first instance, and, to excuse himself, charges the mercantile community, of which he lately formed a member, of commonly practising a similar fraud.

The defendant apparently has been some months in this Province without any property which is visible or tangible, and without any occupation. There is nothing of that sort to lead to the idea that he may not leave Canada at any moment. But he has found, or at least believes he has found, an asylum against the criminal justice of his own country, and relies on his desire to escape that peril as proof that he has no intention to quit Canada.

With the fact of his indebtedness clearly established; of its being created through fraud; of his having fled to avoid the consequences; and of his having no ties in this Province, any more than anywhere else, where he would not be criminally responsible for the acts detailed—all before me, I feel warranted in saying that there is "good and probable cause for concluding that defendant, unless apprehended, would quit Canada to defraud plaintiff;" and I therefore discharge this summons.

NOTE.—When judgment in this case was delivered, owing to its peculiar facts, which might not again arise, it was not deemed necessary to publish the decision. But as it has been in subsequent cases often referred to, it is now published.—EDS. L. J.

V. C. WOOD'S COURT.

(*From the Law Times.*)

COLEMAN V. WEST HARTLEPOOL HARBOUR AND RAILWAY COMPANY.

Injunction—Publication of proceedings in a cause during progress.

A party to a suit has no right during the progress of it to publish any statement of the proceeding which may prejudice the mind of the public against his opponents.

It is a strong *prima facie* presumption that such a narrative, published by a party to the suit, cannot be an impartial representation of such proceedings.

The court will restain a party from publishing or offering for sale during the progress of a suit, any pamphlet or book containing unfair statements of the proceedings in such suit.

[July 19 and 31, August 1, 1860.]

This was a bill filed by the plaintiff on behalf of himself and all the other shareholders, except the defendants, against the West Hartlepool Harbour and Railway Company, to restain them from purchasing steam-vessels for the purposes of marine traffic, or purchasing collieries, or interests in collieries, in making loans, or in any other way exceeding the powers which had been conferred upon them by their Act of Parliament, and for an account of moneys so improperly expended.

The cause being at issue, the parties had proceeded to take their evidence. During the progress of the examination taken before the examiner, and on the 19th July, 1860, the plaintiff caused the following advertisement to be inserted in the *Times* newspaper: "To the share and debenture holders of the West Hartlepool Harbour and Railway Company. I have just published a reply to the proceedings of a meeting of proprietors held at West Hartlepool on the 28th June last, which may be had of King, Parliament-street (and other places, naming them), and at all booksellers," and was subscribed "B. Coleman, —— street, London." A copy of the pamphlet had been purchased by the defendants, and was duly verified. It professed to be "printed for and published by B. Coleman." It was, as the advertisement had stated, a reply to the proceedings of a meeting held at West Hartlepool on the 28th June, and was addressed to the share and debenture holders of the company. It began by stating that proceedings in Chancery were pending in consequence of an over issue of debentures, and mentioned the decision of the Lords Justices in *Pooley* v. *The Athenæum Company.* It stated that it was proved that the bonds of the company were absolutely worthless in the hands of *bona fide* holders. Then the writer, addressing himself to a speech made by a Mr. Jackson (the chairman of the meeting and of the company), who had said: "He (the plaintiff) is not alone in this matter; there is a conspiracy behind—a conspiracy is a very difficult thing to make out—but that conspiracy is drawing to light; Mr. Coleman himself (the plaintiff) has been examined upon oath. His statements are in writing, and whether they will be published will depend upon himself. But they are there." The writer of the pamphlet then, addressing himself to that, says: "It is true that Mr. Jackson obtained an entire day to examine me, as he was entitled to do by my affidavit, when his counsel found my answers so unpalatable and damaging to Mr. Jackson, that he abandoned his task in an hour. I was asked a great many irrelevant questions, which my counsel advised me I need not answer; but, as I had nothing to conceal, I did not avail myself of the privilege; and, as Mr. Jackson says, my answers are there in writing—that is, they are recorded in the Chancery proceedings, and he is bold in his falsehood, in the confidence that I cannot reply at once to him without prejudicing my position with the V. C., whose opinion has been already elicited upon the complaint of Mr. Jackson, as to my last pamphlet, on the imprudence of publishing anything on the subject pending the suit. But Mr. Jackson is mistaken, for, as he has now given me the opportunity, and has made it my duty to put forward the truth, I am determined not to allow his lies to pass current even for a day. You shall, therefore, know the nature of Mr. Jackson's interrogatories and my replies on the occasion of my examination." The plaintiff then went on to give a digest of the questions and answers, and concluded by stating a conversation which had taken place between the counsel and the witness as to a third party, reflecting upon the character of Mr. Jackson, which it is unnecessary to detail.

An interim order had been obtained by the defendants on the 19th July, to restrain the further publication of the pamphlet, and a motion in the following terms was now made:—That the plaintiff, his solicitors, servants, agents and workmen, might be restrained from printing, publishing, or offering for sale, a book or pamphlet called "A reply to the Proceedings of a Meeting held at West Hartlepool on the 28th of June, 1860, addressed to the Share and Debenture Holders of the West Hartlepool Harbour and Railway Company;" or for printing, publishing, composing, or offering for sale, during the progress of this suit, any book or pamphlet containing any report or account of any of the proceedings in this suit, or from making public or communicating to any person not a party to this suit any information that he may acquire by reason of such proceedings, touching the matters in dispute in this suit, or from distributing any printed copies of his bill of complaint in this suit to persons other than parties to this suit, or that the plaintiff may stand committed for a contempt, &c.

The latter part of the notice of motion referred to a fact which was not denied, that a considerable number of copies of the printed bill in the cause had been distributed in various parts of the locality of West Hartlepool, which was attempted to be justified by the plaintiff's solicitor as being a means of obtaining evidence in support of the plaintiff's case in that district.

Sir H. Cairns, Q.C., *R. A. Hawkins*, and *H. R. Farrer* (*Rolt*, Q.C., with them) in support of the motion. The publication was injurious to all persons interested in the well-being of the company

Public policy required that proceedings in a cause during its progress should not be made public. The distribution of the pamphlet, in addition to 100 copies of the plaintiff's own printed bill in the cause, in the neighbourhood of the *locus in quo*, was prejudicial to the interests of justice, and an improper mode of obtaining evidence, which was the excuse on the other side. They relied on the judgment of Lord Hardwicke in *Anon.* 2 Atk. 469; *Anon.* 2 *Ves. Sen.*; *Williams* v. *The Prince of Wales Company*, 25 Beav. 338; *Brooks* v. *Evans*, before Stuart, V.C.. July 21, 1860.

Giffard, Q.C., and *Hobhouse*, contra, contended that the course of proceeding with respect to the publication of trials and other judicial proceedings was completely altered since the time of Lord Hardwicke; that no ground of public policy was opposed to the publication of such proceedings, and that the present was a true and fair representation of what had really taken place. At all events the defendants's conduct at the meeting of the shareholders had challenged the plaintiff to state the facts he had published, which was simply a reply to the statements made at such meeting. The party moving was bound to show an obstruction of the course of justice, the attempt to do which had here manifestly failed. As to the distribution of the plaintiff's printed bill, the allegations and charges in it were not offensive, but only to the effect that the company had exceeded their powers, and no jury would consider such allegations a libel. They asked to dismiss the motion with costs. They cited *Fleming* v. *Newton*, 1 H. L. Cas. 363; *The King* v. *Stockdale*, 8 Ex. Rep. 256; *Ex parte Jones*, 15 Ves. 237; *Duke of Manchester's* case, V. C. W., not reported.

The defendant's counsel was not called upon to reply.

The VICE-CHANCELLOR said:—I have already expressed my dissatisfaction at the mode of proceeding adopted by the party applying for this injunction, by saying that I would not call upon the other side to make any answer as to the costs of the motion, considering, as I do, that he has provoked a good deal of this which is now before me, as far as he is individually concerned. The present motion I consider one of importance to the public, as far as regards the administration of justice, and I cannot agree with the view which has been urged as to the third branch of the reasons assigned by Lord Hardwicke, in considering a publication of this description a contempt, namely, that its tending to prejudice mankind against one of the parties litigant is a question at all confined to the parties. According to that view, if one party is guilty of suborning witnesses, the other side may be guilty of the same practice. Could that be supposed not to affect the administration of justice? I apprehend, if the one party endeavours to prejudice the public in any way against the other litigant party, there is not the slightest justification for the other party doing the same; and this court, in the administration of justice, always takes care that neither party shall do it. Now, as to the course of conduct which has been pursued in this case, I say this for the sake of both sides, who seem to have conducted this matter quite unbecoming men of sense. If this should be repeated I shall certainly commit one or the other of these parties. Now, as regards the publication of this pamphlet, what I have to consider is whether there is or is not in it any unfair and improper publication of the proceedings in this court. I quite agree with the respondent's counsel in thinking that the present times are very different from those of Lord Hardwicke, and that the present feeling and the general judgment of mankind as to what is or is not proper to be published are exceedingly different to what they were at that time. That may at once be conceded; but at the same time, even as regards the publicity of proceedings in courts of justice, and when it is a question between parties who are not litigant, but between one of the parties litigant and the publisher of a newpaper for instance; even as between those parties the court in these days recognising in the highest possible degree the importance of the public being duly and fairly informed of all that takes place, yet does take care that there shall only be such proper information published in a fair and reasonable manner. I mean that courts of justice, in giving directions to a jury as to the ultimate result in that which is or is not a fair publication, always leaves it for the consideration of such jury, whether or not an independent, or supposed to be independent, person who has published a narrative of proceedings of a court of justice has published them in a fair and reasonable manner, being anxious to inform the public—or whether there is evidence of malice in the mode in which the report was framed. Now this court, in dealing between litigants, takes care that the litigants shall not, by such foolish attempts as appear to me to have been made on both sides here, create public prejudice each against his opponent in the progress of the litigation which ought to be conducted with all proper calmness and discretion; and for the purpose of eliciting truth. I have to look at this pamphlet to see whether, regard being had to the mode in which the statements are made as to the matters that are going on before the court, there is that fair legitimate mode of stating them that the court would require, or any jury would require with reference to the case of an alleged libel in the publication of the proceedings before a court of justice. Indeed, that view was suggested in the argument by the repsondent's counsel, and it was stated that if I looked at this publication I should find that Mr. Coleman rightly abstained from attending the meeting because he might not be able to command his language as he could command his pen, and that if I looked attentively at his pamphlet I should find all that was stated was stated with the same degree of impartiality that would occur in a narrative of a litigation between parties in any public newspaper. I cannot concur in this view. What do I find in the 23rd page of this pamplet? I find first, that there is a narrative of the plaintiff Coleman's own cross-examination. That narrative I certainly feel he was strongly tempted to put forward by such a speech at the meeting as was referred to, in which allusion was made to what Mr. Coleman had said. He adds: "His statements are in writing, and whether they will be published depends upon himself." As far as regards Mr. Coleman, there cannot be the slightest ground for complaining that he has published his own cross-examination. But Mr. Coleman proceeds further; he gives what he conceives to be a fair narrative I suppose, and with all the due command he can exercise over his feeling when sitting down to write, instead of appearing in public to speak, he gives what he supposes to be a fair narrative of his opponent's cross-examination; and that narrative contains these words: "Since that period Mr. Jackson has been under examination himself for a day and a half, and has yet twenty days more, fixed for the 21st and 22nd inst. He did not tell the meeting that, but leaves me to make it public too; I suppose I can do this in a few words." This is his narrative of Mr. Jackson's examination: "He fenced with and avoided almost every question that was put to him. He could not recollect names nor dates; could not give figures with reference to the books, had not brought the books, though ordered to do so by the court, because he had not charge of them; could not say who had the ledger or any other particular book: the books were in the safe at the offices of the company, &c., &c., and on the whole, I say it advisedly, that a more evasive and self-evidently false exhibition it is not possible to conceive." This is a gentleman's calm moment, in which he writes this paragraph I have just read; and this is supposed to be a fair narrative of a gentleman's cross-examination. Now if he had published the whole cross-examination, and had left the public to judge of that, there might have been something to be said for it; but a man certainly has no right during the administration of justice to attempt to prejudice the mind of mankind, as Lord Hardwicke expresses it, against his opponent by giving his version of the cross-examination. It had been urged that the party moving might have shown that it was a garbled version, which was denied. But, in my opinion, it is garbled, because it professes to state the effect, and not the whole, and passes judgment, without giving that which was said, or which would enable anybody to judge whether Coleman has legitimately formed a fair judgment upon that subject or not. With reference to the distribution of the copies of the printed bill, the plaintiff's solicitor justifies himself in circulating the printed bill in this case—forty more seem to have been printed than is ordinarily requsite, accordiug to his own statement—by saying he wished to acquire evidence upon the subject, and this he thought the best and readiest mode of doing so, by circulating the printed bills. I think this by no means a common mode of obtaining evidence—sending printed bills as it were broadcast to different solicitors in the country to know if evidence could be got up to support the case of the plaintiff. The plaintiff himself has nothing whatever to do with that part of the case. What the solicitor says, in his view, was that it was necessary to

procure a large amount of evidence, that a large mass of evidence was to be procured over the whole district. That may be so, but is it not of importance that mankind should not be prejudiced, that all those numerous witnesses which may be called upon to give evidence should not be biased by *ex parte* allegations? I cannot see on the face of things that any very important matter of evidence will be brought forward except the books and documents of the company, for they will disclose what seems to be the principal facts in the case. But assuming that view to be correct, that numerous witnesses are wanted from all parts of the adjoining district, are those gentlemen who are wanted as witnesses to have put into their hands a pamphlet containing a statement that the principal defendant is one who conducts himself throughout evasively on his cross-examination, and makes a false exhibition of himself with regard to all the testimony he adduces? Surely that cannot be a mode in which justice can be properly administered, or a course of proceeding which this court ought to allow to be pursued by one of the litigating parties. With regard to another observation made by the respondent's counsel, nobody feels more sensibly than myself the advantage of having a fair publication of all that takes place in a court of justice; but I make this observation, that whenever one of the litigants is the party making the statement, that is a very strong *prima facie* presumption against its being at all fair, and that in any case in which a litigant makes a publication, it is exceedingly different from that which a newspaper reporter would publish simply in the discharge of what was his duty. Such a case is widely different; I am not aware that any case precisely like this has occurred before, but I had no hesitation in granting the interim order for the injunction in the first instance, because I was aware of what the course of all the courts at all times has been with reference to keeping its proceedings pure from this false description of excitement, which would tend to bring witnesses into the witness-box, with their imaginations coloured and prejudiced by *ex parte* statements sent and circulated among them by one of the litigant parties, and consequently it is a case in which one ought to prevent any such undue use being made of the proceedings of the court. The case referred to in the H. of L. (*Fleming* v. *Newton*) came from Scotland, and is a very different one from the present. It was the case of a registery in Scotland of a promissory note; which appears to be somewhat like the case of the register or book which is kept in this country, and published by some person, containing all the judgments that are registered against individuals; and I believe that there has been no application made to the court to restrain this latter publication. This is, however, very different from a publication, by one of two litigants, of a certain portion of the proceedings which he thinks may tend to create a prejudice against his opponent. In this case, I am bound to say the plaintiff has had great provocation, and for that reason I did not wish to hear his counsel on the subject of costs. I think the calling a meeting of the shareholders to consider the course of conduct pursued by the plaintiff as affecting the company, and especially coupled with very intemperate and improper resolutions passed on that occasion, was not the way in which a question of this kind should be considered. It would quite be legitimate to call together the shareholders to consider a bill filed on behalf of himself and the other shareholders. The simple form would have been to have called a meeting to consider the propriety of that bill, and to express their opinion thereon. That would have been perfectly legitimate, because it is a bill filed on behalf of himself and all the other shareholders, and the directors might seriously wish to be advised as to whether or not the other shareholders concurred, and if they did, there would have been a greater inducement to take a different view from what they would take for their defence under other circumstances. But when we read this speech at the meeting, bearing in mind also the fact that the speaker is challenged as being the instigator of the newspaper articles, and that he contents himself by simply saying that he did not write them, and looking to the language that he has used, and especially as regards that species of invitation as to a portion of the proceedings, which he rather suggests that the plaintiff would not wish to have published, I cannot be surprised that the plaintiff should be betrayed into a course of conduct which I think not right for the preservation of the due administration of justice. Therefore, in making the order I am about to make, I do not direct any costs to be paid by the plaintiff, hoping in future the parties will conduct their litigation like other reasonable men, and as other suitors in this court they will leave the cause to be conducted by their legal advisers on both sides, and abstain from making speeches and publishing pamphlets, or anything that may tend to excitement. I think the proper order to be made will be the following:—That an injunction be awarded to restrain the plaintiff, his solicitors, servants, agents and workmen, from publishing so much of the pamphlet marked A in the affidavit of Ralph Ward Jackson mentioned (stating the objectionable passages), and from publishing or offering for sale, during the progress of this suit, any book or pamphlet containing statements of the proceedings in this suit; and also from making public any of such proceedings otherwise than in the due course of the prosecution of this suit until the hearing of this cause, or until the further order of this court.

SUPREME COURT OF PENNSYLVANIA.

(*From the Pittsburgh Legal Journal.*)

BONBAKER v. OKESON.

Nothing short of an agreement to give time, which binds the creditor, and prevents his bringing suit, will discharge a surety.

Such an agreement cannot be inferred from declarations, made by a creditor to a surety, to the effect that he considered the debtor possessed of property sufficient to discharge the liability, that he either had given or would give him time, that the debtor would pay the debt, and that he did not want the surety any longer.

The duty of determining the meaning of words used in conversation, and what the parties intended to express by them, devolves upon the jury and not upon the Court.

ERROR to the Court of Common Pleas of Juniata Co. Opinion by STRONG, J.—The original liability of Okeson to pay the debt was established, and indeed it was not denied. It was, therefore, incumbent upon him to show affirmatively his discharge from that liability. This he attempted to do by evidence that he was surety and that the creditor had told him on one occasion that Shirlock, the principal debtor, was good enough for the money, that he did not want him (Okeson), that he had been to the West to see Shirlock, that he had a good crop of wheat, a fine appearance for a good crop of corn, and a good stock of horses and cattle on his farm; that he had given him time, or would give him time; and that Shirlock would pay it, and that he did not want Okeson any longer.

The Court charged the jury that "if this conversation occurred, and it was all the conversation that occurred between the parties, and Okeson was the surety of Shirlock, it would discharge Okeson, and be an available defence on the ground that it would lull the surety into security and prevent him from taking any action for his own security or idemnity; and it would be a fraud upon the surety for the creditor afterwards, contrary to his assurance, to call upon the surety for payment." To this instruction the plaintiff excepted, and he has assigned it here for error.

It is noticeable that the learned Judge did not submit to the jury to find what the plaintiff intended, or what the defendant understood by the expressions, he had "given time" to Shirlock, and that "he did not want Okeson any longer." The Court construed the language of the witness, and took away from the jury all inquiry as to its meaning. The rule, however, is undoubted, that the meaning of the words used in conversation, and what the parties intended to express by them, is exclusively for the jury to determine. (9 Watts, 59.) It is obvious that the testimony is utterly inadequate to prove a direct and binding release of the surety. The creditor said "he did not want Okeson any longer," but this did not amount to an agreement to discharge him, and if it did, it was entirely without consideration, and therefore inoperative. Nor does the expression of the creditor that he had given time to the principal debtor, necessarily amount to proof of an equitable release of the surety. It was quite possible for him to give time, without affecting in the least the liability of Okeson.

Nothing short of an agreement to give time which binds the creditor, and prevents his bringing suit, will discharge the surety. Mere delay without such a binding agreement will not. Now if

such an agreement may be inferred from a simple declaration of the creditor that he had given time (which we do not admit,) it is not to be inferred by the Court as *presumptio juris et de jure*. Whether the jury were at liberty to draw such an inference need not now be considered; how they could certainly is not manifest, for giving time, and a contract to give time, are distinct and independent things. Proof of the existence of a subject matter about which a contract may be made would seem to have no tendency to prove that one in fact had been made. Indeed, the learned Judge of the Common Pleas does not appear to have rested the defendant's case upon either of these grounds. His view was that the defendant was discharged, because the language of the plaintiff, alleged to have been proved, would lull him into security, and prevent his taking any action for his own indemnity, and because it would be a fraud upon the surety for the plaintiff afterwards to call upon him for payment. The simple meaning of this is that the plaintiff was estopped, not by matter of record or by deed, but by matter *in pais*. The objection to it is, that there was nothing in the evidence to warrant the conclusions that the defendant had been injured by the declarations of the plaintiff, or that he was in any worse condition than he would have been in had those declarations never been made. Certainly it was not for the Court to say as a matter of law that he had been injured. But it is essential to an equitable estoppel by matter *in pais*, that he who sets it up should show that he had been misled or hurt. (*Dezell* v. *Odell*, 3 Hill, 215; *Patterson* v. *Little*, 1 Jones, 53; *Hill* v. *Epley*, 7 Casey, 334.) It never yet has been held that a declaration of the creditor that the principal debtor was good enough, that the surety was in no danger, and that the debt would be collected from the principal, without more, was sufficient to estop the creditor from proceeding against the surety. Such declarations are exceedingly common. They are often made to induce the surety to go into the contract, and they are repeated afterwards without any design to mislead, or without being understood as a waiver of any rights. They are made and received as expressions of opinion. They neither invite confidence, nor is confidence often reposed in them. Standing alone, they will not discharge the surety. *Bank* v. *Klingensmith*, 7 Watts, 528, does not sustain the charge of the Court in this case. There the creditor held a judgment against the principal and surety. The surety called upon the creditor, and requested that an execution might be issued, to seize the principal's property about being removed. He stated that he wished to be released, and that the principal had property sufficient within reach of an execution to pay the debt. The creditor refused compliance, stated that the principal was good enough, and that he would give the defendant clear of his endorsement. No execution was issued. There is no similarity between that case and the present. There the surety was in motion to secure himself. He had a right to insist that execution should be issued and he did insist. There was proof of actual injury in not holding the execution, an execution to which the surety was entitled on his request, and the case was put upon the ground, both in the Court below and in this Court, that he had sustained injury not from the declaration of the creditor, but from the withholding of the execution. The case of *Harris* v. *Brooks*, 21 Pick. 196, relied upon by the defendant in error, is not unlike *Bank* v. *Klingensmith*. There the surety was also in motion. He called upon the creditor, stated that if he had to pay the debt he wished to attend to it soon, as he then could get security of the principal. The creditor assured him that he (the creditor) would look to the principal for payment, and that he (the surety) need not give himself any trouble about the note, for he should not be injured. The case was put to the jury with the instruction, that if in consequence of this assurance of the creditor the surety omitted to take up the note and secure himself out of the property of the principal debtor, he was discharged. The defence, therefore, as in *Bank* v. *Klingensmith*, rested not on the declarations of the creditor alone, but on them and superadded evidence that there had been actual harm resulting from them to the defendant. This essential to estoppel *in pais* was therefore not wanting, as it is in the present case. The language of Chief Justice Shaw is to be understood as applicable to the case he then had in hand, a case in which the jury had found that injury had resulted from the declarations of the creditor, and the only question therefore was, whether they were such as to warrant his relying upon them, and guiding his action by them. Surely without having been the occasion of injury to the defendant, the creditor cannot be guilty of a fraud upon him by calling upon him to pay a debt which he has promised to pay, and no declaration which has not in fact influenced his conduct can have done the surety any harm. In losing sight of this consists the error of the charge, and for this reason, pointed out in both the assignments of error, the judgment must be reversed.

Judgment reversed and a *venire de novo* awarded.

MONTHLY REPERTORY.

COMMON LAW.

EX. C. GENERAL STEAM NAVIGATION CO. v. ROLT. *Feb.* 2.

Principal and surety—Action against surety—Prepayments to principal a defence—Leave reserved to enter a verdict—Evidence—Constructive notice.

In an action against the defendant as surety to recover damages for penalties incurred by his principal for not finishing a ship for the plaintiffs within the time specified in the contract, it appeared that the plaintiffs had paid part of the contract price prior to the principal before it became due.

Held, that such prepayments were *prima facie* a prejudice to the defendant and a defence to the action.

Upon motion by leave reserved to enter a verdict for the plaintiffs the court will only consider whether upon the evidence and finding of the jury the verdict ought to be so entered, but will not regard the way in which the case has been left to the jury.

The jury, in answer to the Judge, negatived any knowledge by the defendant of the prepayments referred to above having been made, but the Judge did not ask whether by such prepayments the defendant had been prejudiced.

Held, that an objection, if any, upon this ground was the subject of a bill of exceptions, but could not be raised upon motion to enter a verdict.

C. P. May 7, June 27, Nov. 11.

WALMSLEY AND ANOTHER (ASSIGNEES, &c.) v. MILNE.

Mortgagor and Mortgagee—Fixtures.

M. the owner of land, in 1853, mortgaged it in fee to O, who in August, 1858, sold it to the defendant. M. became bankrupt in September, 1858. After the mortgage and before the sale, M., who had always continued in possession, erected buildings on the land, and set up a steam engine and boiler used for supplying with soft water the baths which had been erected on the premises, also a hay cutter and malt mill or corn crusher and grinding stones; all (except the grinding stones) being secured with bolts and nuts, or otherwise firmly affixed to the buildings, but in such a manner as to be removable without damage to the buildings or to the things themselves. The upper millstone lay in the usual way upon the lower grinding stone. All the fixtures were put up for the purpose of trade. They were all firmly annexed to the freehold, for the purpose of improving the inheritance and not for any temporary purpose.

Held, in an action by the bankrupt's assignees to recover the articles so affixed, that when the mortgagor, after the date of the mortgage, annexed the fixtures for a permanent purpose and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage deed in the mortgagee, and that consequently the assignees of M., the mortgagor, could not maintain the action.

The relationship existing between mortgagor and mortgagee was discussed as to what denomination of tenant he (the mortgagor) was, at all events not such a tenant as would so operate. The fixtures should be considered as chattels. Next day, however, one of the Judges requested to have stated that he entertained serious doubts as to whether the articles were chattels or not.

REVIEWS.

A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY.—By Emory Washburn, LL.D., Professor of Law in Harwood University. Boston: Little, Brown & Co.

We have little more than glanced through this work. The subject of which it treats being of such importance we are not prepared in this number, and without giving it a more careful persual, to review it as fully as we should wish to do.

We can however, form a sufficient judgment of the merits of the work to say that the author seems fully to understand how to treat his subject so as to render it equally valuable as a text book for the student and a book of reference for the practitioner.

There can be no question but that a work of this kind is needed owing to the great changes which the Law of Real Property has undergone of late years. A glance at the heads of its contents is sufficient to satisfy us that it will be found a most useful book in the library of a Canadian Lawyer. "The work is divided into three books, the first embracing the nature and quality of estates in corporeal hereditaments, with their qualities and characteristics; the second treating of incorporeal hereditaments their nature and characteristics, and the third presenting in outline the titles by which real property may be acquired and held and the rules of its transmission and transfer."

The following comprise some of the titles of the subjects treated of in the first volume—Nature and classification of Real Property—Estates in Fee simple—Estates tail—Estates for life—Estates by courtesy—Dower—Jointure—Estates during coverture—Joint Estates—Estates for execution—Morrtgages.

The name of the publishers is a sufficient guarantee that the work is typographically well executed.

THE MONTHLY LAW REPORTER; Edited by George P. Sanger. Boston: Walker, Wise & Co.

Each number of the Reporter contains short articles on legal topics of general interest, discussions of mooted points of law, full reports of cases not reported elsewhere, abstracts of all cases of importance in the principal courts, Federal and State; full abstracts of all English cases of use in the United States; Reports of Revenue cases, Treasury decisions in Revenue matters, State legislation, &c. The publication was commenced in 1837, and has since been attended with a pretty fair measure of success. Every number contains 64 pages, handsomely printed on good paper, making annually a volume of 768 pages. Twenty-two volumes have been completed. The subscription is only $3 per annum.

BLACKWOOD'S MAGAZINE—September number. New York: Leonard, Scott & Co. Contents—1. A Sketch of the Life and Character of Sir Robert Peel; 2. The Romance of Agostini; 3. Great wits—mad wits; 4. King Arthur and his round table; 5. The Struggle at Melazzo; 6. The Tower of London; 7. Norman Sinclair.

The *first* is an elaborate and truthful sketch of the life of the great man whose name it bears. The mark which he made on the page of history was one of no ordinary size. His life and his services will not soon be forgotton. The *second* is the commencement of what is described as a true story of modern Rome. It is likely to be widely read, and so far as we can judge from the portion given is worthy of extensive perusal. The *third* takes for its text the saying, "Great wits to madness nearly are allied," and its aim is to prove that genius is health and strength, not disease and weakness. The lives of many illustrious men are noticed in proof of this position, and the whole article is not only very readable, but one of unusual interest, and is characterized by much depth of reasoning. The *fourth* does not require much description from us as it speaks for itself. We may however mention that the object of the writer is to show that antiquarian hero worship is unreal. The *fifth* is a description of the thrilling scenes now being performed in the theatre of Italian liberty, and is greatly in praise of the well-known Garibaldi. The *sixth* is an entertaining history of what is well known in history "the grim old building on the Thames," the Tower of London, the place of many a harrowing scene—whose walls, if gifted with language, could tell more than ever pen has described or pencil depicted. The *seventh* is a Romance which is being published in the pages of "Blackwood" by an unknown author, and is said to be well worth reading.

THE CHRISTIAN EXAMINER, September, 1860. Boston: Walker Wise & Co., 245 Washington Street.

This is a very able expositor of what is conceived to be scriptural truth. The leaning of the publication is decidedly Unitarian, and yet many papers which are contributed to its pages may be read by all denominations, and are not calculated to give offence to any denomination. Of these, "Paul's argument for the abolition of the Law," and "The Woman of Thackeray," in the number before us, are two such papers. The remaining papers are intituled, Dr. Huntington's Introduction to Bickersteith; Leslie; German Hymns; St. Augustine at Keppo. We are very glad to be able to add this sterling publication to the list of our exchanges.

The ECLECTIC MAGAZINE for October, 1860. New York: W. H. Bidwell, is received.

It opens with a portrait of Garibaldi, by Sartain. It is said to be from an original photograph, and to be true to life. If so, Garibaldi must be as handsome as he is energetic and determined. The portrait, now that the name of the original is on every tongue, is most opportune. The letter-press of the number is as follows: 1. The Protestant and Catholic Revolt; 2. The Patrimony of St. Peter; 3. William Caldwell Roscoe's Poetry; 4. Garibaldi, his life and times; 5. On the importance of energy in life; 6. Vonved the Dane; 7. Cayenne, a penal colony; 8. Dr. Krapf's travels in Eastern Africa; 9. Baron Humboldt's letters; 10. Imaginative literature; 11. Expected return of the Comet of Charles the Fifth; 12. The great Armada fight; 13. Concerning summer days; 14. Footfalls on the boundary of another world; 15. The great eclipse in Spain;

THE LOWER CANADA REPORTS: Quebec, Augustin Cotè.

We have received Nos. 7 and 8 of Vol. 10, of these reports. They contain the reports of thirteen decided cases, of which one *Montizambert* v. *Gervais* is of great public importance both in Upper and Lower Canada. It was an appeal from a judgment rendered in the Superior Court of Quebec and determines on general principles and in general terms, that a Registrar of titles is responsible for the damages caused by his negligence, whether the loss arises out of his neglect to enregister a title or by reason of an insufficient certificate of title given by him.

THE LOWER CANADA JURIST: Montreal, John Lovell.

We have received several numbers of this publication and shall be glad to receive it more regularly; we do not know the cause of the irregularity whether it is the time of publication or rests entirely with the post-office authorities. We recommend the enterprising Mr. John Lovell, to make proper inquiries into the matter.

TO CORRESPONDENTS.

M., JOHN HOLGATE, and JAMES F. ELLIOTT—Under "Division Courts" pp. 220, 231.

J. A., Dunnville.—Received too late for this number, will be answered in our next.

SEMPER FIDELIS.—The publication of your letter would serve no good purpose. Therefore declined.

DIARY FOR NOVEMBER.

3. Saturday..... Articles, &c., to be left with Secretary Law Society.
4. SUNDAY..... *22nd Sunday after Trinity.*
5. Monday..... Recorder's Court begins.
6. Tuesday..... Chan. Ex. Term. Goderich and Cornwall, commences.
10. Saturday..... Last day for notice of Hearing, Chancery.
11. SUNDAY..... *23rd Sunday after Trinity.*
14. Wednesday.... Last day for service of Writ in County Court.
18. SUNDAY..... *24th Sunday after Trinity.*
19. Monday..... MICHAELMAS Term begins. Chancery Hearing Term begins.
23. Friday..... Paper Day, Q. B.
24. Saturday..... Paper Day, C. P. Last day for decision County Court.
25. SUNDAY..... *25th Sunday after Trinity.*
26. Monday..... Paper Day, Q. B.
27. Tuesday..... Paper Day, C. P.
28. Wednesday.... Paper Day, Q. B.
29. Thursday..... Paper Day, C. P.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

NOVEMBER, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60" *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5.'60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The* "60" *has reference to the year, and not to the amount represented as due.*

COUNTY COURTS—JURISDICTION IN EJECTMENT.

The act of last session chapter 43, conferring jurisdiction on the County Courts in actions of ejectment opens a new and extensive branch of business to the country practitioners

Injuries may be so small as not to bear litigation in the Superior Courts, and persons usually submit to sacrifices of some kind to avoid it, or are tempted to take the matter into their own hands and carve out a relief which the law does not sanction—just such a class of cases will be covered by the recent enactment, and landlords will be able to obtain speedy and cheap redress at, so to speak, their own doors.

Every measure furthering a remedy of this kind, while it benefits the public, is a gain to the local practitioner by opening a new source of business.

Imagine the owner of a small house worth, say two dollars per month, bringing an action of ejectment in the Court of Queen's Bench or Common Pleas against a tenant in default or overholding—why the thing would be absurd, and any respectable practitioner would if consulted say to the landlord, "far better for you to give ten or twenty dollars to get possession of your property, than bring an action and probably have to pay your own costs amounting to more than that sum," or some doubtful *expedient* might be suggested as "*worth risking*" under the circumstances.

While the act will enable the County Courts to take cognizance of the most trifling cases, the jurisdiction is yet more extensive than might on a cursory consideration be supposed.

We purpose examining some of the leading features in the law, and take the liberty of remarking that it is a reform which has been long and warmly advocated by the Editors of this Journal, and like other subjects to which we from time to time directed public attention, has been adopted and carried into law by the Legislature.

The law owes its paternity to the Hon. Mr. Patton. It is a carefully drawn act and has the great merit of being free from a mass of words.* The consolidation of the statute law of Upper Canada would not have been a full practical benefit unless it afforded a model likely to be followed in the construction of acts of Parliament; and we notice with pleasure that several acts of last session, including the one before us, are evidently framed after the model of the consolidation.

The act deals only with the action of ejectment, and its object is to enlarge the jurisdiction of the County Courts so as to embrace it. It is to be read with "the County Courts Act"—as if its provisions had been incorporated therewith—both are to form as it were one act. Thus section one of the act before us would come in conveniently and might be read as sub-section five of sec. 17 of the County Courts Act, sections 3, 4, 6 and 7 of this act following in their order—section 339 of the Common Law Procedure Act being slightly altered so as to bring in the matter of sec. 5.

The action of ejectment is a mixed action to recover possession of land together with damages and costs. It is *real* in respect to the land—*personal* in respect to the damages and costs. But there is no general jurisdiction in ejectment; it is only in certain cases and subject to certain circumstances that it lies in the County Courts. Being purely statutable all the requisites of the statute which

* Mr. Patton has certainly improved his style in this particular since his act respecting attorneys, which was *not* a model of brevity.

creates the jurisdiction must be observed. We give the clause :—

Sec. 1. The several County Courts in Upper Canada shall have jurisdiction and hold plea in actions of ejectment for the recovery of corporeal hereditaments (where the yearly value of the premises, or the rent payable in respect thereof, does not exceed two hundred dollars) in the following cases, namely :—

1. Where the term and interest of the tenant of any such corporeal hereditaments shall have expired, or been determined by the landlord or the tenant by a legal notice to quit.

2. Where the rent of any such corporeal hereditament shall be sixty days in arrear, and the landlord shall have right by law to re-enter for non-payment thereof.

"For the recovery of *corporeal hereditaments.*"

If a thing is capable of being inherited it is an heriditament—it is no less an heriditament because the party has a leasehold interest in it. *Baddeley* v. *Denton*, 4 Exch. 508. Hereditament is a general term for every description of property. *Harris* v. *Davison*, 15 Sim. 134. Whatever may be inherited is an hereditament, be it corporeal or incorporeal, real, personal, or mixed. Co. Litt, 6 A. "*Corporeal* hereditament" as used in this clause, we take it, will include anything on which entry can be made or of which the Sheriff can give possession, but not anything on which entry cannot be made or of which the Sheriff cannot deliver possession under a writ of execution. Ejectment would not lie at Common Law for incorporeal hereditaments as for advowsons, common in gross, or other things which pass only by grant. The action of ejectment is maintainable in the County Courts, we assume for all kinds of corporeal hereditaments.

A general limit to the action is found in the words, "where the yearly value of the premises, or the rent payable in respect thereof, does not exceed two hundred dollars."

It will be observed that it is *either* the yearly *value or* "the *rent*," the words are in the alternative, and if either do not exceed the limit—two hundred dollars—ejectment for the premises, it is presumed, will lie in the County Courts. Several cases on this point have been decided in England, under the enactment 9 & 10 Vic., ch. 95, sec. 122, which is in terms nearly identical with ours. It gives jurisdiction for the recovery of tenements "where the value of the premises, or the rent payable in respect to such tenancy, did not exceed the sum of £50 by the year, and upon which no fine shall have been paid," &c.

The first case in point on this enactment is, *Fearon* v. *Norvall*, 1 Co. Court Cases 171. It was an application to the Bail Court for an order for a prohibition upon the following facts. A judgment had been pronounced in favor of the landlord, directing possession of the premises to be given. Several months after the judgment the landlord, treating it as a nullity, commenced another action and again recovered judgment, and the prohibition was moved for on—first, the ground of the prior judgment existing unreversed, and secondly, that as the value of the premises (though not the rent) exceeded £50 there was no jurisdiction. In respect to this last point Patteson, J., expressed himself upon the argument as follows : "There is no pretence for saying that where the rent does not exceed £50 per annum, and there is no fine—it is not within the section even though the value may be a thousand pounds. I am quite clear upon this point." Reserving the other point in giving judgment, after taking time to consider, his lordship said : "I disposed of the second objection upon the argument being clearly of opinion that if the rent did not exceed £50 it was immaterial how great might be the value of the premises.

Crowley v. *Vitty*, 1 Co. Court cases, 528. In this case there was an agreement in writing to take certain premises at £1 per week. Subsequently the rent was reduced by a verbal arrangement to a sum under £50 per year, but the yearly *value* was shown to be over £50 so that there was clearly no jurisdiction unless the rent was under £50. The Court held that the verbal arrangement did not discharge the written agreement and that the original demise stood. Baron Alderson, in the course of argument in the case referred to the point of which we are speaking, thus : "What do you say to a case of this sort—suppose a man takes a piece of land, pays £25 a-year ground rent, and builds a house on it worth £500 a-year—do you mean to say the owner of the land could in such a case go to the County Court under this section to turn out his tenant?"

The suggestion thrown out by Alderson, B., that to give jurisdiction, neither the rent nor the yearly value must exceed £50 was laid hold of but held to be unsound in *Earl of Harrington* v. *Ramsay*, which is the leading case on the point. This case was first determined in the Court of Common Pleas, on motion for rule for prohibition, 2 Co. Court cases, 154. At the trial before the County Court Judge it appeared that the rent of the premises in question was £41 per annum, but that their value exceeded £50 per annum, and it was thereupon contended that the judge had no power to proceed if either the annual rent or the value exceeded £50. The learned judge of the County Court however ruled adversely and judgment was given for the plaintiff against which the defendant appealed.

Upon the argument Bramwell for the prohibition, referred to the language used by Alderson, B., in *Crowley* v. *Vitty*. The learned judge is reported to have said, with reference to the rent forming the criterion : "That cannot be so always. Suppose a man take a piece of land and pays £25 a-year ground rent, and he builds a house on it worth £800 a-year, could the owner of the land go to the County Court under

this section?" Pollock, B., in delivering judgment said, "We proposed to have the case of *Lord Harrington* v. *Ramsay* re-argued, but on consideration we think we cannot read "or" for "and." We have since looked at the act, and the clear grammatical construction is strictly in accordance with what we have decided; but we are satisfied that if the attention of the Legislature had been called to the point, the clause would have been differently framed so as to exclude the jurisdiction of the County Court in such a case. But we, sitting here as we do to construe the acts of the Legislature as we find them, cannot change "or" into "and," or turn an affirmative negative into a negative affirmative, so as to make the law what the Legislature may have meant, but did not express."

Whatever the value of the argument raised, that the jurisdiction was of such a nature that it never could have been intended to confer it upon the small debt courts where the matter is determined by the judge in the summary way provided for in the act—it would not apply to our enactment which confers upon the County Courts a jurisdiction in ejectment with like powers and procedure as in the Superior Courts, and giving the right to appeal.

The case of *Earl of Harrington* v. *Ramsay*, was again moved in the Court of Queen's Bench, (2 C. Court cases 136) and another rule obtained on the same grounds as in the Court of Exchequer. The court took time to consider, and Campbell, C. J., after stating that Erle, J., who was absent, had seen the judgment of him (Lord Campbell) and concurred in it, proceeded as follows, "I am of opinion that the Court of Exchequer has put a right construction on the 9 & 10 Vic., ch. 95, sec 122. The object of that section was to give to landlords a summary remedy against tenants holding over "when the value of the premises or the rent payable in respect of the tenancy does not exceed £50 by the year. Where the annual value did exceed £50, but the annual rent fell short of that sum; and the defendant contends that the County Court has no jurisdiction. It is said that these are alternative conditions, and that if either the rent or the value exceeds £50 by the year, the County Court has no jurisdiction. It must be confessed that there is some carelessness in the wording of this clause, leaving it apparently open to the objection now relied on; but there is nothing so absolute in the language as to justify the court in straining it against what appears to be its general intention. I think the effect of the section is as if the Legislature had expressly enacted that on either condition existing the court should have jurisdiction. It would be a serious inconvenience if the tenant could contend that the premises were worth more than their real value when the rent was fixed and ascertained. The Legislature I think, did not intend that, but only that value should be considered when no rent had been fixed. The case of *Crowley* v. *Villy*, is not an authority against this view, and *Re Fearon* v. *Norvall*, which is opposed to that case is more directly in point. I therefore think that the County Court Judge has jurisdiction in this case, and that this rule should be discharged."

In view of these cases on an analogous enactment it seems safe to conclude that if the rent reserved, whether on a building lease or otherwise, and whatever the length of the term, does not exceed £50 per annum, the County Courts can claim jurisdiction, whatever may be the actual yearly value of the premises.

(*To be continued.*)

EVIDENCE IN CRIMINAL CASES.

In the mother country, at the present time, there is a strong inclination to amend the law of Evidence in criminal matters, so as in the first place to allow husband and wife to give evidence for or against each other, and in the second place to allow a person accused of crime to give evidence on his own behalf.

The apparent necessity for one, if not both of these amendments, has been forcibly suggested by the extraordinary circumstances attending the trial and conviction of the Rev. Mr. Hatch, and the subsequent trial and conviction of his accusers on the charge of perjury.

Judging from the result of this singular case, it is reasonable to suppose, if either the accused himself or his wife had been allowed to give evidence when the accused was on his trial, that there would have been no necessity for the legal farce of two convictions entirely opposed to each other, followed by two sentences of which the one was wholly inconsistent with the other.

In the subsequent proceedings for perjury against the witnesses on the first prosecution, the accused was allowed to do indirectly, that which the law would not allow directly, viz., to give evidence on his own behalf; and this, it is argued, has as well a tendency to bring the administration of the law into contempt, as to impoverish and perhaps ruin innocent persons, when charged with crimes, the very name of which would cause innocence to recoil with abhorrence.

This is the line of argument adopted by the writer of an article headed "Law of Evidence in matters Criminal," first published in the *Scottish Law Journal*, and republished by us in this number of the *Upper Canada Law Journal*. We must say that, as applied to the particular case we have mentioned, there is much cogency in the argument; but at the same time, we must not lose sight of the fact that laws are not made for particular cases, but for all cases; and the true criterion is, to determine whether the balance of mischief, as the law now stands, outweighs

its long-settled advantages in a public point of view. That there are such advantages, we presume the most sanguine law-reformer will not deny. So far as husband and wife are concerned, in a social point of view, it is an advantage that no cause of family dissension should be produced by the giving of evidence, either for or against each other, in matters civil or criminal; and so far as persons accused of crime are concerned, it is an advantage that public morality should not suffer by the sight of men endeavoring to save their lives or their reputations by the commission of deliberate perjury. If a false oath would prevent the conviction of a murderer or a highway robber, we venture to affirm that few such would find their way to the gallows or the penetentiary. It may be replied, that the statement of the accused, if untrue, would be exposed, and its want of truth made manifest by cross-examination or surrounding testimony from other sources. This is possible; but what we hesitate to endorse is, temptation to perjury, in cases where the inducement would be so strong as to be almost irresistible. We think that the man who would take the life of his fellow-man—destroy the chastity of his neighbour's wife or daughter—set fire to his neighbour's buildings—rob his neighbour's house—steal his neighbour's property, would not hesitate, in the hope of escape, to add perjury to his other crimes, and so swell the calendar of crime.

While making these remarks, we have no desire to do more than to present the arguments both for and against the proposed amendments, as they present themselves to our mind. We are quite open to conviction; and if wrong in any view that we have ventured to express, we shall be only too happy to be set right. We are no sticklers for things as they are—if improvement can be shown to us to be both expedient and practicable. But we cannot help thinking that amendments of the nature proposed should be approached with much caution, and that more than one case like that of Mr. Hatch should be adduced as a motive for amendments of a character so general, so sweeping, and so comprehensive.

HORSE RAILROADS.

Sometimes we have the pleasure of reading, in cotemporary law periodicals of the United States, judgments of great learning, characterized by great reason, and couched in clear and appropriate language.

On no occasion do we remember to have read a judgment more deserving the above description than that of Chief Justice Shaw (reported elsewhere), in the case of *The Commonwealth* v. *Ira Temple*, and for which we are indebted to our valued cotemporary the *Monthly Law Reporter*, of Boston.

The ability with which the very able Judge whose name we have mentioned, applied the principles of the common law to the case then before him, is deserving of sincere admiration. The judgment will be of great weight wherever known, and wherever the law of England prevails. It is of value, not merely because of its bearing on the rights of proprietors of horse railways, but because of its clear ennunciation of the principles which regulate the use of public highways, as between different individuals, whose interests, from selfish or other such motives, may clash.

We learn by our exchanges that Chief Justice Shaw, after having served his State for more than thirty years as its highest judicial officer, has retired with the well-wishes of all who knew him either by reputation or had the good fortune to make his personal acquaintance. The occasion of his retirement was one of mingled pain and pleasure; pain, that the State was about to lose the services of so bright an ornament, and pleasure, that after so useful and enviable a career, the distinguished citizen was able to retire into that privacy which was most congenial to his tastes, his habits, and his years.

Massachusetts is one of the few states of the Union that has not yielded to the seductive yet blighting influences of an elective judiciary. Long may she remain firm to the great principles of a thoroughly independent judiciary—independent, not only of those in authority, but of the fickle populace, who generally, in a mass, are as incapable of pronouncing on the qualifications of a Judge, as of giving disinterested and discerning support to a pure-minded candidate for any high station in the commonwealth.

ELECTIVE JUDICIARY.

Judge Edmunds, of New York, has written a letter declining the nomination that has been tendered him for the position of Recorder for New York. We take this opportunity of making a few extracts from the letter as a most telling commentary upon elective judiciary:—

"I am aware how much good I could do in the office, but it would take time to place the court in the condition which I should aim to give it, and I am persuaded that that time would not be afforded me. My tenure of office would be only three years. While on the bench I should, of course, be withdrawn from political action, and could not resort to the usual means to secure my continuance in it; while on the other hand, ambitious aspirants for the position would be restrained by no such consideration, and would easily oust me long before I could give any permanency to the character I should aim to give to my court.

"It is owing to this cause, doubtless, that since our adoption of the practice of judicial election, not a single justice of the Supreme Court has been re-elected in this city; out of fourteen justices of the Superior Court only four have been re-elected, and a recorder—never.

"I could expect no exemption in my case from this seemingly inevitable fate of the judiciary in this city, and I must

calculate on being removed long before attaining the end, the prospect of which alone could induce me to take the office.

"Besides, the shortness of the term would continually subject me to the imputation of shaping my decisions in reference to a re-election. I experienced this at the close of my judicial career, and I had abundant cause to know that I was thereby shorn of my independence, and my usefulness was impaired. I felt this so keenly, that I then resolved never to undergo it again.

"I have already been made aware of the anxiety there is in many to have me take the place, and in coming to a determination on the subject, I have endeavoured to avoid all selfish considerations. I have, therefore, dwelt but little, even in my own mind, on the pecuniary sacrifice it would be to me, or on the disturbance that would ensue to a business that I have been fortunate enough to build up around me, and which supplies me with all I want, yet leaves me in full freedom to act on all occasions according to my conceptions of what is best; and have been governed by considerations which I owe it to the convention frankly to mention, even at the hazard of being misunderstood.

"When I spoke of the good I could do as a motive for accepting the place, I had in my mind the cases, so frequent in our criminal courts, of innocence unjustly accused and often struck down because unfriended and unprotected; and I could easily imagine the gratification that would flow from being able to guard it in its hour of peril. But until I saw there was a possibility of being inducted into the office, I did not far enough see the whole ground, and to become aware that in much the greater number of instances it would be my duty to condemn, rather than relieve. It would be painful to me thus to sit in judgment on my fellow-men, and to condemn when I would far rather pity and forgive, and endeavour to reform.

"When I now recall my past judicial carreer, where the administration of criminal justice was of rare, and not, as it would be here, of constant occurrence, I find that the most vivid feeling I have is the painful recollection of the many cases in which I was called upon to condemn and punish the erring."

PRIVILEGES OF MEMBERS OF PARLIAMENT.

We publish in this number the report of *Henderson* v. *Dickson*—a decision which was pronounced in the Court of Queen's Bench during last term, and is of much general importance. In it the Court held that a member of the Legislative Council is not privileged from the obligation of any ordinary judgment debtor to attend and be examined as to his property; and that if he refuse to do so, and be committed by an order in the common form for a given period within the discretion of the Court or a Judge, he cannot afterwards succeed in an application to be discharged on the ground that he is a member of Parliament.

LAW OF EVIDENCE IN MATTERS CRIMINAL.

(*From the "Scottish Law Journal."*)

In no department of public affairs has the ameliorating influence of advancing civilisation been, of late, more conspicuous than in what is generally described as the Law of Evidence—more strictly speaking, the rules affecting admissibility of witnesses in judicial investigations. Confining our observations to Scotland; the time is not far distant when, to modern eyes, the grounds of exclusion were such, and so various, that it seems almost incomprehensible how judicial business could be conducted at all. A very brief retrospect will suffice to explain our meaning.

First of all, we had the exclusion of witnesses on account of supposed "want of integrity," which was ascertained by a "conviction," under the verdict of a jury, of such crimes as forgery, coining, theft, and robbery. Formerly, an objection arising from such a conviction was "indelible," or removable only by royal pardon or statute—no length of time or amount of punishment, could efface the stain. This objection was modified, some thirty years ago, and has recently been entirely removed. It proceeded upon the fallacy that evidence-bearing was some sort of franchise or privilege, on the part of the witness, in place of being, what it truly is, a duty or obligation in which third parties have a *jus quisitum*, which ought not to be defeated by any misconduct on the part of the individual who happens to be the depository of the necessary knowledge. The credit to be given to such evidence is another matter altogether. Then, in very ancient times, *women* were altogether rejected in civil causes. As text writers say—"Our Courts of "Law proceeded to relax the harshness of more ancient de-"cisions, first allowing them to be received as necessary wit-"nesses, in cases of a domestic nature, or where other evidence "could not, from the nature of the case, be obtained;" and, in process of time, females have come to be competent witnesses, in all causes, both civil and criminal. But, the old prejudice still lingers so far as to render it, at least, very doubtful whether a woman, no matter what may be her character, education, or social position, can be an instrumentary witness, to the execution of any deed, however trifling, even where no other witness can be found. So much for the gentler sex. With regard to the lords of the creation, it was at one time held, that a man who happened to be "extremely poor"—which was defined as not being worth £10 Scots—could not be received as a witness at all. Servants of the parties to a cause were also excluded, on account of the supposed influence exercised over them by their masters; and so with yearly tenants, as regarded their landlords. Magistrates of burghs, burghesses, rate-payers in a parish, as regarded any question affecting the community—in short, all having any *interest*, however small, were in like manner deemed unworthy of credit. Pupils—that is boys under 14, and girls under 12 years of age—were declared unfit to give evidence in civil causes, "as not being supposed to have sufficient understanding accurately to apprehend and remember facts;" whereas, every one accustomed to judicial proceedings, now recognises, as a notorious fact, that youths, from 10 to 14, are the most truthful, perspicuous, and satisfactory of all witnesses, as to what they may have seen and heard. Then, there came the category of "relations," including father, mother, brother, sister, son, and daughter, either by consanguinity or affinity: uncle, aunt, nephew, and niece, by consanguinity—it being pointed out as worthy of special congratulation, that "the exclusion does not extend to "uncle or nephew, aunt or niece *by affinity*." (See *Tait's Law of Evidence;* Voce Disqualification of witnesses from relationship.)

As if all this were not enough, we had another general element of exclusion described as "agency and partial counsel." Under this flexible phrase, advocates and agents engaged in a cause, clerks who might have heard, or written, or read, part of the pleadings; any person who had introduced a client to an agent, or chanced to be present at a consultation, or been kind enough to tender a litigant some friendly advice; any one who might have heard another precognosced, or been stupid enough to remain in court during part of a trial—all these were excluded. And finally, we had the "ultroneous" witness the man who was simple enough to save expense to the parties, by appearing for examination, without being compelled by a summons; and the witness who might have been spoken to after citation.

With all these disqualifications, deliberately recognised and acted upon, the wonder is that the wheels of justice were not entirely stopped. What lawyer, who has practised for, say, 20 years past, can fail to remember with a lively sense of the ridiculous, the stereotyped "examinations in *initiliabus*"—the depositions taken to "*lie in retentis*"—the constantly recurring judgments upon technical questions, more nice and delicate even than those involved in the merits of a cause—the admission of witnesses, "*cum nota*," as it was termed—and, occasionally the absolute forfeiture of just rights arising out of this state of the "Law of Evidence?" To the younger members of the profession such things must be merely matter of tradition. But we assure them we have actually known an initial examination, with the view of disqualifying a witness extend over many hours, and cover scores of pages of *foolscap*—most appropriate name for paper devoted to such a service? We have, during a jury trial, and when it became desirable to make some inquiry of a witness in attendance, been formally warned by counsel to take the precaution of getting the messenger to withdraw the citation already given, and cite the witness anew, after the conversation! And we have known a jury trial suddenly brought to a close, and an important claim absolutely lost, in consequence of the circumstance transpiring that an incautious or inexperienced clerk had allowed the pursuer's witnesses to be present while he was taking their respective precognitions.

Such was the condition of the law of evidence not many years ago. Great changes have recently taken place; so much so that, as regard civil causes, the revolution is almost complete.

First, there was an Act of Parliament, (3 & 4 Vic., cap. 59) declaring that the presence of a witness during any part of a trial should not form a ground of disqualification, where it did not appear that this had occurred from any improper motive. Next came the Statute 15 Vic., cap. 27, by which, among other things, it was enacted—"That no person adduced "as a witness in Scotland, before any Court, shall be excluded "from giving evidence by reason of having been convicted of, "or having suffered punishment for *crime*, or by reason of "*agency*, or of *partial counsel*, or by reason of having appeared "*without citation*, or by reason of having been *precognosced* sub-"sequently to the date of *citation*." This was, however, qualified by the proviso that, "any person who shall, at the "time when he is so adduced, be *acting as agent* in the action "in which he was so adduced," should not be admissible. The same statute declared that a person who was merely a *nominal* party in a cause, without any "substantial interest," in the result, should be competent as a witness. Then followed the Statute 16 Vic., cap. 24, repealing the exclusion of an acting agent, and enacting that "it shall be competent to ad-"duce, and examine as a witness, in any action or proceeding "in Scotland, any *party* to such action, or the *husband* or *wife* "of any party, whether he or she shall be individually named "on the record or not." This enactment, on the principle of the greater including the lesser, necessarily swept away all objections on account of relationship, or otherwise. If the hostile parties themselves were to give evidence, there was an end to all remaining objections—unless, in so far as any such were specially saved by the statute.

This course of legislation was avowedly rested upon the ground, that the true principle applicable to all testimony is, not to exclude altogether parties who may be liable to objection but to deal with such objection as affecting their credibility. In short, the public mind had gradually been brought to entertain the important proposition—that the object of all judicial investigation is, by every available means, to *arrive at the truth*. The corollary followed, that it was absurd to shut out attainable light for the sake of mere technicality. To our couched eyes, the premises and conclusion seem equally self-evident: but, in matters like this, mankind are slow to learn, and we must not wonder at the reluctance with which such changes as we have pointed out are admitted.

Bold and comprehensive, however, as was the step last taken, it halted even with regard to *civil* causes. Under the old law, with all its narrow limitations and technicalities, our fathers had found that there were circumstances in which these must of necessity be relaxed; and consequently, in spite of the general rule absolutely excluding all interested witnesses, and especially parties themselves, there was a class of cases in which a pursuer was admitted to give evidence. We refer to cases of filiation, where, after certain grounds of presumption were established, the mother of a bastard child was admitted to prove the paternity. This exception to the general rule of law was obviously suggested by the *necessarily occult nature* of the inquiry. At, present both pursuer and defender are allowed to give evidence, in the first instance in all such cases. But, singularly enough, while the Legislature, at the suggestion of the Scottish law authorities, was relaxing the rules of evidence with such boldness otherwise, there was introduced into the statute this remarkable qualification, "That nothing "herein contained shall apply to any action, suit or proceeding, "in Scotland, in consequence of adultery, or for dissolving any "marriage, or for breach of promise of marriage, or any action "of declarator of marriage, putting to silence, legitimacy, or "bastardy, or in any action of adherence or separation." Our fathers considered the occult nature of an inquiry to be a good reason for relaxing the common law rule; we are so inconsistent as to make the very same element a ground for tightening the ordinary rule. With regard to this department of law, we must undoubtedly follow our English neighbours, at an early day. But, meantime, the *actual* anomaly shows the slow progress of correct views in such matters.

Our article is headed "The Law of Evidence in Matters Criminal," and it is really to this we wish to call present attention. Our readers will, however, easily see how the general review we have thus taken bears upon our special subject, when we direct attention to the important proviso contained in the last mentioned statute, regarding criminal causes. The statute appears to throw the door wide open in the first instance; but goes on to provide that "nothing herein contained "shall render any person, or the *husband* or *wife* of any person, "who, in any criminal proceeding, is charged with the com-"mission of any indictable offence, or any offence punishable "on summary conviction, *competent* to give evidence for him-"self or herself, his wife, or her husband." The law of England is, we believe, alike in this respect. Now, dealing with this statute as it stands, we might put the question, If a party, or the wife or husband of a party, may safely and properly be trusted to give evidence in a civil suit, involving in its issue—affluence or beggary, the loss of character and reputation, or justification from some foul slander, is there any reason why they should not be allowed to open their mouths with regard to an alleged "offence," the punishment for which may be of a comparatively trivial nature—a pecuniary penalty, perhaps, of a few pounds? But, while we put this question as bearing upon the minor offences covered by the statute, we go farther, and boldly put the general question, Is, there any maintainable reason why the principle applied in *civil*, should not be applied in criminal, investigations—and those even of the gravest character? We have again and again put this question to ourselves, and after the most deliberate consideration, we must answer in the negative. If, when engaged in a civil cause, involving the most serious consequences, the true principle be, to find out the truth by every available means, and therefore to admit any person as a witness who can give evidence, reserving to judge of the credibility of that evidence according to the whole circumstances, we can see no reason why the same thing should not be done in a criminal inquiry. Indeed, if there be any room for a distinction, this must be in favour of criminal causes. Because, in the first place, with

regard to contracts, and other grounds for pecuniary claims, there is generally room for preconcerted proof, whereas anything of the kind must be absent in matters criminal; and, in the second place, because all crimes must, from the nature of things, be more or less occult.

Laying aside for a moment, the evidence of an accused party himself, it may, and often does happen, that a husband or wife is the person possessed of the most direct and important knowledge as to the subject of inquiry. In such circumstances, why should the husband or wife be excluded from giving evidence? All that can be said is, that he or she must be necessarily biased in favour of the accused. No doubt this is true, and would weigh with judge and jury in dealing with the evidence given. But, the Legislature, supported by public opinion, having solemnly declared that bias, or interest, should not absolutely exclude a witness, in one set of causes; it lies with those who would make a distinction to show a foundation, in principle, for such a distinction. That the present state of the law produces monstrous results has recently been demonstrated by a remarkable case in England.

The Rev. Mr. Hatch was a married man, of previously irreproachable character. He wished to eke out his income by taking some young people into his family, for board and tuition. Two girls named Plummer became inmates of the house, and almost immediately after they united in accusing Mr. Hatch of criminal conduct towards them. In the evidence of the girls it was alleged that the prisoner's indecent conduct occurred, more or less, in the presence of his wife. Here, then, was one means of testing the truth of the whole story. But, according to rule, Mrs. Hatch could not be allowed to give evidence; and so her husband was found guilty, and subjected to a severe and ignominious sentence. Husband and wife were ruined for life. But the law of England permitted a counter charge of perjury to be made against the Misses Plummer. In the trial that followed, Mr. Hatch and his wife were competent witnesses, and upon their evidence the elder of the two girls was found guilty. Mr. Hatch has, of course, been pardoned, notwithstanding the verdict of the jury finding him guilty, but who will restore him and his wife to their station in society—who can cure the wounds under which they have already suffered?

We are not sure that any remedy would have been available in Scotland. But, taking this case as it stands, no one can fail to see that Mr. Hatch was ultimately acquitted of the crime charged against him *by means of his wife's evidence, and his own.* And, such being the case, was it not monstrous that that evidence could not be made available at the original trial? Notwithstanding the pardon by the Crown, there at present stands upon the records of the Court two verdicts of a jury, one finding Mr. Hatch guilty, the other finding him not guilty. In the same way there stands on the records of the Court two sentences, one awarding severe punishment for a crime, resting on the evidence of his accusers, and the other inflicting punishment upon one of these accusers, on account of that very evidence. Such are the consequences that always result from any serious departure from sound principle.

After the case of Plummer and Hatch, the law excluding the evidence of a wife and husband cannot possibly stand. But we contend that the change must go farther. Even accused parties themselves must be allowed to give evidence, if so disposed. Why should it be otherwise? One man is *accused* of a crime. Another who has been *convicted* of a more serious crime, it may be, is allowed to give evidence against him; but he is not allowed to open his mouth as a witness on oath, although the law and common sense combine in saying he must be considered innocent until found guilty. Is not this an anomaly? It may be that the question is one, substantially, between the accused and the witness, as in the case of Mr. Hatch, and in many cases of assault. If the law or the administrators of the law, have so far given the one an advantage over the other, as to make him the accuser and witness, why should this shut the mouth of the accused? Why must their technical positions be reversed, by some *hocus pocus*, as in the case of Hatch, before a full investigation can be made. Apropos of this, we may remind our readers of the case of Francis Paterson, which lately caused so much interest in Glasgow. Paterson, a gentleman of hitherto unimpeached reputation, was accused of an indecent assault upon a married woman. At the trial, his accuser, and some accomplices, gave evidence upon which he ran the imminent risk of being convicted, and thereby ruined. He of course was not admissible as a witness; but providentially, some third parties were found to give evidence that led to an acquittal. The tables being turned, Mr. Paterson, gave evidence, in the Court of Justiciary, upon which, chiefly his accusers were convicted of the crimes of conspiracy and perjury, the punishment for which they are now undergoing. Would it not have been most desirable that Mr. Paterson should have been deliberately examined, and given his version of the occurrences, under the original trial?

This leads us to conclude with a remark or two upon the relative system of "Judicial Declarations" taken from persons accused of crimes, in Scotland.

Such declarations must be taken for one or other of two purposes. They are intended, either for the purpose of enabling the public prosecutor to form some opinion as to the probable guilt of the accused, and to trace other necessary evidence; or, for the purpose of being used as proof at the trial. In so far as the former purpose is concerned, we confidently affirm that such declarations should remain in the private repositories of the Lord Advocate or Fiscal; and, as regards the second purpose, we with equal confidence maintain that they are a relic of barbarism which should be at once swept into oblivion. The fundamental principle of our trial by Jury is, that the evidence upon which a verdict is to proceed must be exhibited in open court, subject to the tests of publicity and cross-examination. But how does a "prisoner's declaration" come within such a principle? In place of being made publicly, it is extracted from him in the privacy of the Fiscal's office. Instead of being the result of examination, in any proper sense, the prisoner has not the benefit of the presence, or advice of a local agent, much less of counsel.

That declaration, or so much of it as the Fiscal chooses to write down, being once subscribed by the magistrate, and by the prisoner, if he can write, is produced and read by the Clerk of Court, without the slightest opportunity of explanation or elucidation. It may be a disterted or partial edition of the truth, requiring such explanation to make it tell in favour of the prisoner's innocence. It may be a mere tissue of falsehood, calculated to create doubts and difficulties. In either case, an open examination, with reference to the other elements of the trial, would probably clear away all mystery. But no; it is read, and whether it goes, improperly, to prejudice an innocent man, or to mystify a jury, nothing more can be said. Now, we venture to say this is inconsistent with the principles of our jurisprudence. If a man is to be judged by his own evidence, that evidence should be given fully, openly, and with reference to the whole proof upon which he is sought to be inculpated, and not obtained privately, inquisitorially, and partially.

At first sight, some may think that, to allow a person accused to give evidence on his own behalf, would afford him an undue advantage. But we feel quite confident it would not be so. No guilty person will ever succeed, under the test of open cross-examination, in concealing the real facts of a case. The opportunity can only be available to the innocent.

It may also be argued that such a state of the law would open the door to the commission of perjury. And no doubt cases of this kind would occur, as they do in civil causes, where the parties themselves give evidence. But, the object being to reconcile fair-play towards accused persons, with the attain

ment of truth, we put it to our professional brethren, whether the amended law, as regards civil trials, has not, upon the whole, largely tended to the discovery of the real state of facts; and, if this be so, we see no reason to doubt that the same result would follow in criminal causes. The innocent might show their innocence. The guilty would avoid examination altogether; or, they would give evidence to their own condemnation.

To us this appears to be a subject worthy of the serious consideration of the profession. We cannot flatter ourselves that, in these brief remarks, we have done it justice, but trust that what we have said may lead to some fuller and more conclusive discussion.

INSANITY IN CRIMINAL PROCEEDINGS.

(*From the "Jurist."*)

The unsatisfactory state of the practice respecting the subject of insanity in criminal proceedings is again forced upon our attention by the recent trial of William Godfrey Youngman for murder, and also by a statute passed in the session of Parliament which has just expired, the 23 & 24 Vic., c. 75.

Youngman was indicted for the murder of his mother; and there were three other indictments against him, for having at the same time murdered his two infant brothers, and a young woman to whom he was engaged to be married. Having been convicted and executed on the first of these indictments, the others were not tried. The defence set up by the accused was, that on the occasion in question his mother had, unprovoked, attacked and killed the three other persons, and then attacked himself, with the view of killing him also; whereupon he killed her in his own defence—a story improbable in itself, and inconsistent with the facts in evidence. In support of this defence, a medical witness deposed, on cross-examination, that a person might labour under insanity so as to be excused from responsibility, although his reasoning powers were not in the least affected. This is reproducing a question respecting which a contest has long been going on between the law of the land and a portion of the medical profession. From the earliest time the law of this country—and we believe that of every other also—has held that insanity consists in the presence of *delusion* in the mind, which prevents the unhappy object of it seeing and understanding things as they really are; and if, under the influence of such delusion, he does an act which in a man of sound mind would be criminal, he stands excused from responsibility, on grounds alike of humanity and policy. But since the great development of the valuable sience of medical jurisprudence in modern times, many medical jurists, and some very eminent persons who have devoted themselves to the study of mental disease and the treatment of the insane, profess to have discovered that there is a species of insanity where no delusion of any kind exists, but the moral character of the patient is revolutionised, and he his hurried to the commission of crimes, of the guilt of which he is perfectly aware, by what they call "irresistible impulse." To this form some of them have given the name of "moral insanity," and some have even subdivided it into species—as the mania to commit homicide, arson, theft, &c. The law has, however, always sternly refused to acknowledge the existence of this species of insanity; although there is every reason to believe, that in certain cases, owing to the weakness of judges and jurymen, defences founded on it have been allowed to prevail to the defeat of justice. For our own part we have no belief in its existence; but at least we may safely venture to affirm that it is *not proved;* and it is needless to observe, that the onus of proving the existence of so singular a phenomenon lies on those who assert it.

This is not, as is often hastily assumed, a peculiarly medical question—it is a metaphysical or psychological one, on which legislators and tribunals are as well, if not better, capable of judging than physicians. Is man a responsible agent at all? This is clearly a metaphysical question; and so must be the branch of it. Is man a responsible agent so long as he retains his reason? Add to which, the common sense of men in every age has indorsed the judgment of their laws, that so long as reason is on her throne responsibility exists. If, indeed, the whole medical profession had in all times held a contrary opinion, it would be a matter deserving of grave attention, although even this could hardly be allowed to outweigh the established opinion and practice of the human race. But the theory of which we are speaking is not held by medical men in general—it is a theory started in modern times, and confined to a particular school. We should strongly advise every person anxious of studying the subject to read attentively the cases on which the dogma is founded; most of them will be found collected in Beck. Med. Juris. 436, 477, 7th ed., and Tayl. Med. Juris. 791 et seq.; see also p. 787, 3rd ed.; and we venture to say they fall far short of establishing it. In many of them the aberration of reason is plain enough; and in the rest, although there is ample evidence of preternatural impulse to crime, we find no ground for the hypothesis of irresistible impulse. Indeed, the whole doctrine seems based on the fallacy of confounding *preternatural* (we do not say *supernatural*) with *irresistable* impulse. A man may feel a sudden preternatural impulse to crime, but it is his bounden duty to resist that impulse; and when this kind of defence was once urged to a certain learned judge, he sarcastically said, "Laws were made to compel men to resist these irresistible impulses." If a man feels, what many persons have been known to feel, an impulse to throw himself down when standing on the brink of a precipice, it is his duty to conquer that feeling if possible; and if not, to take the remedy which common sense dictates—not to go near precipices: and if a man feels an impulse to commit a crime, it is his duty to conquer that feeling; and if he cannot, or thinks he cannot, then to avoid all occasions which might lead him into the temptation.

When we recollect how often the defence of insanity is resorted to with success—sometimes when it is well founded, but very frequently when it is not—it becomes of importance to consider the legal consequences of such a defence. Until the 39 & 40 Geo. III., c. 94, the prisoner was acquited simpliciter, and let loose upon society to repeat, if so inclined, the mischief he had already done. By that statute, when a person is acquited on the ground of insanity, the Court is directed to detain him until the pleasure of the Sovereign is known; and, according to the practice, he was placed in some lunatic asylum, where such lunatics are kept apart from others. But by the statute just passed, 23 & 24 Vict., c. 75, the Crown is empowered to appoint asylums for criminal lunatics, and the Secretary of State may direct criminal lunatics to be confined in them, (sects. 1 and 2); he may also (sect. 4) appoint any *persons*, not less than three in number, to be a council of supervision for any asylum under that act, and also appoint a resident medical superintendent, &c. The 7th section contains the following proviso:—"Provided always, that any order for removal or discharge, which may now be made by the Secretary of State on the certificate of two physicians or surgeons, may be made on the certificate of the resident medical superintendent of the asylum and any two of the council of supervision." The 9th section then enacts, "that it shall be lawful for the Secretary of State, by his warrant, to permit any person confined in the asylum to be absent from such asylum upon trial for such period as he may think fit, or to permit any such person to be absent from such asylum upon such conditions in all respects as to the Secretary of State shall seem fit; and in case any person so permitted to be absent upon trial for any period do not return at the expiration of such period, or in case any of the conditions on which any person is so permited to be absent be broken, the person not returning at such expiration, or absent after any such conditions have been broken,

as the case may be, may be retaken as herein provided, as in the case of an escape." Whether the large discretion left to the Executive by this statute, and the facilities which it affords for getting rid of confinement in the asylums which it has created, are consistent with the safety of society against the acts of real or pretended lunatics, especially if moral insanity is to be recognised as a defence to a criminal charge, is a question on which our readers may judge for themselves, but which time alone can effectually determine.

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "The Editors of the Law Journal, Toronto."

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—I desire to inform your readers of the extent of my experience in the law of Replevin in the Division Courts. Having had one suit, I give you the result. The plaintiff placed two affidavits in my hands (marked No. 1 and No. 2), which I enclose. These had been prepared by a legal adviser, and, on the strength of the 6th clause of number one and the 2nd section of the act, I issued a writ of replevin. I did this, as from the distance to the place of residence of the Judge, and having only a tri-weekly mail, a delay of nearly a week would occur in waiting his order. However, I sent him both affidavits by first mail, and informed him what I had done. Meantime, the plaintiff seemed to relent, and withdrew his action, so that I have nothing further to report in the case. Subsequently, the Judge sent me the draft of a bond, which I enclose, marked No. 3, for publication, if you should deem it desirable.

Your Correspondent, in the September number, seems to think the occurrences of the Clerks being required to issue writs of replevin without a Judge's order will be very rare, but I incline to the opinion that these cases will be more frequent than the opposite. In withdrawing suit the plaintiff demanded the affidavits, but I declined giving them up in the meantime, being of opinion that as a suit had been entered and a writ issued, the affidavits properly belonged to the Court. Is this view correct?

Yours,

Oct. 22, 1860. A CLERK.

[Papers, after being filed by the Clerk, should not be given up or allowed out of his possession without an order of the Judge.—EDS. L. J.]

No. 1.

COUNTY OF ——, } In the —— Division Court, County of
To Wit. } ——.

I, J. S —— of the Township of —— in the County of ——, farmer, make oath and say:

(1) That I am the lawful owner of a certain heifer, now in the possession of one H —— K ——, of the Township of —— farmer and shoemaker.

(2) That the said heifer was wrongfully taken out of my possession about six weeks ago.

(3) That the said heifer is of the value of ten dollars, or thereabouts.

(4) That the said heifer is coming two years of age, is red on the sides, white on the back and belly, mixed grey about the head, mixed white and red up each side of the hip, white hind legs from the hocks downwards, and of a common breed.

(5) That I am advised and believe that I am entitled to an order for a writ of replevin to replevy the said heifer to me.

(6) That I believe there is good reason to apprehend that unless the said writ of replevin is issued without waiting for an order, the delay will materially prejudice my just rights in respect of the said heifer.

(Signed) J. L——.

Sworn, &c.

No. 2.

In the Division Court of the County of ——.

COUNTY OF ——, } I, J. S ——, of the Township of ——,
To Wit: } in the County of ——, farmer, make oath and say:

(1) That I am the lawful owner of a certain heifer, which appeared to have strayed away or been taken from my possession about six weeks ago.

(2) That on making search for the said heifer, I found that she had been unlawfully taken out of my possession by one H —— K ——, farmer and shoemaker, of the said township of ——, within two calendar months from the date hereof.

(3) That the said heifer is wrongfully detained in his possession by the said H —— K ——, who positively refuses to return her to me.

(4) That the said heifer is of the value of ten dollars, or thereabouts.

(5) That the said heifer is coming two years of age, &c. &c.

(Signed) J. S.

Sworn, &c.

No. 3.

Know all men by these Presents, that we, A. B., of &c., W. B., of &c., and J. S., of &c., are jointly and severally held and bound to W. P., of, &c., Bailiff of the —— Division Court, in the County of ——, in the sum of —— of lawful money, to be paid to the said Bailiff, or his certain Attorney, Executors, Administrators or Assigns, for which payment to be well and truly made we bind ourselves, and each and every of us in the whole one and each, and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals. Dated this —— day of —— A. D. 186—.

The Condition of this Obligation is such, that if the above bounden A. B. do prosecute his suit with effect, and without delay against C. D. for the taking and unjustly detaining (or unjustly detaining, as the case may be) of his cattle, goods and chattels, to wit: (here set forth the property distrained, taken or detained) and do make a return of the said property, if a return thereof shall be adjudged, and also do pay such damages as the said C. D. shall sustain by the issuing of the writ of replevin, if the said A. B. fails to recover judgment in the suit; and further, do observe, keep and perform, all rules and orders made by the Court in the suit; then this obligation shall be void, or else remain in full force and effect.

Signed, sealed and delivered,	A. B.	[L.S.]
in presence of	W. G.	[L.S.]
(1 or 2 Witnesses).	J. S.	[L.S.]

To the Editors of the Law Journal.

Dunnville, Sept. 17th, 1860.

GENTLEMEN,—I wish to ascertain your opinion on the following questions:—

1st. Has not the Clerk authority to sell perishable articles seized on an attachment, whether requested by plaintiff or not? See last part of 213th section of Division Court Act authorizing this officer to sell at his discretion.

2nd. If the Clerk cannot sell unless requested by the plaintiff, is it compulsory upon him to take a bond before doing so, or may he not sell without this bond at his discretion?

3rd. If Clerk is bound to have plaintiffs request, or to take bond before selling, is it obligatory upon him to provide horse, cattle, &c., under seizure, with provender at his own expense,

so long as the same remain in his possession under the warrant? If so, this is an outlay which in many cases the Clerk would probably never have repaid him.

4th. Would it not be well that the 214 section of the present Division Court Act, ch. 19, be amended to the effect that the Clerk should not be obliged to "receive" the perishable property, &c., unless bonds were first given either to the Bailiff *on seizure*, or to the Clerk afterwards?

JOHN ARMOUR,
Clerk of Division Court.

[1st. This is rather a doubtful point, but we incline to think that the request of the plaintiff is necessary. The portion of the section which says that the Clerk may sell at his discretion, taken in connexion with what has gone before, would seem to mean that the Clerk may use his discretion in selling or not, but the correct reading of the section is, we think, that the Clerk may, "*at his discretion*," sell the articles on a shorter notice than eight days—that is if the articles are perishable and will not admit of being kept until the expiration of the usual notice of eight days, they may be sold on such shorter notice as the Clerk in his discretion may consider advisable to be given. The length of time to be, of course, regulated by the exigency of each particular case.

2nd. The statute expressly provides that the Bailiff need not seize, or the Clerk take charge of the property for which a writ of attachment has issued, unless a satisfactory bond is given by the attaching creditor. If either of these officers neglect to obtain this bond or to see that it is given, we apprehend it will be at his own risk. The bailiff who seizes should, in the first instance, where the goods are perishable, demand and obtain a bond from the plaintiff, but if he neglects to do so, the Clerk might, we think, certainly refuse to receive them until this proper precaution is adopted for the safety of both.

3rd. The Clerk is allowed "all necessary disbursements" for keeping the property, which, of course, he would deduct from the proceeds of the sale, if the plaintiff succeeded in in making good his claim, or be secured him by plaintiff's bond if he failed.

4th. We agree with our correspondent so far as in thinking that it would be well to have the question settled beyond a doubt by legislative enactment.—EDS. L. J.]

(*See letter of "B.," under "General Correspondence," placed there by mistake.*)

U. C. REPORTS.

QUEEN'S BENCH.

TRINITY TERM, 1860.

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*

HENDERSON V. DICKSON.

Consolidated Statutes U. C., cap. 24, sec. 41—Examination of judgment debtor—Member of Legislative Council—Privilege.

Held, that a member of the Legislative Council of this Province, is not privileged from attending to be examined as to his property, &c., and that in the event of non attendance where he is, under the act, committed for a period of time, he is not entitled to be discharged from custody.

Contra, where the order for committal besides directing imprisonment for a specified term, orders that defendant, upon payment of the judgment debt within the period specified for committal, shall be released from custody.

Mr. Harman obtained in this term a rule on the plaintiff's attorney to shew cause why an order granted in Chambers by Mr. Justice Richards, ordering the defendant to be committed to the close custody of the sheriff of the County of Lincoln, for one week, for not submitting to be examined pursuant to the Judge's order and appointment, made in this cause and served on the defendant, and that such sheriff do arrest and detain the defendant for such period, be rescinded on the ground of the defendant's privilege as a member of the Legislative Council.

On 9th May, 1860, a Judge's order was made in this action, depending in this Court for the examination of the defendant before the Judge of the County Court of the County of Lincoln, upon which an appointment was made by the Judge of the County Court to attend before him on the 25th May, in Niagara.

The defendant being duly notified of this order and appointment declined attending, stating that he was advised by counsel that he need not do so.

The defendant on shewing cause against the rule *nisi*, put in Letters Patent dated 8th February, 1855, summoning him to the Legislative Council of Canada, and an affidavit of the defendant was filed in answer to the rule, in which it was stated that he has been a member of the Legislative Council since 8th February, 1855, on which day he was appointed by patent.

That he has always since acted and still acts as a member of the Legislative Council, that the Provincial Parliament was prorogued on 19th May, 1860.

That he did not intend to treat the order of this Court with contempt, and informed the Judge of the County Court that he declined attending on the ground that he was a member of the Legislative Council, and that he acted as he was advised by his counsel.

Mr. Burns showed cause.

ROBINSON, C. J.—After the many instances in which the Courts in this country have recognised the right of members of the Provincial Parliament to claim privilege from arrest for debt, most of which were referred to in *The Queen* v. *Gamble and Boulton*, 9 U. C. Q. B. 545, we shall assume the right to exist. There were indeed some earlier instances of a judicial recognition of the privilege; these are cited in the report of that case.

But admitting the privilege and that the defendant in this cause was entitled to it as a member of the Legislative Council, which was at the time in actual session, it only follows that if the defendant had been arrested and committed to custody in violation of that privilege, he could apply for a writ of *habeas corpus* and obtain his discharge. The order granted for his examination was an ordinary step in the practice of the Court according to the Common Law Procedure Act and was properly made, for the Judge may have had no judicial knowledge of the fact of the defendant being a member of the Legislative Council and if he had, it would have been no reason against the making the order for examination since he could not know that it would be complied with, in which case no question about privilege would arise. But the order to attend and be examined not having been complied with, a Judge's order has been made on the fact being shewn, that the defendant be committed to close custody for a week for not having submitted to the order.

And we are asked to rescind that order as having been illegally made in disregard of the defendant's privilege. The order for commitment made in such cases under the 41st section of ch. 24 of the Consolidated Statutes of Upper Canada, is such an order as has been determined in England to be in effect a qualified limited execution against the debtor, rather than a commitment for contempt of Court in not obeying the order. In Dakin's case 16 C. B. 77, that point was settled by the Court of Common Pleas in England after full discussion.

It was then held in consequence that in a case like the present, where a defendant was imprisoned for a certain time by order of a judge of the County Court for disobeying an order of that Court to attend and be examined as a judgment debtor—he was entitled to his discharge being a person privileged from arrest for debt, and the Court therefore discharged him upon a writ *habeas corpus*, as they would have done if he had been in custody on a *Ca. Sa.* in the same suit. We have therefore only to consider whether there is ground for any difference between the laws which regulate imprisonment for debt in England, and our laws which should lead to a different conclusion—and that depends, I think on the question whether if the defendant being committed under the order was to pay the debt and costs in full within the week, he would be entitled to his discharge. If he would, then upon the principles which governed the Court in Dakin's case, this order should be considered as nothing more than a writ of execution, a process for coercion of the defendant to pay the debt and not a commitment by way of punishment for a contempt of the court which made the order, that is of this court.

And the question would then be whether the Court should abstain from interfering till the party has been arrested, and then

order his discharge, or whether they should rescind the order, on the ground that it was illegal to direct a defendant to be imprisoned in execution for debt (regarding the order in that light on the authority of Dakin's case) who was entitled to privilege from such arrest.

In general, I think the course has been not to move against the *Ca. Sa.* when privilege is claimed, but to apply for discharge of the party from custody, limiting the application to that as if the *Ca. Sa.* were not irregular, but only the arrest under it. In the case for instance of *Winter* v. *Dibdin*, 18 M. & W. 25, that was the course—but in *Cassidy* v. *Stewart*, (a member of the House of Commons) 9 Dowl. P. C. 366, the Court after discussing upon the particular point which I am now considering set aside the *Ca. Sa.* "There was no doubt (they said) that the arrest of a member of Parliament during the period of privilege is illegal, and that the question is whether if the arrest is illegal it is lawful for the plaintiff in a suit to sue out process directing the sheriff to take the person of a member of Parliament in execution."

It appeared to them (they said) that the thing ordered to be done being illegal, the order to do the act must itself also be illegal, and that the defendant should not be put in the situation of having an order issued against him, which if the sheriff executes, must put him to the trouble and expense of obtaining redress against that which is an illegal fact.

I feel that our way is clear in disposing of this application when we have determined the point whether in these courts as in England a defendant committed under such an order as is now moved against, would be entitled to his discharge from custody on satisfying the execution at any time, although the period had not expired for which the order directed him to be imprisoned, and whether we have any enactment which secures to the debtor his discharge upon payment of debt and costs, as is provided by the Imperial Act 9 & 10 Vic. ch. 95 section 110. I can find none applicable to the Superior Courts, though in regard to the Division Court there is such a provision, as will be found by reading in succession the 165th and 169th sections of the Division Courts Act, ch. 19 of Consolidated Statutes of Upper Canada.

Then the question is whether in the absence of any similar provision in respect to defendants committed in the Superior Courts for refusing to attend to be examined in obedience to an order, a defendant *who* shall be committed on account of so refusing can be treated as being in execution within the authority of the English decisions which have been cited. I apprehend he cannot be so considered.

If in this case the order for commitment had happened to be so framed (as it sometimes is) by sanction of the Judge who grants it, as to entitle the party to be discharged at once upon the payment of debt and costs in full, then I should be at liberty to take a different view, but in this case the order for commitment contains no such direction but simply orders that the defendant shall be committed to close custody for a week for not submitting to be examined pursuant to the judge's order and appointment, &c., and that the sheriff shall arrest and keep and detain the defendant for such period aforesaid.

Then taking our statute ch. 24, sec. 41, (Con. Statutes, U. C.) and this order that has been made under it, I do not feel warranted in holding that the defendant if committed under that order could be regarded as being committed in execution, or as being *quasi* in execution, for if he should pay the debt and cost in full immediately on his commitment for a week under the order, I cannot say that he would be entitled to be discharged before the week had expired; and on the other hand if he should have paid no part of the debt when the time had expired, he would nevertheless be entitled to be discharged, so far as that order was concerned.

I have come reluctantly to the conclusion that under such circumstances this order can be looked upon as nothing else but a commitment for contempt of the order and that the defendant could be legally committed and detained under it for the period mentioned in it, notwithstanding the privilege against being committed in execution which I take to be a different matter.

I think therefore that this rule must be discharged with costs.

COMMON PLEAS.

Reported by E. C. Jones, Esq., *Barrister-at-Law.*

Bradbury v. Wasley.

Bankrupt—Sale of lands under a commission from a Lower Canada Court—Ejectment.

Where a bankrupt whose property had been sold under a commission of the court in Montreal, commenced proceedings in ejectment to recover possession of the same land without having first taken steps to supersede the commission and duly prosecuted the same,
Held, that he was barred by the statutes 7 Vic., ch. 10, and 9 Vic., ch. 30.

This was an action of ejectment brought by the plaintiff against the defendant to recover possession of lot No. 22, in the 3rd concession of the township of Scott, in the county of Ontario, to the possession whereof the plaintiff claimed to be entitled, and by the consent of the parties and by the order of McLean, J., according to the Common Law Procedure Act, 1856, the following case was stated for the opinion of the court:

It was admitted for the purposes of the action that William Bradbury, the plaintiff, was, on the 30th May, 1848, seized in fee of the land in question in this cause. That on the 31st of May, 1848, a commission in bankruptcy issued out of the court of bankruptcy in and for the district of Montreal, against the said William Bradbury. That under such commission a final order and decree were issued under which lands in Upper Canada, and amongst others, the lands in question, were sold, and that the defendant was a purchaser at such sale, and now holds the said land in question under and by virtue of a deed from the assignees under the said commission.

The plaintiff contended that the court of bankruptcy in Lower Canada had no jurisdiction over the lands in Upper Canada, and could not sell them nor give title to them.

The defendant contended that sales of land in Upper Canada under a decree of bankruptcy issued out of a court in Lower Canada was valid, and that therefore his title to the land in question was good.

McMichael for the plaintiff, cited 7 Vic., ch. 10, secs. 7, 25, 30, 31.

Eccles, Q. C., contra., referred to 4, 24, 32, 36, 34, 51, 72 and 78 secs. of 7 Vic., ch. 10.

Hagarty, J.—The first section of the Bankruptcy Act, 7 Vic. ch. 10, declares it expedient to provide, by a general law of the province, for the discovering and securing of the estates and effects of bankrupts for the benefit of their creditors, and for the administration and distribution thereof, &c. Section two declares it to be an act of bankruptcy for any trader to make within this province any fraudulent grant or conveyance of his lands, &c. Provision is made for the issuing of commissions of bankruptcy by the judge or commissioner for the district in which the bankrupt resides; and sec. 30 directs the judge or commissioner to execute the instrument declaring the appointment of assignees, which instrument is to be received in all courts of this province in evidence. Section 31 enacts that such instrument shall vest in the assignees all the property of the bankrupt, both real and personal, which he could in any way have lawfully sold, assigned, or conveyed, or which might have been taken in execution against him at the date of the commission, &c., with power to the assignees to redeem all mortgages, &c., upon any goods or estate of the bankrupt, or to sell the same subject to such mortgage, &c. The bankrupt is directed to make and execute all deeds and writings, &c., as the assignees shall at any time reasonably require, and which may be necessary for enabling them to demand, recover, and receive all his estate and effects *which lie in or out of this province*, and the assignees shall have the like remedy to recover all the said estate, debts, and effects in their own name, as the bankrupt might have had if no commission had issued. Section thirty-three declares that whenever the assignees shall deem it expedient to sell any real estate of the bankrupt, the judge or commissioner shall name a day and direct certain advertisements. Section thirty-four declares that every deed or conveyance executed by the assignees according to the usual form of law, shall have the like effect as to incumbrances, &c., as if the sale had been made by a sheriff under a writ against lands issuing out of any court of common law in the

province. Section fifty-seven directs that the several judges and commissioners authorised to issue commissions and to act in the prosecution thereof shall be auxiliary to each other for proof of debts or for examination of witnesses on oath. Section fifty-eight declares that nothing in the act contained shall prevent a commissioner from having jurisdiction beyond his district over a partner of a bankrupt firm resident beyond the district, as far as relates to the interest or share of such partner in such firm, if he be included in the commission. And lastly, section eighty-five directs the act to be construed in the most beneficial manner for promoting the ends thereby intended. This act is amended by 9 Vic., ch. 80, but section twenty-five declares that no title "to any real or personal estate sold or to be sold, under any commission or under any order in bankruptcy shall be impeached by the bankrupt or any person claiming under him in respect of any defect in the suing out of the commission, or in any of the proceedings under the same; and no such title after this act shall come into operation shall be so impeached for any other cause unless the bankrupt, &c., shall have commenced proceedings to supersede the said commission, and duly prosecuted the same within twelve calendar months from the issuing thereof." 12 Vic., ch. 18, continues this act for certain purposes.

The only question submitted to us is, whether the bankrupt, the present plaintiff, can recover in ejectment land sold by his assignees to the defendant under final order and decree of the court of bankruptcy for the district of Montreal; the plaintiff contending that the Lower Canada court has no jurisdiction over and could not sell lands in Upper Canada. The case does not allege any proceeding taken by the bankrupt to supersede the commission. Independently of this or any question raised by the twenty-fifth section of 9 Vic., ch. 80, in this grave point, I am of opinion that the plaintiff cannot recover, and that in the case stated the vendee of the assignees can hold against him, and that the Montreal court of bankruptcy had authority to sell lands in any part of the province of Canada.

To affirm the proposition asserted by the plaintiff would, in my judgment, be wholly opposed to the wording and subversive of the object of the statute, which professes to be of general application to the province, which provides local machinery to work the law according to the place of residence of the bankrupt, but which expressly provides for the seizure, realization and distribution of all his estate, and vests the same expressly in his assignees immediately on the execution of their appointment as such.

I may add that if it were necessary to decide the case on the question of the bankrupt being concluded from questioning any proceedings under the commission, unless by proceedings to supersede taken within a given time, my inclination would be strongly against the right to recover in this case on the facts laid before us.

Judgment for defendant.

BACON v. LANGTON.

Replevin—Action on sheriff's bond—In whose name suit may be brought.

Held, that the assignee of a sheriff's replevin bond may maintain an action thereon in his own name.

Declaration on a replevin bond for certain goods and chattels, to wit, an engine, boiler and one carriage for the same, and one smoke-pipe attached the said boiler, the defendant Thomas Langton, claiming possession of the said goods and chattels, made his plaint to Frederick William Jarvis, Esquire, sheriff of the United Counties of York and Peel, of the taking and unjustly detaining of the said goods and chattels of the said Thomas Langton by the said John Bacon, and then prayed the said sheriff that the said goods and chattels might be forthwith replevied by the said sheriff and delivered to the said Thomas Langton, and thereupon the said Frederick William Jarvis, so being sheriff of the said united counties according to the statute in such case made and provided, did take from the said Thomas Langton and from the said defendants Mark Hutchinson and Jeremiah Carty, as two responsible sureties, a bond in treble the value of the said goods and chattels, (the value of the said goods and chattels having been on that occasion first ascertained by the affidavit on behalf of the claimant duly sworn and filed according to the statute in such case made and provided,) and the said defendants, on the 9th of April, 1851, by their certain writing obligatory sealed with their respective seals, the date whereof is the day and year last aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the said sheriff in the sum of one hundred and fifty pounds of lawful money of Canada, to be paid to the said sheriff or his certain attorney, executors, administrators or assigns, with a condition thereunder written that if the said Thomas Langton should prosecute his suit with effect and without delay against the said John Bacon for the taking and unjustly detaining his goods and chattels and personal property, to wit, goods and chattels hereinbefore mentioned, and should make a return thereof, if a return should be adjudged, that then the said obligation should be void and of non-effect, otherwise to remain in full force and effect, and after alleging a breach set out an assignment to the plaintiff.

The defendants demurred, assigning as matter of law to be argued on the said demurrer, that the said action being brought on a bond given under the provision of the statute 14 & 15 Vic., ch. 64, was not maintainable in the name of the plaintiff, and the plaintiff has no right of action thereon, as the said bond was merely a chose in action not assignable so as to give to the assignee a right of action in his own name. And it appears from the said declaration that the plaintiff in this action did not avow or make cognizance in the replevin suit, and could not therefore acquire a right to sue in his own name.

M. C. Cameron supported the demurrer, citing *Phillips* v. *Price*, 3 M. & S. 183; *Dean* v. *Freeman*, 5 T. R. 195; 14 & 15 Vic., ch. 54.

Anderson contra, cited *Short* v. *Hubbard*, 2 Bing 349.

DRAPER, C. J.—The case of *Dean* v. *Freeman*, (5 T. R. 195,) as commented on in *Phillips* v. *Price*, in 3 M. & S. 183, shews that it is not necessary for the assignee of the sheriff who sues on a replevin bond to show that he is either avowant or cognizor, but at the same time it may be conceded that both those cases were decided upon a replevy of goods distrained upon. The Upper Canada statute 4 W. IV., ch. 7, was intended, I apprehend, to apply to similar cases, and it is conceded that a bond taken under that act would be assignable, but the defendant contends that the bond taken under the act 14 & 15 Vic. ch. 64, cannot be assigned, because the statute does not in express terms say so. Except by implication the sheriff cannot take a bond under this latter act. The legislature assume, that in extending the remedy of replevin to other cases than those of distress, the essential parts of the remedy continue, of which the giving a bond by the party claiming to replevy was certainly one, as a protection to the party out of whose hands property of more or less value was to be taken. Therefore, in the fourth section it is said, the condition of the bond to be taken by the sheriff "and *prescribed* by the act" 4 W. IV. ch. 7, may be altered so as to correspond with the writ to be issued under the new act, and the bond shall be taken for treble the value sworn to of the property replevied. This, I think, clearly shews that it was considered the enactment of the 4 W. IV., as to making a bond with condition was recognised as continuing and applicable to replevin under the new act; and I can see no reason for holding that the legislature did not equally mean that the right to have an assignment of the bond should equally extend to a bond conditioned according to the last as well as the first act, the authority for requiring a bond at all being in either case referable to the first act only. Besides, it may be said that the 8th section of the Consolidated Statutes of Upper Canada, ch. 1, enacts that these statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as *declaratory of the law* as contained in the previously existing acts, and the 8th section of 29 of these Consolidated Statutes enacts that the bond in every action of replevin shall be assignable. I see nothing to indicate that this is a new law, in effect different from those which preceded. I regard it as a legislative interpretation to which I entirely subscribe. I should have arrived at the same conclusion without its aid; with it there is no room for doubt or hesitation.

Judgment for plaintiff.

The Bank of Montreal v. Armour.

Bill of exchange—Payment of drawer after action—How for satisfaction as to acceptor.

Held, that the payment of a bill by the drawer after action brought does not operate as a consequence of law as a satisfaction and discharge in an action by the indorsee against the acceptor.

Declaration.—For that certain persons by, under, and using the name, style and firm of Strong and Matheson, on the 19th of February, 1859, by their bill of exchange now over due, directed to the defendant, required the defendant to pay to the order of the said Strong and Matheson the sum of $400 three months after the date thereof; and the defendant accepted the same, and the said Strong and Matheson endorsed the same to one W. M. Matheson, who endorsed the same to the plaintiffs, but the defendant did not pay the same or any part thereof, and the plaintiffs claim $600.

For a defence arising after this action was commenced the defendant says the said Strong and Matheson, after this action was commenced, satisfied and discharged the plaintiffs' claim by payment.

To which plaintiffs demurred, assigning as grounds of demurrer, that the satisfaction therein set forth was not averred to have been made at the request or for or on behalf of the defendant, or for or in respect of his liability on said bill. That no legal privity is shewn in said plea between the said Strong and Matheson and the defendant, therefore the satisfaction did not enure to the benefit of the defendant. That the satisfaction was made by the parties who were under a personal liability upon a bill declared on. That the plea imports that the satisfaction made by them referred and was limited to their own personal liability, and it is not stated in said plea to have extended beyond, and that the satisfaction to the endorsee of a bill made by a drawer or endorser does not, as a legal consequence, enure as a satisfaction of the bill quoad the acceptor.

Crombie for the demurrer, cited *Goodwin* v. *Creamer*, 18 Q. B. 757; *Jones* v. *Broadhurst*, 9 Com. B. 173; *Ex parte Taylor*, 8 Jur. N. S. 753; *Randall* v. *Moon*, 21 L. C. C. P. 226.

J. H. Cameron, Q. C., contra.

Draper, C. J.—The cases cited for plaintiff were *Jones* v. *Broadhurst*, 9 C. B. 173, and *Randall* v. *Moon*, 12 C. B. 261. Both these cases were decided before the English Common Law Procedure Act of 1852, and the rules of pleading founded thereupon. The case of *Williams* v *James* (15 Q. B. 498), and *Goodwin* v. *Creamer* (18 Q. B. 757), which also bear on the question, were likewise decided before that act came into force.

The broad ground on which the first of these decisions rests is, that there is no principle upon which, as a consequence in law, the satisfaction of a bill as between the endorsee and the drawer should operate as a satisfaction and discharge in an action by the endorsee against the acceptor. In that case the defence arose before the commencement of the action.

In *Randall* v. *Moon* the acceptor pleaded payment by the drawer after the commencement of the action, and that the plaintiff was not suing as a trustee for the drawer. The plaintiff replied traversing the allegation that the payment was in satisfaction of the causes of action in the declaration mentioned.

On the trial it appeared that the defendant accepted for the drawer's accommodation; that actions had been brought against both drawer and acceptor; that the drawer had obtained a judge's order to stay proceedings in the action against him, and had paid the plaintiff the full amount of the bill, &c. The plaintiff had a verdict for the full amount, and the court refused a rule of *nisi* to enter a verdict for the defendant, or to reduce the damages, holding as to the first point, that payment by the drawer (the holder having no notice that defendant accepted for his accommodation) was not to be considered a payment by the acceptor, because a right of action for damages had rested at the time of payment.

In *Williams* v. *James*, payment before action by the drawer was pleaded by the acceptor in full satisfaction, &c., and was traversed by the replication. Payment by the drawer was proved, but it also appeared that subsequently to such payment the defendant had written letters to the plaintiff promising payment. Lord Campbell, in giving judgment said, "*Primâ facie* a payment by the drawer is for the benefit of the acceptor, but the drawer has his remedy against the acceptor, and may take the bill from the endorsee and sue upon it in his own name, or may employ endorsee to do so." The judgment of the court was, however, for plaintiff, on the ground that the defendant's letters shewed an understanding that the bill was not extinguished, but the drawer's remedy was preserved.

In *Goodwin* v. *Creamer* the acceptor pleaded that after action brought the last indorser paid the plaintiff the full amount of the bill and interest in full satisfaction, &c., of all moneys payable in respect thereof. During the argument *Lord Campbell* again said that *primâ facie* the party who has received the money in satisfaction of the bill cannot afterwards sue the acceptor. The court, however, held the plea bad on the ground that damages might be recoverable beyond the amount of the bill, and that a holder had a right to continue his action against the acceptor until the costs were paid.

In *Ex parte* Taylor *in re.* Houghton, 8 Jur. N. S. 753-4, Sir *J. L. Knight Bruce*, L. J, questioned the accuracy of the position that at law the holder of a bill of exchange could recover the full amount from the acceptor, notwithstanding previous payments by the drawer or other parties, but this was merely throwing out a doubt. *Turner*, L. J., abstained from expressing any opinion on the rule at law, and it was decided against the holders right to prove for the whole against the estate of the bankrupt acceptor. Leave was offered to carry the case to the House of Lords, but I have not found any further trace of it.

The 117 sec. of our Common Law Proceedure Act, 1856, and the rules of pleading framed under the authority of that statute, both copied from the English act and rules, appear to me to do away with any technical ground, such as the right to costs, on which any of the preceding cases may have been partially rested. I do not perceive that our statute 1 W. IV., ch. 5, relative to costs of several actions against the different parties to a bill or note, can aid in disposing of this demurrer. We are called upon as appears to me to decide whether, in an action by the endorsee against the acceptor of a bill not appearing to have been accepted for the accommodation of the drawer, a plea that the drawer has paid the bill, is good in bar.

Upon the best consideration I have been able to give, I think it is not, without its further being shewn that such payment was made on the acceptor's account, and that he adopted it at the time of payment or subsequently.

In *Jones* v. *Broadhurst*, the court left undecided the question whether an unauthorised payment by and acceptance in satisfaction from a stranger is a good plea in bar. But in *Simpson* v. *Eggington* (10 Exch. 845) the court considered that the law was fully established by the cases of *Belshaw* v. *Bush* (11 C. B. 191) and *James* v. *Isaacs* (12 C. B. 791). The former deciding that a payment by a stranger considered to be for the defendant, and on his account, and subsequently ratified by him is a good payment, and the latter, that a plea of satisfaction from a stranger without the authority prior or subsequent of the defendant was bad.

In the present case the payment by the drawer to the holder was no satisfaction as between the acceptor and the drawer, who, though obliged to pay the holder, had his remedy over against the acceptor. The bill is not extinguished. The money paid to the holder by the drawer still leaves the acceptor liable on the bill, while the acceptor, by paying it to the holder and taking it up, extinguishes all right and claim upon it. If the drawer has already paid the holder, the money to be recovered in this action will be money had and received to his (the drawer's) use, and he can have no future recourse against the acceptor. While, if the plaintiffs confessed this plea, they would be entitled to recover their costs to the time of pleading it from the defendant, and might either sue again on behalf of the drawer, or by handing the bill to him, enable him to recover the amount of it from defendant.

Judgment for the plaintiff on demarrer.

CHAMBERS.

(*Reported by* CHRISTOPHER ROBINSON, ESQ., *Barrister-at-Law.*)

HENDERSON V. MOODIE.

False return—Declaration—Striking out count—Variance between copies filed and served.

Where plaintiff in a declaration for a false return inserted three counts, the second alleging as a breach of duty on the part of defendant, neglect to levy, *&c.*, and the third alleging as a breach that although defendant did levy he falsely returned no goods; the third count was upon the application of defendant struck out as being substantially the same as the second—the real grievance being the false return no matter which way stated.

Semble, when the evidence is given in such a case an amendment would be allowed without difficulty in accordance with the facts found.

Held, also on an application to set aside a declaration on the ground of variance between the copy served and copy filed that a mere verbal error by the omission of words which leave the sense and substance unaltered, is not a ground for setting aside the declaration or copy served.

Semble however that "being in a hurry" is no excuse for a variance between the copy of pleading filed and that served.

(31 March, 1860.)

This was an action brought by the plaintiff against the defendant as sheriff of the county of Hastings, for a false return.

The declaration contained three counts.

First count.—For that the plaintiff heretofore, to wit, on, &c., in the Court of Queen's Bench, at Toronto, by the consideration and judgment of the same Court, recovered against one Michael Manion a certain debt of forty-five pounds fifteen shillings and six pence, and also ten pounds eight shillings and eleven pence costs, which in and by the same court were adjudged to the plaintiff, and with his assent, for his damages, which he had sustained as well by the occasion of the detaining of the said debt as for his costs and charges by him about his suit in that behalf expended, whereof the said Michael Manion was convicted, as by the record and proceedings thereof still remaining in the same court of our said Lady the Queen at Toronto aforesaid, will more fully appear. And that the said judgment being in full force, and the debt and costs remaining unpaid and unsatisfied, the plaintiff, on, &c., for the obtaining of satisfaction thereof, sued and prosecuted out of the said court aforesaid a certain writ of our Lady the Queen called a *fieri facias*, directed to the sheriff of the county of Hastings, by which said writ the said sheriff was commanded that of the goods and chattels of the said Michael Manion in the said sheriff's bailiwick he should cause to be levied the damages aforesaid, and that he should have that money before the said justices of the said court at Toronto immediately after the execution thereof, to render to the plaintiff for his damages and costs aforesaid; and that the said sheriff should have then there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff as hereafter mentioned, to wit, on, &c., was duly endorsed with a direction for the said sheriff to levy the sum of forty-five pounds fifteen shillings and six pence debt, and ten pounds eight shillings and eleven pence costs, with interest on the same from the 19th day of November, 1858, ten shillings for certificate of judgment, seventeen shillings and six pence for *fi. fa.*, besides sheriff's fees, poundages, and incidental expenses; and which said writ endorsed, afterwards, and before the execution thereof, to wit, on, &c., was delivered to the now defendant, who then, and from thence until, and at, and after the execution of the said writ, was sheriff of the said county of Hastings, to be executed in due form of law; and although there then and afterwards, and whilst the said last-mentioned writ remained in full force, were divers goods and chattels of the said Michael Manion within the bailiwick of the now defendant as such sheriff as aforesaid, whereof he could and might and ought to have levied the monies so endorsed and directed to be levied as last aforesaid, whereof the defendant all the time aforesaid had notice, yet the now defendant, so being sheriff of the said county of Hastings, not regarding the duty of his office as such sheriff, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the now plaintiff in this behalf, and to deprive him of the monies so endorsed on the said last mentioned writ, and directed to be levied as last aforesaid, and of the means of obtaining the same, did not nor would, within a reasonable time for that purpose which hath long since elapsed, levy the money last aforesaid, or any part thereof, but wholly neglected and refused so to do, and therein made default; and afterwards, to wit, on, &c., falsely and deceitfully returned to the said court of our said Lady the Queen, that the said debtor Michael Manion had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages and costs aforesaid, or any part thereof, as by the said last mentioned writ and the return thereof remaining of record in the said court fully appears; by means of which said premises, &c.

Second count.—And that the judgment in the first count mentioned being in full force, and the said damages and costs in that count mentioned remaining unpaid and unsatisfied, the plaintiff afterwards, to wit, on, &c., pursuant to the statute in such cases made and provided, applied for and obtained, and an order was made, upon and by virtue of said judgment in the first count mentioned, by the Hon. W. H. Draper, C.B., Chief Justice of the Court of Common Pleas, at Toronto, dated, &c., whereby the said Justice ordered that all debts due and owing from one Paul Larkins, the garnishee in said order named, to one Michael Manion, the judgment debtor therein named as being the person in the first count mentioned, should be attached, to answer a judgment recovered against the above named judgment debtor, on, &c., by the now plaintiff, the judgment creditor in the Court of Queen's Bench, and being the same judgment described in the first count mentioned; and the said Justice did thereby further order that the then named Paul Larkins, the garnishee therein named, his attorney or agent, should attend before the said Justice, at the time and place therein mentioned, to show cause why he should not pay to the now plaintiff, the judgment creditor, the debt due from him to the judgment debtor, or so much thereof as might be sufficient to satisfy the said judgment debt due the now plaintiff the said judgment debtor. And that the said order so made as aforesaid, was duly served upon the said Paul Larkins, garnishee therein named; and that the said Paul Larkins, garnishee as aforesaid, did not appear upon the said summons and order at the time and place mentioned therein, and in pursuance thereof; and that afterwards, to wit, on, &c., upon proof of the service of the said summons and order, an order was duly made by the then presiding Judge in Chambers, at Toronto, for an execution to issue to levy the amount due from said Paul Larkins, garnishee as aforesaid, to the said Michael Manion, judgment debtor as aforesaid, towards satisfaction of the said judgment debt. And that afterwards, to wit, on, &c., the now plaintiff sued and prosecuted out of the said court, upon and by virtue of said order, a certain writ of *fieri facias* against the said garnishee therein named, Paul Larkins aforesaid, directed to the sheriff of the county of Hastings; by which said writ our said Lady the Queen commanded the said sheriff that of the goods and chattels of the said Paul Larkins, garnishee as aforesaid, in the sheriff's bailiwick, he should cause to be levied fifty-six pounds four shillings and five pence, being part of the amount of the debt due from the said Paul Larkins to Michael Manion attached in the hands of the said Paul Larkins by an order of the Hon. W. H. Draper aforesaid, dated, &c., pursuant to the statute in such case made and provided, to satisfy fifty-six pounds four shillings and five pence, which Geo. E. Henderson the now plaintiff lately in the Court of Queen's Bench recovered against the said Michael Manion, whereof the said Michael Manion was convicted, as appears of record; and that the said sheriff should have that sum before the said court immediately after the execution thereof, to be rendered to the now plaintiff for his damages aforesaid; and that the said sheriff should have then there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff, to wit, on, &c., was duly endorsed with a direction to the said sheriff to levy of the goods and chattels of the said Paul Larkins, the garnishee therein named, the sum of fifty-six pounds four shillings and five pence debt and costs, fifteen shillings for *fi. fa.*, with interest from the 5th day of October, 1859, besides sheriff's fees; and which said writ, so endorsed, afterwards, and before the execution thereof, to wit, on, &c., was delivered to the now defendant, who then and from thence until, and at, and after the execution of the said writ, was sheriff of the said county of Hastings, to be executed in due form of law; and although then and afterwards, and whilst the said last mentioned writ remained in full force, there were divers goods and chattels of the said Paul Larkins within the bailiwick of the now

defendant as such sheriff as aforesaid, whereof he could and might and ought to have levied the monies so endorsed and directed to be levied as last aforesaid, whereof the defendant during all the time aforesaid had notice, yet the now defendant, so being sheriff of the said county of Hastings, not regarding the duty of his office as such sheriff, but contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the now plaintiff in this behalf, and to deprive him of the monies so endorsed on the said last mentioned writ, and directed to be levied as last aforesaid, and of the means of obtaining the same, did not nor would within a reasonable time for that purpose which hath long since elapsed, levy the amount last aforesaid, or any part thereof, but wholly neglected and refused so to do, and therein failed and made default; and afterwards, to wit, on, &c., falsely and deceitfully returned to the said court that the said Paul Larkins had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages and costs aforesaid, or any part thereof, as by the said last mentioned writ and the return thereof remaining of record in the said court fully appears; by means of which said premises, the plaintiff hath been and is greatly injured, &c.

The third count was the same as the second count, with the exception of the breach. Instead of assigning as a breach that the defendant neglected to levy, &c., it alleged that the defendant did seize and levy, &c., and yet returned that the said Paul Larkins had not any goods and chattels, &c., in the usual form.

H. B. Morphy, for defendant, obtained a summons on plaintiff to show cause why the declaration, the copy and service, or the copy and service, should not be set aside for irregularity, with costs, on the ground that the declaration served was not a true copy of the declaration filed; and also why the second or last count of the declaration filed should not be struck out, the two counts being substantially the same. The variances between the declaration filed and the declaration served were merely clerical.

English showed cause. He filed an affidavit of plaintiff on which it was sworn that before the time was out for entering appearance in the cause, and after writ was served he was informed by one Morgan Jellitt the brother of R. P. Jellitt, and managing clerk in his office, that his brother the said R. P. Jellitt was going to defend the cause as defendant's attorney, and asked him if they had entered an appearance, to which he replied no, that they did not intend entering an appearance until the time was out, and that they would have until Saturday morning to enter the appearance and would not do so before then.

That from this information he relied on an appearance being filed by R. P. Jellitt as defendants attorney, at the latest on Saturday morning in Toronto, and which was the last day for the service of declaration for the Belleville Assizes, which service was required to be made before three o'clock that day, that said Jellitt did not enter an appearance for the defendant on Saturday aforesaid as it was supposed he would, and which deponent only ascertained about noon of that day, by sending to the Deputy Clerks office, to search if an appearance had been entered, and which he was induced to do by being informed on that day short time before that the said R. P. Jellitt intended to throw him over the assizes if possible, with the cause. That in consequence of the appearance not being entered, a personal service upon the defendant was necessary, and that he had consequently to send one of his clerks to look up the defendant, or in failure of not finding him to serve at the house, and therefore had not time to compare the copy served, with the one filed before the hour of three would arrive. That the copy served was served by one of his clerks, only a few minutes before three, at the house of the defendant, who resides nearly a mile from deponent's office, a much greater distance off than defendant's attorney's office. That if the defendant's attorney had entered the appearance on Saturday morning, service might have been effected upon him at his office, before three o'clock, of that day, with a compared copy of the declaration filed. That the principal differences between the copies served and filed, is an omission of some words in the one filed. That since the filing and service of the declaration, an appearance was entered by R. P. Jellit, defendants attorney on the twenty-seventh instant, a true copy of which was filed, and a notice of such appearance having been entered, was served at his office. That the first count in the declaration is a distinct and separate cause of action, for a false return to the writ *fi. fa.* against Michael Manion, the judgment debtor in the declaration mentioned.

Draper, C. J.—I think the last count of this declaration should be struck out. Whether the fact be that there were goods and the sheriff neglected to levy—or that he actually leved and made the money—the return of *nulla bona* is the substantial grievance. And in whichever form the count is framed, when the evidence is given an amendment would be allowed without difficulty in accordance with the facts proved.

The third count being struck out, I see no sufficient ground for setting aside the declaration for variance between the copy filed and that served. A mere verbal error by the omission of that which leaves the sense and substance unaltered, would not I think constitute a ground for setting aside the declaration or the copy served. At the same time I should not hesitate to hold parties to great care and attention in examining their papers before filing or serving—and do not think *being in a hurry* affords any excuse—even though a trial might be lost.

CHANCERY.

(Reported by Thomas Hodgins, Esq., Barrister-at-Law.)

Bank of British North America v. Moore.

Right to redeem by mesne incumbrancer—Injunction—Judgment creditors—Assignees.

A judgment creditor offers to redeem a prior judgment creditor, whose *ven. ex.* was in the Sheriff's hands, and made an assignment of the judgment; but the prior judgment creditor (who was also holder of a mortgage subsequent to the second judgment creditor) refused to receive the money otherwise than in satisfaction of the judgment, and refused to assign; whereupon the second judgment creditor filed his bill to redeem, and for an injunction to restrain the sale. On the motion for the injunction, it was *Held* that he was entitled to redeem and to an assignment of the judgment, and an injunction was accordingly granted.

(5th July, 1860.)

This was a bill by a subsequent judgment creditor to redeem the prior incumbrancer, the assignee of a judgment, whose *ven. ex.* was in the Sheriff's hands. It was proved by the Sheriff's affidavit that if the property was forced to a sale it would not sell for any thing like its value. The other facts appear in the judgment of the Court.

Wood for plaintiff, *G. R. Van Norman* for defendant Robinson.

The following cases were then cited by the plaintiff:—

Ramsbottom v. *Wallis*, 5 L. J., N. S., 92; *Dunstan* v. *Patterson*, 2 Phil. 341; *James* v. *Bion*, 8 Swans, 284, *Rhodes* v. *Buckland*, 16 Beav, 212; *Smith* v. *Green*, 1 Coll. 555; *McMaster v. Phipps*, 5 Gr. 253; *Moffat v. Marsh*, 3 Gr. 623; Fisher on Mortgages, 619; *Thirkell* v. *Patterson*, 17 Q. B., U. C.

Spraggs, V. C.—The plaintiffs file their bill as registered judgment creditors of the defendant Moore, to redeem prior judgment creditors, the Ketchums, of whose judgment the defendant Robinson is assignee, and to foreclose Moore. The lands of Moore, in the county of Oxford, affected by both judgments, are about to be sold, upon the judgment of the Ketchums against Moore, upon a writ of *ven. ex.* The sale is advertised for the twelfth of the present month.

The plaintiffs have offered to pay the prior judgment debt, upon receiving an assignment of the judgment; but this has been refused by the assignee Robinson, who declines to receive the money otherwise than in satisfaction of the judgment. He is assignee of (besides the judgment) a mortgage of Moore's, which is subsequent to the plaintiffs' judgment. I understood it to be stated in argument that Robinson was assignee of a judgment against Moore subsequent to the plaintiffs, and that he hoped and expected that if the sheriff's sale proceeded, enough would be realised to satisfy the Ketchum judgment, the plaintiffs' judgment, and the subsequent judgment, or part of it, of which he is assignee; and I supposed that writs against lands in all these three suits were in the hands of the sheriff;—and I could understand Robinson being unwilling to be first to redeem the plaintiffs in respect of his subsequent judgment, when he was expecting to obtain payment through the sale by the sheriff; and I am not prepared to say that he would be making an inequitable use of his position as first judgment creditor in refusing to be redeemed and to assign under

the circumstances, because by assenting he would forego a fair advantage of his position. The affidavits filed on his behalf state only that he is assignee of a subsequent mortgage, upon which it is not stated that any proceedings at law or equity had been taken.

To put out of view for a moment the subsequent mortgage, Robinson objects that he was not bound, upon payment of the Ketchums' judgment, to assign it; and in support of his objection the rule is cited, that a mortgagee is bound only to convey the mortgage premises, not to assign the mortgage debt. This is established, as between mortgagee and mortgagor, in *Dunstan* v. *Patterson* (2 Phill. 345), and *Smith* v. *Green* (1 Coll. 562); and the rule may also apply as between prior and subsequent mortgagees: but the ordinary form of decree, upon a judgment creditor being redeemed by a subsequent incumbrancer, is, that he assign the judgment to the party redeeming him; and the succeeding directions show that the right to receive the mortgage or judgment debt paid, passes to the subsequent incumbrancer, who pays it.

Then, is the registered judgment creditor justified in refusing to receive payment of the judgment debt and to assign the judgment? *Smith* v. *Green* was the case of a first mortgagee, to whom notice was given by a second mortgagee of his intention to pay off the mortgage at the usual period, six months. Before the expiration of the time, the first mortgagee filed his bill to foreclose; and the second mortgagee, just before the expiry of the six months, tendered to the first mortgagee his mortgage money, with costs incurred up to that date. This was refused, and the foreclosure suit proceeded with. Sir J. L. Knight Bruce intimated as his opinion, that a prior mortgagee ought, without suit, to receive his mortgage money from one entitled to redeem him. His language is: "To say that a first mortgagee ought not, without a judicial proceeding, to accept payment from a second mortgagee, and thereupon to convey to him the mortgaged estate, with or without the concurrence of the mortgagor, when the second mortgagee does not desire the mortgagor's concurrence, is too much." And he deprived the first mortgagee of his costs, incurred after tender of his mortgage money.

If a first mortgagee ought, without suit, to receive his mortgage money, and convey the mortgaged estate to a second mortgagee, redeeming him, so a prior judgment creditor ought, without suit to redeem him, to receive his judgment debt, when offered by a subsequent incumbrancer, and to assign to him his judgment. Vice-Chancellor Knight Bruce thought the taking of proceedings to recover his mortgage debt inequitable after such tender; and it cannot be doubted that if the first mortgagee could have taken, and were taking, proceedings that would put the mortgaged estate beyond the reach of the subsequent incumbrancer to redeem it, he would have restrained such proceedings, as was done by Sir John Romelly in *Rhodes* v. *Buckland* (18 Beav. 212).

A refusal by a judgment creditor, pressing a sale of his debtor's lands to satisfy his debt, to receive payment and assign his judgment to a subsequent judgment creditor, would appear simply unreasonable and vexatious. As soon as he registered his judgment, and another creditor registered a judgment after him, the right of the latter was to redeem the former—a right clearly enforceable in equity; and an offer to redeem refused, would, I have no doubt, be at the peril of costs, and the court would see hat the right to redeem was preserved to the incumbrancer making the offer. A refusal by a judgment creditor to be redeemed would indeed be almost unaccountable, unless redemption would in some way operate to his prejudice. It remains to consider whether the reason offered on behalf of Robinson for his refusal in this case is a sufficient one. The rights of the parties are clear, according to their priorities: the Bank to redeem Robinson in respect of Ketchums' judgment, and Robinson, if he desires it, to redeem the Bank as subsequent incumbrancer under the subsequent mortgage assigned to him. Then, does this interfere unfairly with any legal right of Robinson? The land cannot be sold by the sheriff to satisfy this subsequent mortgage; but if the Bank pay off the Ketchum judgment, not getting an assignment of the debt, a prior incumbrance will be removed at the expense of the Bank, and the subsequent mortgage will be relieved of so much of prior incumbrance. This would be an undoubted advantage; but is it a just one? If Robinson desires to use his legal process to force the Bank into such a payment, I think such use of it would be inequitable. I see nothing in the circumstance of Robinson being assignee of a subsequent mortgage, to alter his position from what it would be if he were only first incumbrancer sought to be redeemed by a second incumbrancer. I may possibly be under a misapprehension as to some of the facts, for the counsel for Robinson did not seem to expect that the argument could be proceeded with when it was. I have intimated what view I should probably take of the matter, if Robinson held a judgment subsequent to the plaintiff's, which might be satisfied at the Sheriff's sale; but finding upon the affidavits a subsequent mortgage stated, with, so far as appears, no proceedings taken to enforce it. I have taken such to be the facts, and my judgment proceeds upon such being the position of the parties. The order will be, that upon payment to Robinson, if he will receive it, and assign the Ketchum judgment, of the amount of that judgment and subsequent costs, or if not, then, upon payment into court of the same amount, an injunction should go to restrain the sale of Moore's lands in the county in which the plaintiff's judgment is registered, in satisfaction of the Ketchum judgment.

PATERSON V. HOLLAND.

Reported by A. GRANT, Esq., *Barrister-at-Law.*

Practice—Re-hearing—Adding parties in Master's office.

Defendants presented their petition for a second re-hearing on the ground that certain persons, necessary parties, were not before the court, but as two opportunities of making the objection had been disregarded, and the interests of the parties complaining of the omission would be properly protected by making them parties in the master's office, the petition was refused.

The proper practice is to bring all necessary parties before the court, at the hearing, and not to add them in the master's office.

A. Crooks, for some of the defendants in this suit, moved upon petition for an order to re-hear this cause a second time, on the ground that one Kneeshaw, or his representatives, had not been made parties to the suit.

Hector and *Blake*, for the other defendants.

McDonald and *Strong*, for plaintiffs, *contra*.

ESTEN, V. C.—This is a petition for a second re-hearing. The ground stated in it is that certain persons, necessary parties, were not before the court at the original hearing. These persons, however, with the exception of Kneeshaw, or his representatives, were then out of the jurisdiction, and therefore their absence was not properly matter of objection, and the court made such a decree as it could properly make in the absence of those parties. Is then the fact of Kneeshaw, or his representatives, who were within the jurisdiction, not having been before the court at the original hearing, a sufficient reason for allowing a second re-hearing, and undoing all that has been effected under the decree, when two opportunities of making this objection have been disregarded, and all the ends of justice can be secured as regards the parties in the master's office? I think not; but at the same time I think that all necessary parties should be brought before the court at the hearing, and I am opposed to the introduction of any practice of adding such parties for the first time in the master's office, merely to remedy defects arising from the carelessness and negligence of the plaintiffs in the suit.

SUPERIOR COURTS.

MONTREAL DISTRICT.

(*From the "Lower Canada Jurist."*)

ROLLAND V. BRISTOW.

City Councillor—Montreal—Disqualifications.

Held:—Under 12 Vic., cap. 128, ss. 8 & 41, 10, That a party elected to be councillor in the corporation of the City of Montreal, not being possessed to his own use and benefit of real and personal estate within the City of Montreal after payment of his just debts, of the value of £500 cy., is not qualified to be so elected.

2nd. That a party elected to be such a councillor, and becoming insolvent during his occupancy of said office, is by such insolvency disqualified to hold such office

29th February, 1860.

The petitioner in this matter by his petition or *requête libellée*, set out his qualification as a voter of the St. Lawrence ward in

Montreal, and that by the statute 14 & 15 Vic., cap. 128, ss. 8 & 41, it is enacted that no one shall be elected a councillor of the City, unless a resident householder within it for a year before his election, and unless he has real and personal property within the city, after payment of his debts, of the value of £500 currency; that he should continue to have such pecuniary qualification during his term of his office, and should continue to be a resident householder, and that he should become disqualified if he became insolvent or bankrupt.

That defendant was, on the 28th July, 1859, elected councillor for the City of Montreal for a term of three years; that he was not at the time of his election or afterwards qualified, not having been a resident householder in Montreal for a year before the election, nor possessed of the property qualification; that since his election he had become insolvent and ceased to hold his office; that he illegally assumed to exercise the office of councillor and the court was authorised to issue a writ requiring him to answer the petition and to shew cause by what authority he assumed to exercise the office.

With the petition was filed a copy of a judgment of the Circuit Court, rendered 13th September, 1859, against the defendant for £11 7s. 2d., together with copies of writ of execution in the same case with a return by bailiff of *nulla bona* against the defendant, the report purporting also to be signed by him, also affidavits by petitioner and another setting out their belief that the defendant had not the necessary property qualification, had become insolvent, was not at the time of the making of the affidavit a householder, but was living in a boarding-house.

The defendant pleaded an *exception à la forme*, which was dismissed. Afterwards defendant pleaded to the merits alleging his qualification, that he was not insolvent and denying the allegations of the petition. The case being inscribed for evidence and hearing, the petitioner examined the City Clerk and another witness who produced the voters, and assessment lists of the City of Montreal, extracts from which are filed, showing that the petitioner's name was on those lists as proprietor of houses in Bleury Street; the defendant's name occurred in the list of 1859 as a tenant and not as proprietor of real estate, that in the voters' list for 1860 the defendant's name did not appear either as tenant or proprietor.

Smith, J., in giving judgment, held that the proof was sufficient to sustain the pretensions of the petitioner, in the absence of any proof on the part of the defendant, who was bound to show that he had the right to exercise the office he assumed to hold, the proceeding being in the nature of a *quo warranto*. The judgment was recorded in the following terms.

"Considering that the said petitioner and informant hath fully established by legal evidence the material allegations of the said *requête libellée*, and namely, that at the time of the election of the said William Bristow to be a councillor for the St. Lawrence Ward for the City of Montreal, to wit, at the election held in the city for the election of a councillor for the said St. Lawrence Ward on the twenty-eighth day of February last past, to wit, February, 1859, the said informant as petitioner was a duly qualified elector and voter qualified to vote at the election of a councillor for the said St. Lawrence Ward in the City of Montreal, and that he, the said William Bristow, was not duly qualified to be elected as such councillor, the said William Bristow not being possessed to his own use and benefit of real and personal estate within the City of Montreal, after payment or deduction of his just debts, of the value of five hundred pounds currency, and that he hath continued to be so disqualified down to the filing of the information or *requête libellée* of the said informant or petitioner, and thereby by reason thereof, the said William Bristow was unqualified by law to be elected as such councillor.

"And further considering that it hath been established by legal evidence by the said informant or petitioner, that since the said election and during the occupancy of said office of councillor by the said William Bristow, the said William Bristow hath become insolvent, and hath thereby become disqualified by law to hold the said office, and by reason thereof hath ceased to hold the said office of councillor as aforesaid, the Court doth maintain the said petition, information, or *requête libellée*, and doth declare the said election of the said William Bristow to be and to have been illegal, null and void, and doth further declare that by reason of the subsequent insolvency of the said William Bristow, the said William Bristow hath by law ceased to hold the office of councillor as aforesaid, and by reason thereof, doth declare the occupation of the said office as councillor as aforesaid, for the St. Lawrence Ward to be an intrusion into and a usurpation of the said office, and the Court doth accordingly oust the said William Bristow from his office of councillor for the St. Lawrence Ward in the City of Montreal, and doth exclude the said William Bristow from the exercises of the functions of the said office as aforesaid.

"And the Court doth condemn the said William Bristow to pay the costs of the said information or *requête libellée*."

QUEEN'S BENCH, APPEAL SIDE.

DISTRICT OF QUEBEC.

(*From the "Lower Canada Reports."*)

Montizambert, *Appellant*, and Talbot dit Gervais, *Respondent*.

Held:—1. That a registrar is responsible for damage or loss caused by his neglect to enregister a mortgage, or by a certificate given by him wherein an omission occurs, from the effect of which a purchaser *de bonne foi* is troubled in his possession.

2. That the action in such case must be one *en garantie*, the registrar being the *garant* of the party to whom he has directly caused damage.

[19th day of June, 1860.]

This was an appeal from a judgment rendered in the Superior Court, at Quebec, on the 1st. day of April, 1859, whereby the appellant, who is the registrar of the County of Quebec, was condemned to pay to the respondent the sum £57 19s. 9d., for damages sustained by the latter, arising out of the alleged neglect of the appellant to register a mortgage upon a certain property which the respondent had purchased.

The facts of the case are as follow:—In February, 1843, one Paquet purchased a certain property in St. John street, in the city of Quebec. In July, 1845, a judgment was rendered against him in the Court of Queen's Bench for the sum of £25 10s. cy., with interest and costs; and this judgment was registered in August of the same year by Dérouselle, who had obtained it by assignment. The deed of acquisition of the property above mentioned was not registered, until November, 1845; and, in October, 1846, Tessier, notary, having applied to the appellant for a certificate of all mortgages registered against the name Jean Paquet, received a certificate in which reference was made to a number of mortgages, but omitting all mention of the judgment in favour of Dérouselle, which had been registered in August, 1845. In November, 1846, Prudent Talbot dit Gervais, the present respondent, acting on the faith of the certificate granted by the appellant in his capacity of registrar, purchased from Jean Paquet the property in question. In September, 1858, an hypothecary action was instituted by Derouselle against the respondent, founded upon the mortgage created by the judgment rendered in his favour against Paquet; and in February, 1855, a *quittance portant subrogation* was granted by Derouselle to the respondent, for the sum of £47 0s. 8d., being the amount of principal, interest and costs in his action against the latter. Upon these grounds the respondent instituted his action against the appellant and obtained the judgment from which the present appeal was brought.

Holt and *Irvine*, for appellant, maintained that the certificate granted by him to the respondent was not such an one as the registrar is required to give by the 49th clause of the Registry Ordinance; and that not being in the course of his official duty, he could not be held liable for any damages occurring through an accidental error or omission in such a certificate. Admitting, however, that the registrar was actually bound to give such a certificate, it would be the duty of any person bringing an action for damages, against the registrar, based upon such certificate, to shew that the amount claimed had been paid out by him, and not by reason of any neglect or omission of his own; but because of negligence on the part of the registrar. It was but fair that the party bringing such a suit, should be made to prove the amount of his loss in an accurate manner. In the present action there was no proof of

this kind. For instance, it did not appear that Derouselle's action was ever entered in Court, or that any proceedings were had after the service of the writ and declaration. Neither did it appear that Paquet had ever been sued by the respondent as his *garant;* nor that any notice had ever been given to him by the respondent, although it did not appear that he was insolvent. And again, the respondent should not have paid Derouselle without a judgment having been rendered or even a suit pending against him. He should, moreover, have taken all possible steps to enforce payment from Paquet. With regard to the amount claimed, there was, in the first place, no evidence in the hypothecary action of the amount of costs claimed by the respondent having been ever taxed, neither was there any evidence of the amount paid by the respondent for legal advice. One item of £2 was also paid as having been charged to the respondent by a notary, for drawing up a petition to His Excellency the Governor General. For this demand the appellant certainly could not be liable. The counsel for the appellant concluded by denying the liability of the registrar in the action; stating that there was not sufficient evidence of the respondent's loss; or that even admitting the sufficiency of the evidence the appellant had been condemned by the Court below to pay double the amount for which he was responsible.

Fournier and *Gleason*, for respondent, stated that it was an admitted principle of justice that he who by his neglect or his error, caused damage, should be held liable for it. If the responsibil ty of the registrar had no valid existence, it would be much better to close all registry offices; it would, at least, remove a trap from the path of lenders and purchasers in good faith.* With regard to the pretentions set up by the appellant that a notorial *acte authentique* is no legal evidence against a third person not a party to such act, it was a doctrine contradicted by all the authors who had written on the subject.† With regard to another allegation of the appellant it might be stated that the insolvency of the vendor, Paquet, was both proved and admitted in the case; and, as to the amount claimed by the respondent, it was proved by the *quittance* given by Derouselle as well as by the appellant's admission of facts.

SIR L. H. LAFONTAINE, BART., C. J.—After a careful examination of the facts of the case, it will be observed that it involves a question of great importance, affecting, as it does, the responsibility of registrars in their capacity of *conservateurs* of mortgages. The main question is, whether the party aggrieved has a right to maintain an action against the registrar for the amount of damage alleged to have been sustained. This right is clearly established by the 8th sec, of the Ordinance 4th Vic., cap. 30; and it cannot be denied that the registrar is responsible for the damages caused by his negligence, whether the loss arises out of his neglect to enregister a title, or by reason of an insufficient certificate given by him. The *conservateur* should be held personally responsible for negligence of his public functions. It is true that the action does not exist on, or arise from, a special contract or a personal cause; but it originates in the fundamental principles of law itself, and proceeds from the damage caused by the neglect of the party complained of to perform his public duties as an official of the law.

With regard to the amount claimed by the respondent, the payment of principal and costs is not attemped to be denied—nay, it is admitted by the appellant; and this admission, of course, proves his liability for the amount demanded.

I, therefore, come to the conclusion that the judgment of the Court below, in the present action, should be confirmed.

DUVAL, J.—This is a question of which the main issue is the responsibility of the registrar.

On this question, the old and acknowledged principle of our law is well expressed in the following words: "*Tout fait quelconque de l'homme que cause à autrui du dommage, oblige celui par la faute duquel il est arrivé à le réparer.*"

This responsibility comprises as well acts of omission as acts of commission. No public officer can be allowed to plead his own negligence or that of his subordinate to protect himself against such an action as the present. Nor can such public officer be listened to when he pleads ignorance or error of judgment on his part. Bertrand de Grenille well expressed the intention of the legislature when he said: "*la loi ne peut balancer entre celui qui se trompe et celui qui souffre.*" It is needless to refer more particularly to the writers on the subject: Troplong, Toullier, Domat, and others will be found to establish the rule beyond doubt. Indeed, the principle is recognised by all the Judges of this Court.

The objection now made is to the sufficiency of the evidence adduced by the plaintiff. It is said that the notarial acknowledgment of payment signed by Derouselle, the creditor, is not evidence against third parties. I understand the rule of law on this subject very differently. The deed proves itself,—*probat rem ipsam*,—against the whole world: *le Contrat de Vente*, says Pothier, Tr. des Obligations no. 788, *prouve contre un tiers qu'il y a eu effectivement une Vente* (8 Toullier, nos. 148, 149). Were this not so, how could an action *en déclaration d'hypothèque* be maintained against a third party. Parol evidence would be clearly inadmisible. *Faits et articles* would be useless, as the defendant would answer, I was no party to the contract and knew nothing about it. How then could the original debt be proved? This rule of our law: that the deed proves itself against the whole world, is daily recognised and acted upon in all our Courts.

In thus stating my opinion on the law, I will say that there are certain items in the plaintiff's claim that cannot be allowed. The charges of the notary and some of the alleged law expenses are not proved.

As to the want of notice of action to the defendant, a public officer, an objection made in the present suit, it is clearly without foundation. The protest filed contains such notice in the most explicit terms.

MONDELET, J., after a *résumé* of the facts said:—The action in the Court below is founded merely upon a *quittance* given by Derouselle to the respondent; and for this reason, apart from all others, I think the judgment given in favor of the latter should be reversed. The *quittance* is no proof of a judgment against the respondent in so far as the registrar, a third party, is concerned; it establishes the fact only of the payment of a certain sum to Derouselle. Nothing is better established than that the notarial fact is proof only of the fact which has occurred in the presence of the notary. Apart from this *quittance* there is no legal proof of the action said to have been instituted by Derouselle against the respondent; no proof that the suit was ever returned into Court, and nothing whatsoever to shew that a judgment has ever been obtained. Even supposing that the judgment of the Court below should be confirmed by the Court here, there are several items in the respondent's claim which would have to be struck out, such as —interest, costs, amount paid to Mr. Delagrave, advocate, and to Mr. Glackmeyer, notary public, for the drawing up of a petition.

Next arises the question of the responsibility of the registrar. This is a generally admitted principle; but I do not see, in this case, what connecting link there is between him and the respondent. I can easily understand how the latter who had a business transaction with Paquet may have a recourse against him, by reason and in consequence of the damages suffered by him by reason of his being troubled in the possession of the property sold to him by Paquet. But with regard to the appellant who never gave a certificate to the respondent, who certainly never asked him for one, I cannot see what reponsibility he can be said to have incurred towards the respondent. These observations appear to be founded on the principles expressed by Troplong, *Priv. et Hyp.*, t. 4, no. 1001.

I am of opinion, therefore, that the judgment of the Court below, in this case, be reversed.

BADGLEY, J.—I fully concur in the opinions expressed by the Chief Justice, and Mr. Justice Duval, with regard to the incontestible responsiblity of the registrar for damages which he has caused. The public functionary, in undertaking the duties of an office, becomes directly responsible to those who employ him in that capacity for losses caused by his omission, his negligence, or his incapacity,—in proof of which I need only refer to the registry

* 1 Domat, *Lois Civiles*, p. 160, liv. 2, tit. 8, sec. 4, art. 1:—4th Vict., cap. 30, secs. 8, 20, and 49.

† 1 Pigeau. p. 226:—Nouveau Denisart, vbo. *Acte Authentique*, p. 159:—Pothier, *Traite des obligations*, p. 369, part. 4, cap. 1, sec. 4, no. 738, who says:—"L'acte "*prouve contre un tiers rem ipsam:* c'est-à-dire que la convention qu'il renferme "est intervenue."

ordinance. In looking over the facts in evidence, it will be observed that the action instituted by Derouselle was served in February, 1853; that the registrar had notice of it in the shape of a protest, and that the action against the appellant was founded upon a *quittance* granted by Derouselle in the month of February, 1845. With respect to the *quittance*, of which so much has been said, it is a general principle that the *acte authentique* is proof of itself. The exception, as laid down by the authorities, is, of course, that the *acte authentique* can only *faire foi* against a third party when it relates to facts of which the notary is personally cognizant, and not to those which are founded on a mere *oui-dire*. The principle of law, clearly defined, is, that the registrar is responsible in a direct manner, for the amount of the judgment—capital and costs. But it would be utterly preposterous to condemn the registrar in the amount of accumulated interest and costs, on sums other than the original amount of alleged loss and damage.

For the reasons which I have briefly laid down, I concur in the judgment of the Court, and consequently in the reversal of the judgment of the Court below against the appellant.

Aylwin, J.—The liability of the registrar is clearly established and defined in the most unmistakable terms by our own law. As has been truly and forcibly said it arises from the liability of the public servant to every one of Her Majesty's subjects. There is not—there cannot be—any doubt or any question on this point, which must, in all common sense, be conceded at once. In my mind, however, the question at issue before the Court is whether the respondent has availed himself of his undoubted right of recourse against the appellant in a legal way, and whether he has followed it up in a proper manner in this case? Let us examine the facts on record for an answer:

When the respondent is sued by Derouselle he simply protests against the registrar, and then pays the amount claimed by the latter, upon a *reconnaissance simple*. He does not call the registrar before the Court as his *garant*, although the registrar actually was his *garant* in relation to the property in question. Why did he not proceed in this matter as he should have done? I cannot understand why the respondent thought fit to content himself with a simple protest served upon the registrar when he was troubled in his possession. The action of the respondent should have been one *en garantie* and the appellant should have been called into Court as the *garant formel* of the former. Had the respondent adopted this course he would have placed the appellant in a position to resist the action of Derouselle if he thought fit, or of adopting any other course he might deemed proper.

I am of opinion that the judgment of the Court below should be reversed: for, although admitting to the fullest extent the liability of the appellant in his public capacity, I nevertheless feel that the respondent should be taught to proceed in a proper manner for the recovery of what was undoubtedly an undeniable right.

Judgment of the Court below reversed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

(*From the "Monthly Law Reporter."*)

Commonwealth v. Ira Temple.

The legislature, exercising the sovereign power of the State, either by general law or special enactment, have control of all public easements and accommodations for the general benefit.

The right of every one to use the highway is equal, but each is bound to a reasonable exercise of his absolute right.

Where a driver of a wagon made use of the track of a horse-railroad for the wheels of his wagon, and upon the approach of the car behind him, refused to move off the track when requested by the conductor of the car, although he had room and opportunity so to do:

Held, that he was liable to indictment therefor.

Held also, that if the driver wilfully intended to follow his own convenience, in violation of the equal rights of others, it would be sufficient proof of a malicious motive on his part.

This was an indictment founded on the fifth section of the three hundred and second chapter of the acts of 1856, entitled "An act to incorporate the Malden and Melrose Railroad Company," which provided as follows:

"If any person shall wilfully and maliciously obstruct said corporation in the use of said road or tracks, or the passing of the cars or carriages of said corporation thereon, such person, and all who shall be aiding or abetting therein, shall be punished by a fine not exceeding five hundred dollars, or may be imprisoned in the common jail for a period not exceeding three months."

At the trial in the Court of Common Pleas, it appeared from the evidence on the part of the Commonwealth that the defendant was driving his heavily loaded wagon from Charlestown to Boston in a public street, with one wheel in the track of the Middlesex Railroad, when one of the cars of the Malden and Melrose Railroad came up behind him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed that the horse-cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the cars came up the conductor asked the defendant if he would please to remove his team from the track. The defendant did not, but continued it at the same rate of speed several hundred feet, and then turned off. It also appeared from the same testimony, that it was usual for those in charge of vehicles, like that of defendant, to drive them with one wheel in the track, and that they could be drawn much more easily in that place than in any other part of the street. There was no evidence that the defendant got upon the track in the first instance with the intention of obstructing the cars, or that he changed his rate of speed on the approach of the cars, or that he used the street, or did any act in any other than the usual manner. There was no other evidence than this bearing upon the question of malice. As bearing upon the question of intention, the defendant offered to shew that it is not the custom for those in charge of vehicles to turn out when a car comes up behind them, until it suits their convenience. The evidence was objected to and ruled out.

The defendant contended that malice must be shown, and that it could not be inferred from the mere fact that the defendant used a part of the street the most convenient to him in the ordinary way, knowing that the cars would be obstructed by such use.

The defendant also prayed for the following instructions:

1. If the jury find that the defendant was using the highway in the ordinary way, they must find for the defendant, without reference to the motive of his act.

2. In the absence of regulations on the subject, the corporation has no right to drive its cars at any particular rate of speed, and the mere slackening of the speed of the car by the defendant, if it was moving at the ordinary and proper rate of speed, was no obstruction within the meaning of the statute.

3. There is not sufficient evidence to warrant the jury to find a verdict of guilty.

4. The right of the horse-railroad company to use the highways is subject to the right of the public to use such highways as they had previously done.

5. If the jury find that the defendant went upon the track in the ordinary use of the street, without intending to obstruct the car, and continued on the track after the car came up behind him for his own convenience, and because that was the best part of the street to drive on, the defendant is not guilty.

6. In order to establish the crime of obstructing the cars, some act must be shown beside the use of the street in the ordinary way.

7. The act incorporating the railway company created no new crime; it merely attached a new penalty.

8. In the absence of regulations as to the rate of speed, and the mode of use of the track, they have no right to a given rate of speed.

The presiding Judge (Bishop, J.) declined to give any of the instructions, as prayed for, but did instruct the jury that although the public might drive the vehicles over the tracks of the railroad when the cars were not approaching, the corporation had a prior right to the track; and if the jury should find that the defendant was on the track and hindered the progress of the car, and was requested to remove from it, and could reasonably have removed, he was bound so to do; and his remaining there, knowing that the car would be thereby obstructed, intending thereby to obstruct it, in the use of their track, was a wilfull and and malicious obstructing within the meaning of the statute, and that it was not material whether the defendant stopped his vehicle, or whether it continued to move on the track at the ordinary rate of such vehicles; that no other proof of malice was necessary than that the defendant

knowingly and intentionally obstructed the car, although he may have made only the ordinary use of the street.

To all of these rulings and instructions, and refusals to instruct, the defendant alleged exceptions, and took the case up to the Supreme Judicial Court, where it was argued last October by *P. W. Chandler* and *George O. Shattuck*, for the defendant, and by *Attorney-General Phillips* for the Commonwealth. The decision of the court was given by

SHAW, C.J.—Since horse-railroads are becoming frequent in and about Boston, and are likely to become common in other parts of the Commonwealth, it is very important that the rights and duties of all persons in the community, having any relations with them, should be distinctly known and understood, in order to accomplish all the benefits, and, as far as practicable, avoid the inconvenience, arising from their use. This is important to proprietors and grantees of the franchise, who expend their capital in providing public accommodation, on the faith of enjoying with reasonable certainty the compensation in tolls and fares which the law assures to them: to all mayors, aldermen, selectmen, commissioners or surveyors especially appointed by law for the care and superintendence of streets and highways; to all persons for whose accommodation in the carriage of their persons and property these ways are specially designed; and to all persons having occasion to use the ways through or across which these horse-railroad cars may have occasion to pass. These railroads being of recent origin, few cases have arisen to require judicial consideration, and no series of adjudicated cases can be resorted to as precedents to solve the various new questions to which they may give rise.

But it is the great merit of the common law, that it is founded upon a comparatively few, broad, general principles of justice, fitness, and expediency, the correctness of which is generally acknowleged, and which at first are few and simple; but which, carried out in their practical details, and adapted to extremely complicated cases of fact, give rise to many, and often perplexing questions; yet these original principles remain fixed, and are generally comprehensive enough to adapt themselves to new institutions and conditions of society, new modes of commerce, new usages and practices, as the progress of society in the advancement of civilization may require.

In the first place, all public easements, all accommodations intended for the common and general benefit, whatever may be their nature and character, are under the control and regulation of the legislature, exercising the sovereign power of the State, either by general law or special enactment. It may be done by a charter, or special act of incorporation, in case of a bridge over broad navigable waters; or where the necessity for its exercise is of frequent recurrence, it may be by the delegation of power to special tribunals, or municipal governments, by general laws.

Again, when the entire public, each according to his own exigencies, has the right to the use of the highway, in the absence of any special regulation by law, the right of each is equal; but as two or more cannot occupy the same place at the same time with their persons, their horses, carriages and teams, or other things necessary to their use, each is bound to a reasonable exercise of his absolute right in subordination to a like reasonable use of all others; and not to incumber it over a larger space, or for a longer time, to the damage of any other, than is reasonably necessary to the beneficial enjoyment of his own right. If an adjacent proprietor has occasion to stop at his own gate with a carriage or team, if he has occasion to deliver wood, coal, or other necessaries; or if he is a trader, to deliver or receive merchandise, he must place his team or carriage, for the time being, in such manner as to obstruct the way for the use of others as little as is reasonably practicable, and remove the obstruction within reasonable time to be determined by all the circumstances of the case.

So in the actual case of the highway. Each may use it to his own best advantage, but with a just regard to the like right of others. Persons in light carriages, for the conveyance of persons only, have occasion, and of course a right, when not expressly limited by law, to travel at a high rate of speed, so that they do not endanger others. But all foot passengers, including aged persons, women, and children, have an equal right to cross the streets, and all drivers of teams and carriages are bound to respect their rights, and regulate their speed and movements in such a manner as not to violate the rights of such passengers. So in regard to drivers of fast and slow carriages, each must respect the rights of the other. Take a single illustration: if a heavily loaded ox-team be passing along a street wide enough for only one carriage, say fourteen feet, and other fast carriages follow, these last must, for the time being, be restrained to their speed, because this necessity results from these circumstances,—the narrowness of the way, and the ordinary slowness of the ox-team ahead. If parties thus travelling in the same direction should come to a portion of the way wide enough for carriages to pass each other, say twenty feet wide, it is obvious that if the driver of the heavy team would turn to either side, it would give the fast team room to pass, whereas, if he should keep the middle, the five or six feet on either side would not permit any carriage to pass. Now, supposing no impediment should intervene, and no circumstance should render it dangerous for the driver of the slow team to bear off, in our opinion it would be his duty to do so, although it might suit his convenience better to keep in the middle; and his refusal thus to bear off would be an abuse of his own equal and common right, for which, if injurious to another, an action would lie; and, if it was a public highway, the party would subject himself to a public prosecution.

In some few cases, the regulation of the use of the highway is important enough to require a rule of positive law, requiring each traveller, when meeting, to turn to the right of the centre;—in some States, to the left. But the circumstances, under which travellers may be placed in relation to each other are so various, that it would be impracticable to prescribe any positive rule approaching nearer to certainty than the rule of the common law, that each shall reasonably use his own right in subordination to the like reasonable use of all others.

With these views of the law regulating the use of public ways, we will examine the present case, as it appears on the exceptions.

We understand that a horse-railroad and cars are a modern invention, designed for the carriage of passengers, and though not moving with the speed of steam-cars, yet with the average speed of coaches, omnibuses, and all carriages designed for the conveyance of persons.

The accommodation of travellers, of all who have occasion to use them, at certain rates of fare, is the leading object and public benefit, for which these special modes of using the highway are granted, and not the profit of the proprietors. The profit to the proprietors is a mere mode of compensating them for their outlay of capital in providing and keeping up this public easement.

A franchise for the railroad, which the defendant was accused of obstructing, had been duly granted to the proprietors, which grant included the right to lay down tracks on a public highway, and also to use and maintain horse-cars thereon for the carriage of passengers.

Every grant, by an obvious and familiar rule of law, carries with it all incidental rights and powers, necessary to the full use and beneficial enjoyment of the grant; and when such grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement.

It appears that the proprietors of the horse-railroad having received a franchise, had laid down a railway track, and had procured horse-cars, with suitable conductors, and were in the actual use of the track. The defendant, with a heavily loaded team,—it does not appear whether an ox team or a horse team,—was on the public street driving from Charlestown to Boston, with one of his wheels on the railroad track, when the cars came up behind him. The defendant's team was moving at the usual rate for teams of that class, but at a less rate of speed than the cars were in the habit of moving. There was room outside the track for either vehicle to pass the other. When the cars came up, the conductor asked the defendant if he would remove his team from the track; he did not, but continued upon it, at the same rate of speed, several hundred feet, and then turned off.

Several things are here to be observed. The cars could only pass on one precise line. The wagon could deviate to the right or to the left, within the limits of the travelled part of the road. The public by the grant of the franchise had granted the right to move on that precise line, and had given to all passengers the right to be carried on that line at the usual rate of speed at which pas-

sengers are carried by horses, subject only to occasional necessary impediments. The cars cannot so move and the passengers cannot be so carried, whilst the wagon moves on the track. No impediment is shown to prevent the wagon from turning out. The wagon, therefore, is, for the time being, an unnecessary obstruction of the public travel, and therefore unlawful.

It is stated among the above-mentioned circumstances in the bill of exceptions, as if the two vehicles were upon an equality in this respect, that there was room on either side for either vehicle to turn out. But this is mere illusion; the wagon could turn out, the cars could not; *ad impossibilia lex non cogit.*

It is said above that it is usual for those in charge of heavy and slow teams to drive them with one wheel on the track, and that they could be driven much more easily in that place that in any other part of the street. This is no justification. Whilst the track was not required for the cars, perhaps the teamster had a right so to use it. But, when required for the cars, which could pass in no other mode, he had no legal right to consult his own convenience, to the great inconvenience, the actual injury of the equal rights of another.

It is no excuse that the defendant did not get upon the track in the first instance with the intention of obstructing the passage of the cars, or that he did not slacken his rate of speed on their approach; it is a nuisance, if, for his own benefit, he violates the rights of others; and if this consists in the violation of a public right, indictment is the appropriate remedy for its vindication and redress. Nor is express malice, a disposition or desire to cause damage to another, as in case of malicious mischief, necessary to the completion of the offence. It is a nuisance if one wilfully seeks and pursues his own private advantage, regardless of the rights of others, and in plain violation of them; it is a wrong done. And as every man must be presumed to intend all necessary, natural and ordinary consequences of his own acts, it is a wilful and intended wrong; it is malice,—a thing done *malo animo*,—in the sense of the law and no other malice need be proved, to show the act to be a nuisance.

If it be said that the obstruction in this case was very slight, that the cars were delayed but a very short time,—the answer is, that this is very true, and the injury may be trifling in itself, but vindicated and justified as it is in the argument, on the ground of right, it tests a principle of very great importance. If the driver of a heavily loaded truck or wagon may, for his personal convenience, use one rail of the track, wilfully, for a few hundred feet, others may use the other rail for the like purpose, and for any distance which suits their convenience. Cars, which at the ordinary speed of horses in carriages, would pass a given space in one hour, may be three or four in accomplishing it. Passengers whose business requires them to be at the place of destination at a fixed time, and who expect and have a right to expect that it will be reached in that time, may find their business greatly deranged.

Men who, relying on the establishment of horse-cars for their daily passage, have fixed their domicil in one place and their ordinary place of business in another, may find their plans of life thus defeated. Indeed, without pursuing the effect of the right contended for into all its consequences, the establishment of such a principle might essentially impair the value of real estate in many situations.

We will now consider some of the points specially raised by the bill of exceptions.

1. The defendant contended that malice must be shown, and that it could not be inferred from the mere fact that the defendant used a part of the street, the most convenient to him in the ordinary way, knowing that the car would be obstructed by such use.

If the term malice is here used in the sense of ill-will, a desire to injure another, as an actuating motive, the opinion of the Court is, that malice need not be shown, but that if a wilful intent to follow his own convenience in violation of the equal rights of others exists, it is sufficient, and no other malicious motive need be proved.

2. The defendant contended, that in the absence of regulations on the subject, the corporation has no right to drive its cars at any particular rate of speed, and the mere slacking of the speed of the car by the defendant, if he was moving at the ordinary and proper rate of speed, was no obstruction within the meaning of the statute.

This position we think is untenable. We think the corporation had a right, and, in reference to passengers, were bound to move at the rate of speed usual for vehicles for the carriage of passengers, drawn by horses; provided this right could be enjoyed without preventing the loaded team from moving at its usual and proper speed; and both could be done by the team ahead turning off the track, which the car in the rear could not do. It was therefore the duty of the team, in the reasonable use of the public right, to do it. What was the usual and proper rate of speed of the one was not that of the other.

3. The evidence was properly left to the jury.

4. It was contended, that the right of the horse-railroad company to use the highways is subject to the right of the public to use such highways as they have previously done.

This position we think manifestly unsound. The legislature having granted a new and peculiar use of the highways, the right of the public to use them as they had done is thereby qualified, and must be adapted to such new use.

Suppose the legislature should authorize a canal to cross a highway, with a draw, to be raised while boats are passing; the public cannot use the highway, as they have previously done, at all times, but must use it in subordination to the new right granted.

So here the law having authorized a horse-railroad which cannot deviate from one line, other vehicles must conform their use of the way to such new and authorized use, although it prevents them, to some extent, from using it as they had previously done.

The 5th, 6th, 7th and 8th prayers for instructions, we think, were rightly rejected, for reasons which are already sufficiently stated.

The instructions actually given were, in our opinion, correct in law, carefully guarded, and precisely adapted to the circumstances of the case, and therefore the exceptions must be overruled, and judgment entered on the verdict.

GENERAL CORRESPONDENCE.

Goods exempt from seizure—Distress for rent.

To the Editors of the Law Journal.

Gentlemen,—Under the head of "Division Courts" in your last issue, I notice that in considering the subject of landlord's claims for rent in arrear as made under the Division Courts Act, with a special reference to the question, how far, if at all, the goods of a debtor, *exempt by statute*, are liable to seizure by the bailiff on receipt of the required notice of claim by the landlord for rent in arrear, to satisfy the same.

The opinion expressed by the writer of that article is not in accordance with the decision in the cases of *Beard* v. *Knight*, 27 L. J. (N. S.) Q. B. 359, (S. C.) 4 Jurist, (N. S.) 782, and *Wilcoxon et al appellants* v. *Searly respondent*, *Re Foulgar* v. *Taylor*, 29 L. J. (N. S.) Ex. 154.

As this is likely to become a question of consequence to Division Court officers and the public, I desire to draw your attention to it, so that a proper and uniform understanding of the subject may be had.

Yours truly, B.

[As our correspondent says the question he raises is likely to become of consequence to Division Court officers and we willingly insert his communication. It always has been our desire that parties competent to do so should submit any remarks that occurred to them upon matters appearing in this journal. Our only desire is to inform, and if wrong, we shall be only too happy to be set right at any time.

In the present instance we continue to think that the position which our correspondent questions is correct, but our readers must judge for themselves.

We have looked at the case of *Beard et al* v. *Knight*, Reid claimant, referred to by our correspondent,—the other case we have not seen.

The first mentioned case does not touch the point at all. It shows that the property of a third party was seized by the bailiff, and the question raised for the opinion of the court was whether the claimant was not entitled and ought not to have paid him the produce of the sale of the goods seized and sold under the execution as they were found and determined by the judge of the court below to have been the property of the claimant and not of the defendant. To put it in other words, simply a question whether a bailiff can satisfy the landlord's claim for rent due from the execution debtor by selling the goods of a third person which may be in the house of such debtor.

Upon the argument Lord Campbell, C. J., said: "The enactment that the overplus is to be returned to the debtor shows clearly that the goods to be sold were intended to be his, and not those of a third person. It would require very strong language to show that goods belonging to A. are to be sold for the debt of C.; there is hardship enough as the law stands at present, and I should not be inclined to extend it any further. We must regard the rights of the owners of goods, but you seek to destroy their rights. These goods could not be taken in execution."

Our correspondent cannot surely have read the report of the case.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. WHITWORTH & ANOTHER v. HUMPHRIES & OTHERS. *Jan.* 14.

Ejectment—Common Law Procedure Act 1852, *s.* 172.

To be let in to defend in an action of ejectment under the above section a man must be *in possession* by himself or by his tenant.

Held, that a remainderman has not the *possession required* by the section.

C. C. R. REG. v. RACHEL WARDROPER. *Jan.* 28.

Husband and wife indicted for receiving—Coercion and control of husband.

Where a husband and wife are indicted for receiving, it is proper that the jury should be asked whether the wife received the goods either from or in the presence of her husband, and where this question was not put, and both husband and wife were convicted, this court quashed the conviction of the wife.

P. P. YEATMAN v. DEMPSEY. *Jan.* 19.

Contract implied—Agreement to appear at a trial without subpœna—Cause of action—Damages.

The plaintiff with the view (known to the defendant) to obtain a divorce from his wife on the ground of her having been insane at the time of the marriage, employed the defendant, a medical man, to observe her and also to inquire into her past history and procure evidence of her insanity at the time of the marriage, and to make it available in the suit, and the defendant was to be paid for what he did. The defendant did not appear at the trial and his evidence being necessary, the plaintiff was in consequence obliged to withdraw the record.

Held, that this was evidence of an undertaking to appear and give evidence at the trial without a subpœna, and also evidence of substantial damage to the plaintiff.

EX. JONES v. HOWELL. *Nov.* 24.

Notice of action—Arrest—Malicious injury to property—Arrest on Sunday—Statute 7 & 8 *Geo. IV.*, *c.* 30, *s.* 28.

The defendant by the direction of his tenant arrested on a Sunday, two men, one of whom had just before wilfully broken one of his windows and locked them up for two hours in a room of the house. The man who had committed the damage afterwards brought an action for false imprisonment.

Held, that the defendant was entitled to notice of action under 7 & 8 Geo. IV, c. 30, s. 41.

Quære, whether the arrest was justifiable, under 7 & 8 Geo. IV, c. 30, s. 28.

The plaintiff in this case was running away from the place the offence was committed when pointed out to the defendant by his tenant. At the trial the learned judge directed a non-suit reserving leave for the plaintiff to move to enter a verdict for £5. The ground was whether the plaintiff was "found committing" the offence within the statute.

C. C. R. REG. v. CHARLOTTE EVANS. *Nov.* 19.

False pretences—Obtaining change for the note of a bank which has stopped payment—Evidence.

Upon indictment for obtaining money by false pretences in change for a bank note, it was proved that the note was one of a private bank, which had paid a dividend of 2*s.* 4*d.* in the pound, and no longer existed; and that a neighboring bank would not change it.

Held, that the above was not evidence from which it could be inferred that the note was of no value whatever.

EX. ABRAHAM v. REYNOLDS. *Jan.* 12.

Negligence—Master and servant—Common work.

A. contracts to cart wool from B.'s warehouse. Whilst the carting is going on, A's servant who is managing the cart is injured by the negligence of B's servant.

Held, that A's servant though engaged in common work with B's servant, cannot be considered a servant of B., and may recover in an action against B., for the injury.

POLLOCK, C.B.—If several persons undertake an operation together, the fact of their object being common will not exclude one from right of action for an injury arising from negligence of another, as in case of a vessel coming into dock and mariners dragging at one end of the rope and dock-labourers at the other, either party would have a right of action for an injury arising from negligence of the other.

C. C. R. REG. v. CHARLES HUNTLEY. *Jan.* 21.

Pleading—Immaterial averment—Count for receiving, containing words of reference to count for stealing.

In an indictment containing two counts, the first alleged that the prisoner stole certain goods and the second that he received "the goods aforesaid," "so as aforesaid feloniously stolen," after objection that he could not be found to have received goods stolen by himself; the case went to the jury and he was acquitted upon the first count and convicted upon the second.

Held, that the words "so as aforesaid feloniously stolen" were immaterial and that the conviction was good.

EX. CUMMING v. SHAND P. O., &c. *Jan.* 13.

Banker—Credit—Unrealised security—Dishonoring cheque.

By the course of dealing between a banker and his customer the banker gave his customer credit to the value of goods con-

signed to the customer, the bills of lading relating to which were deposited with the banker.

Held, that an action for dishonoring a cheque drawn in respect of such credit was maintainable against the banker, notwithstanding a fall in the market value of the goods, the bills of lading were an insufficient security for the amount to which the customer had been credited.

POLLOCK, C B.—If by the course of dealing whether between a banker and customer or any two individuals, the practice is for one to give the other credit to an ascertained amount in respect of valuable security deposited with him, that is a state of facts from which it may very reasonably be inferred that the understanding of the parties was that it should not be put an end to without notice.

EX. ASTLEY AND ANOTHER v. JOHNSON. *Jan.* 23.

Bill of exchange—Failure of consideration—Consideration payable at a future day and before maturity.

A. drew a bill abroad upon his correspondent in England, at ninety days' sight, payable to the order of B. The bill was drawn and handed to B. on the terms that he should pay for the bill at the end of the month.

Held, that it was a good answer to an action on the bill against the acceptor at the suit of B, that B. had not paid the money or any part of it for the bill; and that the bill was accepted after the month and in ignorance of the non-payment of the consideration.

MARTIN, B., thought the principle of a *condition precedent* to the payment of the money applicable in this case.

Q.B. *Jan.* 23, 24.

NICHOLSON AND OTHERS v. RICKETTS AND OTHERS.

Partnership—Purchase and sale of bills of exchange.

An arrangement was made between the defendants, merchants in London, and V. & Co., merchants in Buenos Ayres, that V. & Co. should draw upon the defendants and sell these drafts, and when an opportunity offered purchase others to be remitted to the plaintiffs for the purpose of covering their acceptances. The profits on these transactions were expected to arise from the difference in the rates of exchange, and it was agreed that they, or the losses, if any, should be divided equally between the two firms. Bills were accordingly drawn by V. & Co. upon the defendants and sold to the plaintiffs, who were informed of the authority given by the defendants to V. & Co. to draw the bills. These bills were signed by V. & Co. in their own names.

Held, in an action against the defendants as drawers of the bills, that though there was a partnership between V. & Co. and the defendants they were not liable, V. & Co. having no authority to bind them by their signature in their own names.

Held also, that the defendants were not liable for the amount of the bills in an action for money had and received as upon a failure of consideration.

Held also, that the defendants were not liable for not accepting the bills, as they had not under the above circumstances contracted to do so.

C.P.

THE PENARTH HARBOUR, DOCK, AND RAILWAY COMPANY v. THE CARDIFF WATERWORKS COMPANY.

Inspection of document—Profert and Oyer, abolition of—Common Law Procedure Act 1852, (15 & 16 *Vic.*, *c.* 76) *ss.* 55, 56.

Where a party to an action, in his pleading, relies on a deed in his possession, the Court may, by virtue of its jurisdiction at Common Law, make a rule absolute for inspection of the deed by the opposite party.

Per WILLES, J., that section 56 of the Common Law Procedure Act 1852, seems incidentally to give a statutory right to apply to the Court for inspection.

Section 56 says: "A party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out."

Held, that giving a right to set out the document, seems incidentally to give a right to apply to the Court for inspection.

CHANCERY.

M. R. SABIN v. HEAP. *Nov.* 17, 18.

Time—Executor—Charge for payment of debts—Liability to see to the application of purchase money.

When there is an express charge in a will for the payment of debts the lapse of twenty-eight years from the testator's death will not be a sufficient period to re-but the presumption that the debts have not been paid, although the *cestuis que trusts* have been in receipt of the rents and profits of the estate.

Semble, that at the expiration of twenty eight years trustees can make out a good title under an express power of sale created by the charge for the payment of debts.

M. R. LOCH v. VENABLES. *Dec.* 16.

Will—Personal estate—Shares—Bonus.

Testatrix being possessed of twelve shares in the Carron Company, specifically bequeathed them to her niece for her life, and after her decease to her great nephew for his life, and in case he should marry to his wife for her life, the remainder to their child or children, but in case her great nephew should not marry then to certain charities, and she bequeathed the residue of her personal estate for the same ends, intents and purposes as the Carron Company's stock. A bonus on the shares was declared by the company prior to, but which became payable after her death.

On bill filed by the trustees of her will,

Held, that the bonus must not be treated as part of the proceeds of the shares, but as part of the personal estate.

V. C. K. DAWSON v. SOLOMON. *Nov.* 25, *Dec.* 6, 22.

Specific performance—Insurance—Vendor and purchaser.

S. contracts in writing to purchase a leasehold house of D. and his co-trustees for sale. The house is held under D. college, and there is a power of re-entry and avoidance of the lease on non-performance of any covenant. The insurance of the house being about to expire, D. renews it so as just to extend beyond the day appointed for completion. The purchase is not completed on that day and the insurance expires. On a subsequent day when the parties met to complete, the fact of the policy having dropped is discovered, but the purchaser's solicitor offers to complete is a waiver of the forfeiture is obtained. This, the plaintiff's solicitor declines, although afterwards a waiver is obtained. The purchaser refuses to complete and on bill filed by D. to enforce specific performance against S., bill dismissed without costs.

Semble, if the fact of an insurance being about to expire after the day appointed for completion and acceptance of title is known to a purchaser and on being applied to for the means of renewing it he refuses to afford them, the Court would enforce performance against him.

The omission of a vendor to inform a purchaser of the day on which a policy of insurance on the premises will expire, followed by a forfeiture of the lease is not sufficient to put an end to the contract.

The relation of trustee and *cestui que trust* is created in its full extent from the day appointed for a completion of a purchase supposing it is not then completed.

M. R. PASSON v. SWAN. *Nov.* 10.

Partition—Account—Infancy—Tenant in common—Occupation—Rent.

B., one of two tenants in common (A. & B.) died leaving C. an infant her heir at law. C. on attaining his majority instituted the present suit for partition and account. The Court decreed that A. should be treated as having entered on C's estate, and having been in actual possession during the whole of C's minority and charged A. with an occupation rent.

REVIEWS.

A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY.—By Emory Washburn, LL.D., Professor of Law in Harwood University. Boston: Little, Brown & Co.

We have read the volume before us which is complete in itself, and furnished with a full and well constructed index. This carefully prepared work will be found a valuable contribution to the Canadian lawyer.

The section on waste we mention, illustrating its peculiar advantage to us.

The condition of things in the United States and Canada is very much alike, and many acts that in England would be waste, are held, and properly so, not to be so in the United States. This branch of the law of real property is very fully illustrated by reference to American cases.

The section "letting lands upon shares" (page 364), may also be referred to as showing the peculiar value of the work to our profession. The English reports and text books, contribute little to our enlightenment on this subject, the practice of "letting on shares" not prevailing in Great Britian.

On the most important statutory provision relating to lands, a compendium of the law of the several States, is given in notes, which will enable the Canadian reader to understand the apparant discrepancies in the decisions of the different Sates, and be useful also for reference.

Our opinion before expressed, that the value of American text books would be greatly increased by reference to the cases decided in Upper Canada, we reiterate in respect to the work before us, and take the liberty of saying that our reports would have furnished Mr. Washburn *more aid in the preparation of his work, than the reports of any three States in the Union.*

We can strongly recommend this work. It is the best American text book we have seen on the law of real property, and we are satisfied that any Canadian lawyer who reads even a single section will desire to have it by him to consult whenever called upon to advise in respect to the important branch of the law which it covers.

ORDERS OF THE COURT OF CHANCERY FOR UPPER CANADA, WITH NOTES, by T. Wardlaw Taylor, Esq., M.A., Barrister-at-Law. Toronto: H. Rowsell, King-street. 1860.

The Editor of this small volume states that the edition is not published by authority, but will be found to contain all the orders by which the practice of the Court is regulated.

It is a shame that something is not done by our Court of Chancery towards consolidating its orders. Long since, we had been given to understand that the Court here intended to do so, and have been in daily expectation that the work would be done. The orders of June 1853 have long been out of print, and the orders of succeeding years were not, until the publication of the volume before us, to be had in separate form.

Mr. Taylor, it will be seen, has attempted to do what the Court should long since have done. His edition is not published "by authority," but yet contains "*all* the orders by which the practice of the Court is regulated." He has not, of course, consolidated the orders; *that* is for the Court to do. What, however, he could do towards supplying a great want to the profession, he has done, and done very well. He has taken the trouble to append to the orders decisions on points of practice arising under them, and also many decisions on those sections of the English Chancery amendment acts which have been adopted into the orders of 1853. With this part of Mr. Taylor's performance we have no fault to find, except that his notes, instead of being foot-notes, or otherwise distinct from the text, are mingled with the text in a manner which is not free from confusion.

In his search for decisions under the orders, he has evidently been industrious, but yet we cannot say that he has noted *all* the decisions. Under order No. ix. subsec. 15, we should find a note of *Goodeve* v. *Manners*, 4 Grant, 101. Under order xiii., *Counter* v. *The Commercial Bank*, 4 Grant, 230; *Shaw* v. *Liddell*, *Ib.* 352; *Prentiss* v. *Brennan*, *Ib.* 147. Under order xvii., *Davidson* v. *McKillop*, 4 Grant, 146; *Clarke* v. *Hall*, 7 Grant, 339. Under order xxxii. subsec. 2, *Hill* v. *Forsyth*, 7 Grant, 461. Under same order, subsec. 4, *Clarke* v. *Best*, 8 Grant, 7. Under order xxxvi. subsec. 12, *Crooks* v. *Crooks*, 4 Grant, 376. Under order xl. subsec. 6, *Re Ausbrook*, 4 Grant, 109. Under order xlii. subsec. 15, *Paterson* v. *Holland*, 7 Grant, 563. Under order xlvi. subsec. 6, *Saul v. Cooper*, 4 Grant, 61.

The volume should have been accompanied with an Index of cases to which reference is made in the body of the work. Had it been, we could have tested its value with more accuracy. It is possible that some of the cases to which we have referred as being omitted, are inserted in places other than where we should expect to find them.

We must, however, do Mr. Taylor the credit of having produced a work that will be of very great service to that portion of the profession who are engaged in Chancery practice. Every man who supplies, at moderate cost, a want of which any portion of the profession stands in need, is a benefactor.

The book is well printed, and printed on good paper. It is done in Mr. Rowsell's usual well-known style. Price, $1 50 paper, $2 half calf, $2 50 half calf interleaved with writing paper.

BLACKWOOD, for October, received. Contents:—Seeing is Believing; The Papal Government; Tickler II. among the Thieves; The Reputed Traces of Primeval Man; The Romance of Ajostini; The Fresco Paintings of Italy; Proverbs; The Meeting; Progress; Strength; Norman Sinclair.

GODEY'S LADY'S BOOK, for November, received. Contents, as usual, varied and interesting. It is embellished with some engravings of exceeding beauty.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

The Hon. JOHN PRINCE, of Osgoode Hall, Esquire, Barrister-at-Law, Q.C., to be Judge of the Provisional Judicial District of Algoma.—(Gazetted Oct. 6, 1860.)

NOTARIES PUBLIC.

JAMES FOX SMITH, of Newtonville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 6, 1860.)

CHARLES ADDISON HARTT, of Clinton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 6, 1860.)

ORLANDO JOHN MACKAY, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 6, 1860.)

DAVID BLAIN, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 6, 1860.)

MACNEIL CLARKE, of Prescott, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 6, 1860.)

JOHN HORNER GREENWOOD, of Whitby, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted Oct. 13, 1860.)

SHERIFFS.

HENRY J. THORP, Esquire, to be Sheriff of the County of Prince Edward.—(Gazetted Oct. 27, 1860.)

CLERKS OF COUNTY COURTS.

JOHN MACBETH, of London, Esquire, to be Clerk of the County Court of the County of Middlesex.—(Gazetted Oct. 27, 1860.)

SEPTIMUS PRINCE, Esquire, to be Clerk of the District Court of the Provisional District of Algoma.—(Gazetted Oct. 27, 1860.)

TO CORRESPONDENTS.

A CLERK; JOHN ARMOUR—Under "Division Courts," p. 249.

B.—Under "General Correspondence," p. 261.

E. S. WHIPPLE—Too late for this number.

DIARY FOR DECEMBER.

1. Saturday..... MICHAELMAS Term and Chancery Hearing Term ends.
2. SUNDAY ..... 1st *Sunday in Advent.*
3. Monday ..... Last day for notice of Trial in County Courts.
9. SUNDAY..... 2nd *Sunday in Advent.*
11. Tuesday ..... Quarter Sessions and County Court Sittings in each County. Sittings of Error & Appeal begins.
13. Thursday..... Last day for service of Writ for Toronto Winter Assizes
14. Friday..... Last day for collection of money for School Teachers' Salaries.
16. SUNDAY ..... 3rd *Sunday in Advent.*
23. SUNDAY ..... 4th *Sunday in Advent.*
24. Monday..... Last day for declaration for Toronto Winter Assizes.
25. Tuesday..... CHRISTMAS DAY. Alterations in School Sections take effect.
30. SUNDAY ..... 1st *Sunday after Christmas.*
31. Monday ..... End of Municipal year. Last day on which remaining half of Grammer School Fund payable.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

DECEMBER, 1860.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60." *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The* "60" *has reference to the year, and not to the amount represented as due.*

THE LAW JOURNAL.

With this number we close Volume VI. of the *Upper Canada Law Journal.*

The conclusion of the volume suggests to us the consideration of the following questions as to the past, the present, and the future:—What have we done? What are we doing? What shall we do?

As to the first question. We have instituted and conducted, with a fair measure of success, the only legal periodical in Upper Canada. We have secured the patronage of a wide class of readers in the legal profession and out of it. We have taken a position that entitles us to the support of all who are in any manner concerned in the administration of justice in Upper Canada. We have widened the circle of our influence till we find ourselves the organ of all interested in the administration of the law or its amendment and improvement. We have done much to give to local courts an abiding place in the land. We have done much to procure the enactment of several beneficial laws. In a word, we have done, to the best of our ability, all that we have undertaken to do.

As to the second question. We are doing our best to make the laws known and respected. We take every opportunity of disseminating information of service to our readers. We lose no opportunity of tendering advice to all officers concerned in the administration of justice, to whatever Courts belonging; and to those engaged in the working of the municipal institutions of the country. We seek to produce among local tribunals, uniformity as well as soundness of decision. We herald suggested improvements of the law. We seize every opportunity of serving our readers within the scope of our undertaking.

As to the third question. We shall continue to do what we have done. We shall, however, be happy to improve, and feel that there is room for improvement. We shall be glad to receive sound advice and not slow to act upon it. Our aim is to serve our patrons, and in return we shall ask only a fair support.

This brings us to a subject upon which we desire to touch. What is the support of a periodical? The goodwill of its readers and their aspirations for its success are not to be despised; but something more is needed to ensure its success—a material support is requisite. The man who wishes us all success, but withholds his subscription, fails to give us proper support. A law periodical cannot be edited and published free of cost. It is an article of bargain and sale. If it is of value and is purchased, purchasers should pay for it. It relies for support upon the number of purchasers and the payment of the purchase money. The man who subscribes for our journal, receives it, and yet from year to year neglects to pay for it, robs us of the reward of our industry. We look only to subscription money for our support. Unlike daily newspapers, we make little of advertisements; unlike daily newspapers, we have no political or other ulterior motive to serve. We ask our readers to take our journal if it is of advantage to them to do so, and if they take it we ask them to pay for it. Nothing can be more reasonable. And yet we are sorry to say that a large proportion of our readers, while they do the one, omit to do the other—they take the journal but omit to pay for it.

The amount standing on our books is very great—

thousands of dollars. To us it is in the aggregate an object of great concern; to each of our readers it is of little moment. The inconvenience to each defaulting reader of paying his subscription money would be much less than the inconvenience which we suffer from being unable to collect our dues. How long is this state of things to last? Not long. We are about to examine our subscription list, and to instruct our solicitors to deal with those upon whom our entreaty has no effect.

Subscribers in default are without excuse. They cannot urge in extenuation that they are ignorant of the amount of their liability to us. Each subscriber, by reference to the cover of each number of the *Journal* as he receives it, can easily discern the precise amount due and payable to us. Our new system of keeping accounts and of addressing the *Journal* affords every facility for prompt payment. It is no object to us, to increase the circulation of the periodical among men who do not pay for it—but the contrary. Neither false pride nor the hope of securing advertizing patronage prompts us to trumpet the extent of our circulation. We want a paying—not a wide and losing circulation—a circulation that causes loss in proportion as it widens. We have no ambition to swell our list with illustrious nothings—in common parlance, dead heads. We prefer therefore, before the commencement of a new volume, to examine our list and if necessary to prune it. We shall take means the most mild of bringing those endowed with self respect to a proper sense of duty as regards the payment of their subscription money. We shall hand the names of the incorrigible to the executioners of the law, at the same time being quite as unmindful of their fate as of their patronage.

COUNTY COURTS—JURISDICTION IN EJECTMENT.

(*Continued from page 241.*)

We have observed that there is no *general* jurisdiction in ejectment given to the County Courts by the act of last session, that it is only in certain cases, and subject to certain circumstances that the action lies; and having noticed the first ground lying at the foundation of jurisdiction—the limit as to amount—we proceed to notice the *cases* in which ejectment may be brought.

The first enquiry of the practitioner is, Does the yearly value of the premises fall within two hundred dollars? Or if a value has been placed on the premises by the parties themselves—that is if the place has been rented—does such value, *i.e.* the rent payable, come within that amount?

The next consideration that presents itself is, as to the parties; for to bring the act into operation, the relation of landlord and tenant, as contemplated by the act, must exist between them.

The right to bring the action is also dependent on the fact whether the term has expired or been determined, or the rent has been sixty days in arrear; and in this order we purpose noticing each ground.

The relation of landlord and tenant.

The precise relation which the words "landlord and tenant" are intended to express is not always easy to determine, though they are terms in constant use. According to the meaning in general attributed to these words, the terms are correlative; the word landlord importing a party who grants a lease, the other the party to whom granted. "I think," says Smith in his lectures on "Landlord and Tenant," "that I am not far wrong in saying that, when we speak of landlord and tenant, we have the notion in our minds of a tenancy limited, in point of duration, within some bounds, not so extensive as to render the landlord's interest *practically* worthless, and accompanied by some remunerating incidents to the reversion, such as a rent or, at all events, a fine in lieu of rent, and also by certain obligations, such as covenants, or, when the tenancy is evidenced by some instrument not under seal, agreements for the performance of the duties usually required from persons taking the description of property demised." But this is the narrow sense of the words, though the usual one, for, "in point of strict law, whenever we find a subject in possession of land, *there* the relation of tenancy is in existence between him and somebody or other." * * * "Some one or other *must* be his superior lord." * * * "No person, except the Sovereign, can hold landed property without a superior lord, and, consequently, in contemplation of strict law, the relation of landlord and tenant is as extensive as the ownership of landed property by subjects." (Smith's Landlord and Tenant, 34.)

The term *tenant* may be applicable whatever the nature of the estate, whether an estate for years, for life, in fee simple, or an estate tail; but the word is then used independently and not correlatively, as when we employ the words landlord and tenant speaking in the ordinary sense of lessor and lessee.

And, as has been noticed, the term *landlord* does not necessarily import one who grants a lease, but the owner of the land. In the statute before us the words "landlord and tenant" are used independently—at least they do not contemplate the sort of tenancy meant when the words are employed in their ordinary sense.

Section six enacts that "The term 'landlord and tenant' as used in this act shall be understood to mean the person entitled to the *immediate* reversion of the lands, or if the property be holden in joint tenancy, co-parcenary, or tenancy in common, shall be understood to mean any one of the persons entitled to *such* reversion."

The *immediate reversion* meant in the section is obviously the reversion expectant upon the tenancy in litigation. And the person entitled to it may or may not be the party granting the lease to the defendant. For example, if a party, after having demised premises, sell the property, in case the lessee refuse to pay the rent or give up the property, we think the owner, under the purchase, could bring ejectment in the County Court, as being the landlord under the act (or person entitled to the immediate reversion); for by his purchase he became owner of the property, subject to the tenancy. Or if tenant for life demise premises for a term of years, upon the death of tenant for life, the party entitled to the remainder in fee could bring his action as the person entitled to the premises. But it has been held under an analagous English enactment by Patteson, J., that a mere constructive tenancy arising out of a mortgage transaction is not sufficient. (*Jones* v. *Owen*, 18 L. J., Q. B. 8). This was a rule for prohibition to restrain the county judge from proceeding in the case, on the ground that there was no tenancy proved to exist between the parties, beyond what was to be implied from the relationship between mortgagor and mortgagee. The plaintiff was mortgagee of the premises; the defendant claimed under the mortgagor. It was objected at the hearing that there was no privity of contract between the plaintiff and defendant, but the judge overruled the objection, and gave judgment for the plaintiff. Patteson, J., in giving judgment said: "I do not think anything is clearer than that the act contemplates the ordinary position of landlord and tenant, *and not* that existing between mortgagor and mortgagee; and I do not find anything in the affidavits to show that any such relation existed in the present case between the parties. I therefore think that the county judge had no jurisdiction to try this case; and that as far as right is concerned, the defendant is entitled to a prohibition. * * There was a total want of jurisdiction."

Another case has been decided in England upon this point. (*Banks* v. *Kebbec*, 20 L. J., Q. B. 476). It appeared that an agreement in writing had been entered into between the parties, for the purchase of the premises in question for the sum of £150, to be paid by weekly instalments of £8 each, until the whole purchase money was paid. Upon a rule for a prohibition it was held that the relation of landlord and tenant did not exist, and that the county court had no jurisdiction.

If our view be right, the question which a practitioner should determine as to whether the plaintiff is entitled to bring the action or not is, simply—is he the party (subject to tenancy) entitled to the premises in dispute? If he is, then, subject to other restrictions in the statute, the action lies.

(*To be continued.*)

ATTORNEYS' BRANCH OFFICES.

It has been intimated to us by the Benchers of the Law Society, that in Upper Canada there is a vicious system springing up whereby attorneys living in leading cities and towns establish in smaller places branch offices, under the superintendence of articled or other clerks, who receive a certain proportion of fees for work done in compensation for their services.

We need not say to our more experienced brethren in the profession, that in point of law such a system is illegal, and on grounds of public policy most objectionable.

It is the duty of an attorney to instruct his clerks and advise personally with his clients, in order that the former may profit by the instruction so as to qualify themselves to pursue the duties and avocations of the profession to which they are brought up, and that the latter may reap the benefit of the advice and judgment of their principal (per Richardson in 7 Moore, 243).

The attorney who, while actually carrying on his profession in one place, establishes branch offices in other places under the management of his clerks, is unmindful of both these duties. On the one hand he neglects his clerks whom he is bound personally to instruct, and on the other he neglects those clients who are entitled to his personal attention, and the fruits of his experienced judgment.

In our opinion the case is not at all improved by the fact that the attorney occasionally makes the circuit of his branch offices.

Attorneys, after having been duly examined and found qualified to act, are admitted to practice under the sanction of and with the approbation of the Courts. When admitted they are entitled to the privilege and protection of the Courts, and are subject to punishment by the Courts in cases of misbehaviour. The Courts, however, could exercise no control whatever over attorneys if they were allowed to have different clerks in different parts of the Province, where clients could seldom if ever have personal communications with them (see per Burrough, J., 7 Moore, 241).

Besides, the system of remuneration established in these offices, is quite opposed to every principle of public policy regulating the conduct of the profession in their relations to the public. The payment of a proportion of profits to inexperienced clerks, could only be an incentive to stir up litigation held out to men (or rather boys) whose motives would not be governed either by learning, experience, or common prudence.

It is unnecessary to do more than refer to *Hopkinson* v. *Smith*, 7 Moore, 237, to shew in what light these partnerships are viewed in England. It there appeared that plaintiff, an attorney, lived at Dewsbury, in Yorkshire, and had a branch office at Wakefield, five miles from Dewsbury,

where he went once a week, and where a person by the name of Berry, who had lately been his articled clerk, but who had not been admitted an attorney, superintended his business and practised in his name. The defendant resided at Huddersfield, fourteen miles from Wakefield, and applied to Berry there, in the first instance, to commence an action against one Naylor. The suit was carried on by Berry. Between him and the plaintiff there was a private understanding that for all business done by the former at Wakefield, he was to receive one-third of the profits, and the plaintiff the remaining two-thirds. It was not shown that the defendant had ever seen or communicated with the plaintiff as to the conducting of the cause. It appeared also, we may add, that Berry was indebted to the defendant for spirituous liquors, furnished to him by the latter, before the bill of costs was delivered. The plaintiff brought an action against defendant for the amount of his bill of costs.

The learned judge at the trial, upon this state of facts, was of opinion that the plaintiff was not entitled to recover, on the ground that no proof had been given that he had been retained by the defendant; that before a client can be called on to pay an attorney's bill of charges for business done by him, in the character of an attorney, he should have had the benefit of his experience and judgment as the principal; that the plaintiff by allowing his clerk to transact his business at Wakefield and giving him one third of the profits, constituted a partnership; that if so, the action should have been brought in their joint names; and that as such partnership would have been illegal in itself, they could not have been enabled to recover, and so the plaintiff was nonsuited.

The judges, *in banc*, refused to set aside the nonsuit, and gave utterance to expressions of disapprobation much stronger than any we have used.

It only remains for us to add that the Benchers of the Law Society of Upper Canada have determined to discountenance every such transaction, and will not allow the time served by an articled clerk at a distance from his master's chief place of business. This determination will, at least, have the effect of deterring young men, anxious to become admitted at an early date, from becoming parties to bargains which every professional man of a correct mode of thinking must condemn in his conscience.

We are also informed that the Law Society have discovered a practice equally liable to censure, and that is, the practice of articled clerks, in the last year of their service, coming to Toronto, bringing with them the agency business of country principals, and pocketing the agency fees, or some portion thereof, as their own. This is a practice which, if discovered in the case of any particular student, will subject him not only to censure, but probably to pains of a more severe description.

It is our duty to the profession, as well as to the public, to make these remarks; and we hope that they will not be without some effect upon those to whom they are especially addressed.

SUMMARY CONVICTIONS, AND APPEALS THEREFROM.

BY A BARRISTER.

A conviction may be defined to be "A record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced."

Being a record therefore of a proceeding taken under the authority of a statute, and in restraint of the common law, which requires that a man shall be tried by his equals, nothing will be presumed in favor of a conviction, but the intendment will be against it.—Burn. 586.

Every thing therefore necessary to show the jurisdiction of the magistrate, the commission of an offence, the hearing and adjudication, must be stated fully and with certainty.

In 1 Lord Raym. 510, Lord Holt said, "Convictions ought to be certain, and not taken upon collection;" and in *Rex* v. *Harris*, 7 T. R. 238, Lord Kenyon said, "A conviction is in the nature of a verdict and judgment, and therefore must be precise and certain."

Except in cases where a form of conviction was given by a particular statute, it was necessary at common law to set forth in a conviction—

1st. An information or charge against the defendant, shewing by whom the complaint was made, the nature of the offence, and the time when and place where it was committed.

2nd. The jurisdiction of the magistrate.

3rd. A summons to the defendant, in order that he might have an opportunity to make his defence.

4th. His appearance or non-appearance.

5th. His confession or defence.

6th. The evidence against him, in case he did not confess.

7th. The judgment or adjudication.

8th. That it be under the hand and seal of the convicting magistrate.

The difficulty of drawing up convictions in due form no doubt induced the Legislature, in the act relating to summary convictions, to give general forms, in which many things necessary to have been stated in a conviction at common law have been omitted.

In a conviction in the form given by the statute 16 Vic. c. 178, Consol. Stat. Can. c. 103, it is only necessary to set forth—

1st. The jurisdiction or authority of the convicting magistrate.

2nd. The offence of which the defendant is convicted, including statements of the time and place when and where committed.

3rd. The judgment or adjudication.

4th. The hand and seal of the magistrate.

First as to the jurisdiction of the magistrate. He should style himself one of her Majesty's justices of the peace *in and for* the county of ———. It is not sufficient to call himself a justice, &c., *within* the county, for *non constat* that he is a justice *for* the county, and therefore having jurisdiction.—*Rex* v. *Dobbyn*, 2 Salk. 474. When a statute gives cognizance of an offence to the *next* Justice, it should be so stated in the conviction. It is not sufficient in that case to call himself merely a justice *in and for the county*, because none but the next accessible justice can have jurisdiction under these words.—Sanders, case 1; Wms. Saund. 263, c.

Second, as to the offence. The offence of which the defendant is convicted must also be stated with certainty, otherwise the conviction will be quashed.

In *Wilson* v. *Graybiel*, 5 U. C. Q. B. 227, a conviction for selling liquor without license, contrary to the form of the statute in such cases made and provided, was held bad because it was not alleged under what statute and for what offence the conviction was made.

A conviction "*for wilfully damaging, spoiling and taking and carrying away, six bushels of apples of the said Rogers, whereby the defendant committed an injury to the said goods and chattels,*" was held not to contain a statement of an offence for which a conviction could take place. —*Eastman* v. *Reid*, 6 U. C. Q. B. 611.

A conviction alleging that the defendant did "*evade payment of toll at the toll gate situated, &c.,*" was held insufficient in not showing that any toll was claimed, or what toll, or how imposed, or that any *could* be claimed. —*Regina* v. *Haystead*, 7 U. C. Q. B. 9.

And so a conviction which stated that the defendant did "*take and receive toll from the informant, at, &c., unlawfully and improperly, the said gate not being in a situation or locality authorized by law,*" was held bad in not stating how much toll was taken, and in not shewing in what respect the taking of toll was unlawful.—*Regina* v. *Brown*, 4 U. C. Q. B. 147.

A conviction stating an offence to have been committed in the alternative is bad.—*Rex* v. *Sadler*, 2 Chitty, 519; *Rex* v. *Pain*, 5 B. & C. 251. See also *Fletcher* v. *Calthorp*, 6 A. & E., N.S., 880; *Rex* v. *Roberts*, 1 Stra. 608; *Rex* v. *Sparling*, 1 Stra. 497; *Rex* v. *Popplewell*, 1 Stra. 686; *Rex* v. *Chaveney*, 2 Lord Raym. 1368; *Rex* v. *Ferguson*, Trin. Term, 4 Wm. IV., U. C.; R. & H. Dig. 121.

Where the offence is created by statute, it is in general sufficient in describing it to pursue the words of the statute. —*Rex* v. *Chandler*, 1 Lord Raym. 581; *Stamp* v. *Surekand*, 14 L. J., N. S., 184; 9 Jur. 939.

If a statute creating an offence or penalty contain a proviso or exception, the conviction should negative the exception.—*Rex* v. *Jukes*, 8 T. R. 542; *Hespeler* v. *Shaw*, 16 U. C. Q. B. 104.

However, if the exception is contained in a subsequent statute to that creating the offence, the exception need not be negatived in the conviction. It is incumbent on the defendant to show that he comes within such exception.—*Rex* v. *Hall*, 1 T. R. 322. And so it would appear where a statute in one clause creates an offence generally, and in a subsequent clause excepts certain cases.—1 Stra. 555; 2 Stra. 1101.

A conviction under a by-law must shew the by-law, that the court may judge of its sufficiency.—*Regina* v. *Ross*, Mich. 3 Vic. U. C.; R. & H. Dig. 127.

The time of committing the offence must also be stated in the conviction, that it may appear that the prosecution is commenced in due time, and also to enable the party to defend himself against a second charge.—Salk. 369; 2 Stra. 900. But the offence need not be proved precisely on the day it is alleged to have been committed; though it must be proved to have been committed within the time limited for the prosecution.—*Rex* v. *Chandler*, Salk. 378; 5 Mod. 446; 1 Lord Raym. 582; *Regina* v. *Simpson*, 10 Mod. 248.

The place where the offence was committed should also be set forth in the conviction, in order that it may appear to be within the jurisdiction of the magistrate (*Rex* v. *Hazel*, 13 East. 139); and also that the party may be able to defend himself against a second charge.

Third, as to the judgment or adjudication. Every conviction must contain an adjudication of the defendant's having been convicted, and there must be a penalty imposed; for it is said that "An appeal is not from the judgment of the Justice as to the fact, but because he has ordered a penalty to be paid, or has committed the defendant, who wants to stay execution or be released."—Dickenson, Q. S. 809. Even in cases where the punishment is fixed by statute there must be an adjudication, for the want of which the conviction in *Rex* v. *Harris*, 7 T. R. 238, was quashed. In *Rex* v. *Hawkes*, 2 Stra. 858, and *Rex* v. *Vipont et al*, 2 Burr. 1163, convictions were quashed

because there was no judgment of forfeiture; and see *Rex* v. *Ashton*, 8 Mod. 175.

A defendant may be convicted of several offences of the same kind, and of several penalties in the same conviction. —*Rex* v. *Swallow*, 8 T. R. 286.

But under particular acts of Parliament only one offence can be committed on the same day. As under the statute 29 Car. II. c. 7, for exercising a trade on the Lord's Day. —*Crepps* v. *Durden*, Cowp. 640; and see also *Rex* v. *Matthews*, 10 Mod. 26; *Rex* v. *Lovett*, 7 T. R. 152.

When several parties are convicted, several and distinct penalties should in *general* be imposed; but where any person or persons are prohibited from doing *an act* under a penalty, it is a joint offence, and only one penalty accrues. *Rex* v. *Bleasdale and another*, 4 T. R. 809.

It is also sufficient in general, and since the statute relating to summary convictions it is proper to direct the penalty to be distributed as the law directs; but if the act creating the offence gives a discretionary power to the magistrate, either as to the proportions in which the penalty is to be distributed among different persons, or for different purposes, or as to the persons or objects to receive the penalty, an adjudication that the forfeiture be disposed of as the law directs would be bad.—*Rex* v. *Dempsey*, 2 T. R. 96; *Rex* v. *Symonds*, 1 East. 189; *Rex* v. *Seale*, 8 East. 568, 573; *Rex* v. *Smith*, 5 M. & S. 183.

Where a commitment formed a part of the adjudication, and it was ordered that "the defendants should lie in prison till they pay their fine," no precise fine being mentioned, the conviction was quashed.—*Rex* v. *Elwall*, Stra. 794; 2 Lord Raym. 1514.

A conviction for obstructing a highway, and order to pay a continuing fine until the removal of such obstruction, was held bad in *Regina* v. *Huber*, 15 U. C. Q. B. 589.

In *Regina* v. *Robertson*, 11 U. C. Q. B. 621, a conviction of an apprentice and order that he should give sufficient security to his master to make satisfaction, and in default of such satisfaction to be imprisoned, &c., was held bad, because the justice did not determine what satisfaction should be given.

Where costs are ordered to be paid the amount must be specified, otherwise the conviction will be quashed for uncertainty. — *Rex* v. *Hall*, Cowp. 60; *Rex* v. *Ferguson*, Trinity, 3 & 4 Wm. IV. U. C.; R. & H. Dig. 121.

Fourth. Hand and seal of magistrate. A conviction should be under the hand and seal of the magistrate. It thereby becomes a record of the conviction.—Dick, Q. S. 895. Without his hand and seal it would be bad, and would be quashed.

It is usual, though not necessary, to add the date of the adjudication; but an impossible or incongruous date, if the conviction be complete without it, may be rejected as surplusage and will not vitiate.—*Rex* v. *Picton*, 2 East. 196.

(*To be continued.*)

NEW TRIALS IN INTERPLEADER CASES.

The subjoined letter is inserted as desired.

If the writer knew of the case of *Reg.* v. *Doty* at the time of writing his first communication he should have referred us to it; if he withheld a reference to it with any sinister design, he acted a most disingenuous and unprincipled part. As legal journalists we desire to place before our readers the best information that our experience and research can furnish, and no question is answered without being first considered. But it is very possible that a decided case may escape the attention of the most diligent. The queries inserted and answered in the *Law Journal* are not merely for the individual querist, but that all its readers may have the benefit of the information conveyed. To suppress a case within the knowledge of a querist is manifestly unfair alike to the conductors and readers. We are willing to believe that Mr. Whipple did not know of *Reg.* v. *Doty* when he first wrote to us. It is the first matter of the kind that has occurred in the six years since this publication was commenced and we trust it will be the last. Correspondents should know and feel that the conductors of this Journal can have no wish as to any debated question, other than, as a great Judge once said, to know what the law really is. We must admit that *Reg.* v. *Doty* escaped our notice, because it is a criminal case. Still we believe our opinion that a new trial may be granted at the present day in Interpleader cases is correct.

Reg. v. *Doty*, (13 U. C. Q. B. 398) was a criminal case reserved. The defendant was convicted of perjury committed before the Judge on an Interpleader proceeding in the Division Court. So far as material to the point under consideration the facts were as follows: An interpleader summons was sued out, and the judgment creditor and claimant appearing, the case was heard before a Deputy, duly appointed, who decided against the claimant. Subsequently the judge ordered a new trial, and on the second trial the defendant Doty gave the evidence upon which he was convicted of perjury. Several objections were taken at the trial. That bearing on this point was, that an adjudication having taken place before the acting judge, such adjudication was final, and that being so, no new trial could be granted, and that therefore the second trial was extra-judicial.

The learned Chief Justice of the Common Pleas, in delivering judgment, after quoting the 13 & 14 Vic. ch. 53,

sec. 102, and 16 Vic. ch. 177, sec. 7, said, "I think tha an adjudication having been made by competent authority was final and conclusive, and that it was not competent for the Judge under the 84th sec. of 13 & 14 Vic. ch. 53, to grant a new trial." This decision was in the year 1856, and upon statutes no longer in force. At that time the proceeding by way of Interpleader was based on 7th sec. of 16 Vic. cap. 177, which contained no such general provision, enabling the Judge to grant new trials as was contained in the original act 13 & 14 Vic. ch. 53, sec. 84, which fact may serve as a clue to the ground of the decision. But we have now to deal with the law as contained in the Consolidated Act, cap. 19. By that act it is provided that the orders, judgments, and decrees of the Courts shall be final and conclusive between the parties (sec. 55), and in the Interpleader clause (sec. 175) the same language precisely is used, namely that the order of the judge "shall be final and conclusive between the parties." Then the judge by sec. 107 "upon the application of either party within fourteen days after the trial, and upon good grounds shown may grant a new trial upon such terms as he thinks reasonable, and in the meantime may stay proceedings." The whole law is now contained in the same act, and to contend *at the present day* that the words "shall be final and conclusive between the parties," in the Interpleader clause debars the judge from granting a new trial, would be something like an absurdity *when the same language is used to cases under the general jurisdiction*. If it were so it would seem as if there could be no new trial in any case.

The present statute we take it puts the decrees and orders of the Division Courts on a similar footing with the judgments of the Superior Court, as Parke, B. observed in *Robinson* v. *Sheghan* (12 Jurist 401) on an analagous enactment, a man may apply to the judge to set aside the judgment, but, if not aside it binds him.

On still broader grounds there is a stronger reason for delegating the power to grant new trials in Interpleader cases than in any other class of cases which came before the Division Courts. From *their* nature they involve more difficult and intricate questions of law and fact. They generally embrace larger and more valuable rights. Indeed there may be said to be no limit as to value in respect to the subject matter, and the very act of bringing the suit may be made to operate as a stay of proceedings in the superior courts respecting the same claim.

If there be good reason for the provision authorising a new trial in any case in the Division Courts, it applies in a high degree to Interpleader cases.

In view then of the law as it now stands and the considerations referred to, we reiterate a strong opinion that a new trial on proper grounds be granted in Interpleader cases in like manner as in other cases before the Division Courts.

Mr. Whipple's letter we give verbatim on the ground mentioned in the first part of this article.

To the Editors of the Law Journal.

HAMILTON, 29th OCT. 1860.

GENTLEMEN,—In answer to my communication of 8th August last, I see that you are of opinion that a Judge of a Division Court has the legal right to grant a new trial on Interpleader. I beg to refer you to the following report, *Regina* v. *Doty* on 398 fol., of 18th vol. U. C. Queen's Bench Reports, 19th Vic., Trinity Term.

Please notice this in your next issue, and

Oblige your obedient servant,
E. S. WHIPPLE.

IMPORTANT TO COUNTY COUNCILS.

In other columns will be found the report of a case (*Gibson and the Counties of Huron and Bruce*) decided under section 70 of the Assessment Act, as to the proper mode of equalizing assessment rolls of local municipalities, and the remedy, if an unjust *equalization* (if we may be permitted the expression) be effected. We confess, however, that little light is thrown upon the meaning of the statutable provision in question, and little hope of redress held out to such rate-payers or such townships as may have reason to complain that their more wealthy and more powerful neighbours have made use of their powers for purposes of injustice or oppression.

We pass no judgment on the merits or demerits of the particular application which elicited the judgment we now publish. The court, unfortunately, does not appear to have power to deal with a case of the kind, and simply informs the applicant that his statements on affidavit are denied by affidavit, and it (the court) cannot interfere. The court, however, goes further. It says, that even if there were the power to interfere, that power could not be satisfactorily exercised by a tribunal not possessed of local knowledge, such as the members of county councils are supposed to possess.

If members of county councils, possessed of the requisite local knowledge, were to act in all cases free from selfishness—if they were in all cases to act dispassionately and disinterestedly—in performing the important duty entrusted to them by the legislature, there would be no cause for a higher or other tribunal; but we know that some men are prone to save themselves and their property at the expense of their neighbours, and that county councils are not free from such men. So long as our human nature remains what it is, we think there should be some check upon the proceedings of county councils, in the matter of equalization of assessment rolls of local municipalities.

We admit that at present we cannot suggest the remedy, unless it be that mentioned by the court in the case to which we have made allusion, viz., election at the polls. So far as the enactments under which the case was decided are unintelligible, the remedy is in the hands of the legislature.

DECISIONS OF COUNTY COURT JUDGES.

It is a fact that several of our County Court Judges do not write their opinions on legal questions raised for decision in their courts, and do little more than say, "Rule absolute," or "Rule discharged."

It is not for us to conjecture why the opinions are not prepared and delivered as by the judges of the superior courts. In some instances the cause may be want of time —in others, want of inclination—in others, want of proper books to consult—but be the cause what it may, there are judges who *do not* write their opinions.

In the event of an appeal, the want of a written judgment becomes not only a serious want, but a direct violation of the statute in that behalf. It is provided by the statute (Consol. Stat. U. C., cap. 15, sec. 68, p. 92) that the judge, after certain preliminary requisites, shall, at the request of the party appellant, certify under his hand to either of the superior courts of common law, named by such appellant, the pleadings in the cause, and all motions, rules or orders made, granted or refused therein, "*together with his own charge, judgment or decision thereon,*" &c.

We should be sorry to say that our remarks have a general application. Far from it. There are many honorable and praiseworthy exceptions, and among these, it is not necessary for us to mention, that his Honor Judge Mackenzie, of Frontenac, Lennox and Addington, is one. We take great pleasure, and receive much instruction in the perusal of the judgments of that learned gentleman, and are sure that our readers are as pleased as ourselves to be put in possession of his judgments.

County Court clerks would discharge a duty to the profession by the publication of decisions of their judges. The publication of the cases will cost nothing, for our columns are at all times open to such contributions. We continually invite them, but either from the fact that many county judges do not deliver their judgments in writing, or that county court clerks do not take the trouble to forward them, we do not receive as many as we would wish.

In this number we have the pleasure of publishing two judgments recently delivered by Judge Mackenzie. One is now under review in the Court of Queen's Bench, and will be in all probability confirmed. It has common sense at its base, and that is no small recommendation.

THE LAW AND PRACTICE OF THE DIVISION COURTS.

We have at last succeeded in obtaining a promise from a gentleman fully competent for the undertaking, to write for the *Law Journal* a serial, embracing the whole or some branches of the law and practice of the Local Courts.

The want of such a work has been long felt, and after a standing offer for some years of a pecuniary inducement to produce it without response, at least none from capable persons, we are now indebted to the disinterested kindness of a friend who, no doubt like ourselves, desires to acquit himself in some part of "the debt which every man owes to his own profession."

We hope with the new year to commence publishing the work in question in our columns, and within reasonable limits, will continue to do so as fast as it may be furnished to us.

In the meantime, we are asked to request any County Judge who would be willing to give the benefit of his experience to the writer upon questions where there is deversity of opinion, to signify his assent to us, that upon *proofs* or otherwise, his views may be ascertained—(though not published unless requested).

This request we sincerely trust will meet ready response, seeing that the object in producing the work is not one of gain, and the end aimed at being such as every County Judge must be deeply interested in.

CROWN LANDS' NOTICE.

Attention is directed to an important advertisement in other columns, directed to debtors to the crown, in respect to crown lands, and to squatters.

"CURIOSITIES."

(*From the Legal Intelligencer.*)

Samuel C. Perkins, Esq., handed us, some time since, the following curious and explicable *Land Contract*, which he tells us that he actually received from the West. It certainly deserves "a corner in the *Legal*." Mr. Perkins observes well, that "it would take more than one court or one jury to construe it:"

$130 "Greenville, Feby. 26, 1858.

Written agreement made between Sarah Roberts and Patrick Hart in conditions to pay her the Balance of the money when the other party has fixed their arrangements that is McNininy who purchased the three fourths part of John Roberts formerly, and according to this statement the said Patrick Hart is to pay Sarah Roberts the Ballance on or about the tenth of next month.

his
PATRICK ⋈ HART.
mark

Present—JOHN QUEEN.
J. EDWARD TAYLOR."

JUDGMENTS OF MICHAELMAS TERM.

The following are the days appointed for the delivery of judgments.

QUEEN'S BENCH.

Saturday ..... 15th December, 10 o'clock.
Saturday ..... 22nd " 2 o'clock.

COMMON PLEAS.

Saturday ..... 15th December, 2 o'clock.
Saturday ..... 22nd " 10 o'clock.

CHANCERY EVIDENCE.

(*From the Legal Intelligencer.*)

The report of the commissioners who were appointed to inquire into the mode of taking evidence in the English Courts of Equity, which has been lately published in England, contains a number of practical suggestions that apply to our own as well as to the English system of procedure in Chancery; and we presume that a brief summary of the results of their investigations, and of the conclusions to which they have arrived, may not be uninteresting to American professional readers.

This Commission was composed of sixteen members—all of them lawyers and judges of the greatest eminence. The living ex-Chancellors, the present Lord Chancellor, the Master of the Rolls, one of the Vice Chancellors, the Attorney General of England, and the Chief Justices of the Court of Queen's Bench and of the Common Pleas, have concurred in the report which has been submitted to Parliament. The character of this Commission entitles their determinations to the respectful attention of all who are interested in the subject that they have been investigating.

The question that they were required to solve was simply this; which is the better system of taking evidence in suits in Equity,—the oral examination of witnesses before an examiner appointed for the purpose of taking down the testimony and reporting it to the court, or the adduction of evidence *viva voce*, at the hearing before the court? Their report upon this question is quite elaborate, but we think that we shall be able to condense, within the space to which we are limited, the pith of all their conclusions.

The practice now followed in England is very similar to our own. Every party in an equity cause is at liberty to verify his case, wholly or partially by affidavits, or wholly or partially by the oral examination of witnesses before one of the official examiners of the court in which the suit is begun, or before an examiner specially appointed to take the testimony. When affidavits are filed, the opposite party has the right to require the attendance of the deponents in an examiner's office for the purpose of cross-examination. The usual practice is to sustain the allegations in the bill and answers, or pleas, by oral testimony before the examiner.

In considering the question whether they would advise the entire abolition of this practice, and the substitution of the system of adducing the evidence *ore tenus*, before the court, that is to decide the facts as well as the law of each case, the commission found it necessary to examine a large number of professional witnesses, with a view to know what their experience had been, and how far a change was really desired by the profession. The testimony has been appended to the report, and is very voluminous. The profession seem to be of one opinion, that the system of taking evidence before the examiners should, except in some special cases, wholly cease, and that all evidence should be adduced either on affidavit or *viva voce* at the hearing. The Commissioners have embodied the result of their deliberations in eighteen resolutions, which will no doubt before long form the basis of an Act of Parliament. They recommend—and we present the most important of these resolutions—that facilities should be afforded for the trial of material facts contested between the parties, upon *viva voce* evidence, to be given before the judge who is to decide upon them, or before a jury—that when a party has filed an affidavit in support of his case, any opposing party may, within such time and in such manner as by general order shall be fixed, give notice that he requires the production for cross-examination at the hearing of the deponent who has made the affidavit—that at the hearing of the cause the *viva voce* examination and the cross-examination of witnesses shall be had in the presence of the judge, as to the matters included in any such notice as aforesaid, and affidavits shall only be received of such facts and documents as the judge shall consider not to be included in the terms of the notice—that where both parties shall agree in desiring that a trial should be had before the court, and the assistance of a jury, as before a judge at Nisi Prius, and shall agree on the issues to be tried, they shall be at liberty to apply to the court to order the trial to be had.

These are, we believe, the most important of the resolutions that the Commission have submitted for the approval of Parliament, and if they should be adopted, as our readers perceive, the result will be, the abolition of the present plan of taking testimony in Chancery, and the substitution of the common law system of oral examination of witnesses before the court. We need not pause to show that all the objections which are found to apply to the old practice, attach to it in this country as well as in England. American lawyers, while they usually work with less caution and care than English lawyers, are, it is true, more expeditious in the management of their cases. But we are much mistaken if our equity lawyers are not of opinion that the delay which seems, under the existing system, to be necessarily an incident to the prosecution of a complicated case in Chancery, is often dangerous and disastrous to those who are intrusted in its determination. If the experience of clients were taken, there would be but one opinion upon the subject.

The writer of this article is the examiner at the present time, in a case in equity, which was begun in 1857. The examination of the witnesses will probably occupy several months, and before the case is heard upon bill, answer and evidence, another year will doubtlessly run by. It would be neither strange nor unnatural if, by the time the cause is ready for argument, the parties in interest had lost all heart in the matter, and become tired and disgusted with the whole proceeding. A counsel, not unfrequently loses his interest in an equity cause long before it is settled. Many other cases intervene—are begun and determined, while it is pending. That intimate, familiar and vivid knowledge of the case in all its bearings, which is so important and necessary to the proper discharge of his duties, becomes blunted very often during its pendency; and when he comes to prepare for argument, he approaches the cause as he would a new subject. We will not dwell upon that which is, after all, the great objection to the examination of witnesses and the adduction of the proof in a case, beyond the sight and hearing of the court. We mean the (appearance and deportment of the witnesses,) total loss to the court of the manner, style, while they are subject to the examination and cross examination of counsel. If correctness and completeness of evidence are to be wished for, beyond all things else, in cases at law, they are much more desirable in cases in equity, where fraud, in one or other of its myriad shapes, is the element upon which many a controversy totally depends; and if there is one thing upon which jurists and legal philosophers, as well as the merest practitioners perfectly agree, it is, that the greatest security for absolute truthfulness in the giving of evidence, as well as for perfect trustworthiness

in testimony, is the examination of the witnesses face to face with the tribunal which is to decide the cause. We need not now enlarge upon this topic.

The suggestions that we have made, though they have not the merit of novelty, deserve consideration. The abolition of the existing method of taking testimony in Courts of Chancery, would perhaps involve the necessity of erecting separate Chancery tribunals, and severing entirely the Courts of Law and the Courts of Equity. But that is a change to which many of the profession here, as we happen to know, are decidedly friendly, and which must be brought about before a very long time. We will revert to this branch of the subject in a future article.

GRAND JURIES.

(From the Jurist.)

AMONG the bills which were brought into Parliament during the last session, but failed in passing into law, is one introduced into the House of Lords by Lord Chelmsford to carry out, in a modified form, a theory which has prevailed for some time among a certain school of law reformers—that grand juries are a useless and injurious appendage to our criminal courts. In furtherance of this view, two bills for their almost total abolition within the metropolitan districts were introduced into the House of Commons by that learned Lord when Sir Frederick Thesiger, which, however, failed of success; although it is not improbable that the discussions on them gave rise, in some measure, to a salutary statute—the Vexatious Indictments Act, to which we shall advert presently.

The principle involved in these bills was, whether the grand jury ought to be abolished as bad in principle; or whether, supposing the objections taken to it to be not altogether groundless, they are such as could be removed by judicious measures of reform; or, even if this could not be effected, whether they are not overborne by the inherent advantages of the system.

The Institution of the grand jury rests on three principles—first, that no man ought to be subjected to the inconvenience, danger, and odium of a public trial for any serious offence by the mere action of the officers of the Crown, or of any tribunal appointed by it—a salutary guard to the liberty of the subject; secondly, that every subject has a right to bring a criminal to justice, whether the so doing be agreeable or otherwise to the Executive; thirdly, the placing in the hands of a number of persons taken from the upper classes among the people a right, by presentment, of their own knowledge, to bring to the notice of the Executive and of society the existence of any evils or abuses within the district where they reside, even though neither the Executive nor an individual has founded, or perhaps could legally found, proceedings upon them. The constitutional functions of the grand jury are well described by the present Common Serjeant (Mr. Thomas Chambers) in a paper read by him before the Juridical Society in December, 1858, the perusal of the whole of which we strongly recommend to our readers.

"When a conflict is going on between prerogative and liberty, between popular rights and the power of the Crown, or when some obnoxious law is sought to be enacted or repealed, at such times the press and the people are both stimulated to unwonted activity and energy, and the liberty of speaking and printing is taken full advantage of. The popular passions find vent and voice at great public meetings, where vehement speeches are made, strong resolutions passed, strong memorials and petitions adopted. All this is done roughly—sometimes even fiercely; much that is unwise, much that is unjust, much that is untrue, is uttered and believed. Authority becomes provoked, and attempts measures of repression; and it commonly begins by selecting the most prominent and noisy exponents of the popular will as the subjects of indictment for seditious or treasonable libel; or it goes lower, and apprehends the most violent members of a mob, and charges them with seditious tumult and riot. Or the Government may resort to more extreme measures—may call in the aid of the military, and the blood of the people may be spilt on the scene of some immense gathering; and then, in all probability, the criminal law will be invoked on both sides—the Government arming itself with indictments against individuals for sedition or treason; the people defending themselves with indictments against officers and soldiers for man-slaughter or murder. In such crises as these the grand jury has, over and over again, rendered invaluable service: the subject has been protected by them in the fullest exercise of his right to demand (though clamorously) the redress of his grievances; the Crown has been vindicated in its constitutional efforts to repress sedition and insurrection. The force of the shock is broken when order and liberty meet in these their rudest conflicts. The bitterness of the strife is allayed, when the rulers and the populace are in angry collision with each other, by a court so constituted as to have sympathies with both parties, and fitted, therefore to act as mediator between them. The harshness of authority is mitigated by its acting through such an organ; the lawless impulses of the disaffected subside when they have the opportunity of appeal to a proper tribunal. The scene of conflict is thus shifted from tavern halls and open commons to the arenas of justice. Both parties change the weapons of their warfare—both appeal to the law. The demagogue stops his inflammatory harangue to advise with his lawyer; the Government recalls its troops and instructs the Attorney-General. The result of this is, that the greatest political questions come on for discussion in our criminal courts, and come on under circumstances very favourable for their correct solution. By ignoring a bill, the grand jury, in sympathy with a people oppressed, calmly rebukes the Crown—by finding a bill, they tranquilly coerce the lawlessness and violence of the mob; they stand midway between the opposing parties, and avert a direct shock; they save the authorities from a more mortifying defeat by stopping their proceedings in limine; they save liberty from discredit by chastising its excesses by the law; and they accomplish all these purposes better than any other tribunal which could be devised to replace them.

* * * * * * *

"But the grand jury not only interposes a shield between the Crown and the subject to protect the latter from the oppression of power; it gives to him also a weapon wherewith he may assail the organs and ministers of prerogative, for he may go with his bill of indictment before that court, and accuse of malversation, or undue rigour, or dishonesty, or injustice in the execution of his functions, any officer of the Government; and may succeed in putting the accused on his public trial at a time when it might be difficult to find a Crown-appointed magistrate, sitting in open court, willing to place himself in an attitude of hostility to the authorities, by holding the accused person to bail. Were this right withdrawn the subject might become impatient and irritated beyond endurance by petty acts of extortion or harshness, for which the law offered him no adequate redress: were this liability removed, those in places of authority might be encouraged to misdemean themselves in their office."

Let us now see what are the arguments used against grand juries by the school of law reformers to which we have alluded. First, they argue against the system generally, that this institution was, or at least with the progress of time has become, valueless, and if so, an hindrance to the administration of justice; that the secrecy of the tribunal renders it irresponsible; that it furnishes facilities for fraud and oppression, by giving an opportunity to a wicked person to go before a secret tribunal, and, without notice to the party accused, to get a bill of indictment found against him, which, whether true or false, may be used as an engine of extortion—further proceedings being abandoned if the prosecutor can be bribed—so that justice is defeated if the defendant be guilty, or an infamous wrong is inflicted upon him if he be innocent. In support of

this, Sir F. Thesiger assured the House of Commons, when introducing one of his bills, that some old women were almost frightened out of their senses at the apprehension of bills of indictment being preferred against them. And, with respect to metropolitan grand juries in particular, it is further urged, that all cases of alleged crime are so well sifted by the police magistrates as to render all further preliminary investigation wholly needless.

In answer to the last of these arguments, it is to be observed, that, so far as the constitutional functions of the grand jury are concerned, it is impossible to take a distinction between metropolitan and provincial districts. However excellent the metropolitan police magistrates may be, still they are the servants of the Crown, and as such *not* the proper persons to decide a question which the constitution has wisely entrusted to the people. Nay, more, the entrusting such a power to them would be sure in time to work their deterioration, by holding out a temptation to the Executive to appoint to those offices persons in whom the sense of justice and constitutional freedom were not strong. As to the secrecy of the tribunal, it is one of its advantages, in many cases at least; and the proposal to abolish it on this account amounts to saying, that in no case ought proceedings to be taken to bring a criminal to justice without first giving him notice of the intention, and consequently an opportunity to escape condemnation by flight. And although the first of the above arguments has considerable foundation in fact, the remedy for the evil consists, not in abolishing the grand jury, but in taking security from persons preferring bills before them to go on with the prosecution if the bills are found, and perhaps also by strengthening the law against groundless prosecutions. There is a good precedent for the former of these, which existed at the time Sir F. Thesiger first attempted to abolish the grand jury. Formerly any person might file a criminal information in the Queen's Bench for a misdemeanor against any other, and such informations were frequently resorted to as a means of extorting money; (see Arch. Crown Office Prac. 17); but the abuse was effectually put a stop to by the 4 & 5 Will. & M. c. 18, which enacts, "The Clerk of the Crown in the King's Bench shall not, without express orders given by the Court, in open Court, receive or file any information for a misdemeanor, before he shall have taken or shall have delivered to him a recognizance from the person procuring such information to be exhibited, in the penalty of 20*l.*, conditioned to prosecute such information with effect." And the Legislature last year acted on this principle in the Vexatious Indictment Act, 22 & 23 Vict. c. 17, which contains the following important provisions:—

By sect. 1 no bill of indictment for certain offences shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster, or of her Majesty's Attorney-General or Solicitor-General, or (in the case of an indictment for perjury) by the direction of any court, judge, or public functionary authorised by the 14 & 15 Vict. c. 100, to direct a prosecution for perjury.

By sect. 2, if a charge or complaint is made of any of those offences, and a justice of the peace refuses to commit or hold the party to bail, if the prosecutor desires to prefer an indictment the justice may take his recognisance.

This statute extends to the following offences, and it may well be a question whether it might not be beneficially extended to many others, and perhaps even to all bills of indictment not really prosecuted by the Executive:—Perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling-house, keeping a disorderly house, and an indecent assault.

But, nothwithstanding the precedent supplied by the 4 & 5 Will. & M. c. 18, the failure of his two former bills, and the passing of the Vexatious Indictment Act, Lord Chelmsford, in the House of Lords, did not loose sight of the idea cherished by him as Sir F. Thesiger, in the House of Commons. Still impressed with the notion of the inutility of the metropolitan grand juries, he brought in a bill, "to make better provision concerning the procedure against persons charged with indictable offences within the metropolitan district," under which modest and unpretending title is concealed, though in a diluted form, the vicious principle we have been discussing. The bill passed the House of Lords, but not the House of Commons. It provided, that after a person had been committed to take his trial by a metropolitan police magistrate, an information, to have the effect of the finding of a grand jury, should be filed in lieu of an indictment. But, evidently pressed by the weight of the arguments used against his former attempts at legislation upon this object, there was a clause empowering the prosecutor to prefer an indictment in the event of the magistrate dismissing the charge; thus placing the prosecutor in the odious and difficult position of pressing a charge that had been rejected by a magistrate—a topic sure to be urged to a tribunal with the most mischievous effect by the accused and his counsel. Pressed also by the constitutional objection, there was likewise a proviso that nothing therein contained should apply to "any charge of treason or misprison of treason, or of any other offence against her Majesty, the State, or the Government; nor to any charge of any nuisance to any highway, bridge, or river, or of any nuisance affecting the safety or health of any of her Majesty's subjects." The first clause of this sentence is evidently framed on the assumption, that if an offence is against the State or Government, that fact must appear on the face of the proceedings in the first instance, and can neither lurk under a charge of an offence apparently of a different character, or be developed in the course of the proceedings. As already stated, this bill did not pass into law.

The attack on the grand jury system in our day, as observed by the Common Serjeant in the paper already quoted, is a signal example of a tendency which some time back was more active than at present. "The distinguishing feature," he remarks, "of our English administrative system, both civil and criminal, is its popular element. The distinguishing feature of all our modern changes of it is the introduction of a professional and official element. . . . . The effect of our modern reforms has been to withdraw *the people* from the tribunals, and replace them by *officials*—to have more judges and fewer juries.

* * * * * * *

"Narrow reasons, plausible enough—special objections, not without weight—may be assigned as the ground of changes which may have wider consequences than the reformer contemplates. Cheapness and speed may be attained at a cost incalculable. My own opinion certainly is, that the stream of justice is not only more picturesque, but more useful, and more fresh and wholesome, when it winds, perhaps slowly, between devious but natural banks, than when it rushes through professional and official conduits, where it not only loses a grace, but may contract a hardness."

We trust that, with the failure of Lord Chelmsford's bill of 1860, we have witnessed the last attempt to overturn one of the most ancient and valuable institutions of the country; and that such attempts will be replaced by sound and well-considered measures to increase the efficiency of the grand jury, by the removal of whatever either was objectionable in its original constituton, or, through lapse of time or altered circumstances, has become injurious at the present day.

WHAT MAY WE DO WITH OUR OWN?

(*From the Solicitors' Journal.*)

We understand that, at a recent convivial meeting, but which has hitherto attracted little or no attention, was started by a learned conveyancer, and that the debate thereon, as conducted by A., B., and C., was to the following effect:—

A.—I have had a doubt as to the soundness of the practice of conveyancers, with respect to separate provisions for married women, in not making any distinction between adults and infants. Is it clearly correct?

B.—Settlement of money—Trust for a married female *infant* for her life for her separate use—Declaration by the settlor that the trustees shall be accountable for the income, during her infancy, only to him, and that, as between settlor, his executors, &c., and the trustees, her receipts, notwithstanding her *infancy*, shall be good discharges. Would not that be good? Put these cases—

1. You give me sixpence to give to a boy who sweeps a crossing. I give it. Am I discharged of the sixpence?

2. Legacy to be given by executors to deserving poor. They give £5 to a distressed needlewoman, aged 20. Are they not discharged?

3. I buy a pair of gloves in a shop of a boy aged 15, and pay him 3s. 6d. Am I discharged?

4. Must you inquire of a lad, who serves out railway tickets, whether he is of age, in order to be safe in paying him for them?

A.—When you (B.) advance unsound propositions, and essay to defend them, you may exclaim, with just exultation, "*Si Pergama dextra defendi possent etiam hac defensa faissent.*"

1. Your first instance is that of income devoted to the separate use of a female infant covert. If payment to her would be good at all, I submit that it would be warranted only as she may be deemed, either the agent of her husband (which, in point of law, she may be), or the recipient of his bounty (which her infancy would not prevent her from accepting); for I conceive that she cannot have the income directly to her *separate use* in the ordinary legal, or rather equitable, acceptation of that term, because she cannot exercise any substantive, independent, discretion. It is familiar that an infant cannot execute a power, and what is money but power? Unless it proceed from the husband, I know of no legitimate channel through which it can reach her so as to be at her sole disposal. It cannot be considered as a "bread-and-butter-girl's" pocket money, because married ladies, young or old (as we know), do not wear pockets, but dip their hands periodically into those of their husbands. Could she make a testamentary disposition of the savings of such income? Suppose I bequeath £1,000 to an infant spinster for her separate use, is it not clear that my executors could not safely pay it to her? Would coverture, supervening upon infancy, give her capacity to receive it?

2. Then as to your second instance, of my giving you sixpence (more probably a copper), to give to one of Lord Shaftesbury's boys, I submit that it proves nothing, because I am a free agent, and may, at my pleasure or caprice, scatter my guinea-fees on the pavement of Fleet-street (not, perhaps, justifiably, even in a legal point of view), or authorise another so to dispose of them. I may fling my purse down Carisbrook Well, (not, however, without committing a trespass), but my discretion (or rather my power of so abusing it) ends with me, for if I direct my executors to dispose of it after a similar fashion, they, I apprehend (with great deference to certain opposite dicta advanced in the course of this discussion), would be accountable to my residuary legatee or next of kin—unless indeed, in a suit, to be instituted by or on behalf of the bottom of the well (apparently the party most deeply interested), the court would decree a specific performance of the direction. In the absence of a valid disposition, the law ordains a successor, and a valid disposition supposes a capable object or reasonable purpose.

3. Your next instance is that of a legacy to be given by executors to deserving poor, and of which they give five pounds to a distressed needle-woman just out of her teens. This you see is *charity*, and in no respect distinguishable on principle from the ordinary action of an hospital or dispensary.

4. If your next problem—that of your buying a pair of gloves in a shop of a boy aged fifteen and paying him 3s. 6d. (a monstrous price for a conveyancer)—is not to be solved by the *lex mercatoria*, it has an answer in the presumption that young doeskin is the authorised agent of some competent vendor; but as all presumptions are liable to be rebutted, it may happen that, unless you proceed with reasonable circumspection, you may find yourself, not only not "discharged" from the 3s. 6d., but onerated with a heavier weight of metal. To the remaining query (as to the underdone lad who serves out railway tickets), a similar answer may, I think, be given.

C.—A man, a living man, may do what he pleases with his money, or other personal chattels, so only that he does not injure or annoy his neighbour. A father may give £20,000 to his infant daughter, whether married or unmarried, but I think he cannot make a settlement and direct that the income of the settled property shall be paid to an *infant* daughter, whether he (the settlor) shall be living or dead. A settlor cannot contravene the policy of the law. A man, during his life, may do anything he pleases with his money, however absurd, but this power ceases on his death. Every testamentary disposition is subject to the rules of law, and if I recollect right, Sir John Nichol set aside a will because it "sounded to folly." A bequest of money to be thrown down a well would be void, not merely on the ground of absurdity, but also, according to certain recent decisions (sound or unsound), because it infringed the rule against perpetuities! The right of a residuary legatee, or of the next of kin, is only to be defeated by a valid bequest, and if money be bequeathed to an infant, he or she cannot give a good discharge for the same. An infant may sell his time and labour and he is competent to receive the price. If an infant were to invent a useful machine, I think he might sell it, and a purchaser would be safe in paying the purchase money. To this extent an infant may contract, and may be considered to have the power of a person *sui juris*. A shopkeeper fills his shop with goods to be exchanged for money, and he may direct how the exchange is to be carried out, whether by a living hand or otherwise—it might be effected by machinery the price of the goods being marked thereon. In such a case an infant may clearly be the agent for carrying out the exchange on behalf of the shopkeeper. His competency is not involved; the law assumes that he only says and does what his master directs. Railway tickets may be delivered by machinery, and the money paid into a wooden hand. If executors have money to give in charity they may give to an infant, for it is to relieve his bodily wants,—assuming that the infant is of sufficient age to be able to expend the money for such a purpose. Executors, in such a case, would not be justified in giving £5 to a child of four or five years old.

[As we do not profess *tantas componere lites*, we leave this, not unimportant, problem to be solved on the reassembling, with renovated powers, of the grave body to whose love of curious inquiry it is attributed.]

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "The Editors of the Law Journal, Toronto."

CORRESPONDENCE.

To the Editors of the Law Journal.

Nov. 7th, 1860.

GENTLEMEN,—I would feel obliged if you would give your opinion through the *Law Journal* upon a decision which was given in a Division Court upon the following facts:

A. recovered judgment against B. in the 2nd Division Court. The defendant B. recovered judgment against C. in the 3rd Division Court, and gave to one D. an order upon the clerk for the amount of his judgment against C.

After this order was given the bailiff of the 2nd Division Court seized upon the judgment obtained by B. against C. under execution in the suit of A. against B. The clerk paid no attention to this seizure, but paid the amount realized upon the judgment against C. over to D. who held the order.

It was held upon these facts that the clerk took the proper course: and that the seizure and notice, *would not* hold *against* the *order*.

B. was insolvent at the time he gave the order. T.

[We think the decision is correct. Presuming that the order given by B. to C. was designed to transfer the benefit of the judgment to the latter, that it was at all events in the intention of the parties an assignment of the judgment in B's favor without fraud and for a valuable consideration, we think as against D. the property was changed. Under the law of garnishment the equitable transfer of a debt is recognized, and why not in the present case. But a most important question arising in the case our correspondent does not notice. Could the judgment be seized at all under an execution? Some years ago our opinion, expressed in this Journal, rather leant to the view that it could, and now we are by no means convinced that it could not. Yet this opinion is very much shaken by the case of *Calverley* v. *Smith*, reported in vol. 3, p. 67 of this Journal. The principle there laid down, though not exactly analogous, bears very strongly on the question.—EDS. L.J.]

To the Editors of the Law Journal.

Brockville, 9th Nov. 1860.

GENTLEMEN,—Does the act 23 Vic. cap, 25, apply to the Division Courts? The 3rd section of that act furnishes a substitute for section 254 of chap. 22 of the Consolidated Statutes of Upper Canada, which clearly applies only to the Superior Courts and the County Courts. But the 4th section by its wording would seem clearly enough to apply to every court in Upper Canada from which a writ of execution may issue. If this act should be held to apply to the Division Court execution it is manifest that the form of the writ of execution prescribed for and now issued from the Division Court is opposed to the law (that is so far as the exception to certain goods is concerned) and commands the bailiff to do what the statute declares shall not be done under any writ. As this question is of some importance to many of your readers, and as your views, expressed in print, are always considered with respect, because given cautiously, and notwithout deliberation, an answer would oblige, Yours truly, D.

[The act clearly applies to Division Courts. Section 2 fits the existing Division Court Law to altered exemptions provided in sec. 4. Section 3 does the same thing for the Superior Courts.

Of course the old form of writ is wrong and should be altered to square with the new law. If D. will look over recent numbers of the *Law Journal* he will see that a caution has already been given on this head and a suggested form given for altering the writ.

The alteration we gave was from an execution which had been submitted to Judge Gowan, and approved by him. For further information on this subject we refer our correspondent to the last August number of this Journal.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

TRINITY TERM, 1860.

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*

IN RE. GIBSON AND THE UNITED COUNTIES OF HURON AND BRUCE.

Assessment Act, sec. 70—Equalization by County Council—Authority of Courts to interfere—Setting aside By-laws.

It is provided by the Assessment Act, s. 70, that the Council of every County shall yearly, before imposing any County rate, and not later than the first day of July, examine the assessment rolls of the different townships, towns and villages in the County for the preceding financial year, for the purpose of ascertaining whether the valuation made by the assessors in each township, town or village for the current year bears a just relation to the valuation so made in all such townships, towns and villages; and may, for the purpose of County rates, increase or decrease the aggregate valuation of real property in any township, town or village; adding or deducting so much per cent. as may, in their opinion, be necessary to produce a just relation between all the valuations of real estate in the County; but that they shall not reduce the aggregate valuation for the whole County, as made by the assessors.

Held, upon a complaint against a County Council of unfair equalization, that the court has no authority to place itself in the situation of the Council, and to judge for them; still less to place itself above them, and overrule their valuations, upon whatever ideas the court may entertain as to what would be more just or more reasonable in regard to amount; and that it is not the province of the court to judge of the reasonableness of the valuations by comparing the value set upon land in one municipality, with the value set upon land in another.

Semble: If it were there are various circumstances to be taken into consideration, as bearing upon the question of computation and value, of which the court has not the means of judging, for want of that local knowledge which the members of the County Council, chosen by the people themselves, must be supposed to possess.

Quære: As to the proper method of carrying the act into effect. Per Robinson, C. J.: "I confess I think that although the person who framed the 70th and 71st clauses of chapter 55, may have understood very clearly himself what he intended, he has not succeeded in making the meaning quite intelligible to others."

Held also: Although the statutes do require that by-laws to be passed for certain purposes shall contain particular recitals and provisions, yet the court is not at liberty to infer anything against the validity of the by-law, unless it can see clearly on the face of the by-law, or have otherwise shown to it, that the by-law was passed for a purpose which required them to be inserted.

Mr. Harrison, in this term, obtained a rule on the Corporation of the United Counties of Huron and Bruce, to show cause why their by-law No. 8, intitled "A By-law to raise within the United Counties of Huron and Bruce the sum of fifty-one thousand dollars for general local purposes for the year 1860," or so much of it as relates to the townships of Morris, Grey, Howick and Turnberry, in the county of Huron, or some one of those townships should not be set aside with costs.

1st. Because the Council of the United Counties did not, in June last, 1860, when equalizing the valuation in the different municipalities of the said United Counties, examine the assessment rolls of the different townships, towns and villages, for the preceding financial year, in order to ascertain whether the valuations made by the assessors in each case for the current year bore a just relation to the valuation, &c., made in all such townships, towns and villages in the said United Counties.

2nd. Because the valuations in the different townships, towns and villages in the county of Bruce, as pretended to be equalized by the Council, bore no just relation to the valuations in the townships, towns and villages of the county of Huron, but were made and equalized independently of them.

3rd. Because the valuations in Huron are not made to bear any just relation to each other; but new townships—such as Morris, Grey, Howick and Turnberry—are excessively and disproportion-

ately taxed, as compared with the older townships of Tuckersmith, Goderich, Colborne and Biddulph, which is contrary to the statute.

4th. Because the Council, while pretending to equalize the valuations of the United Counties for the purpose of county rates, did not diminish or increase the aggregate valuation of real property in the different townships, towns and villages in the United Counties, by adding or deducting so much per cent. as might be necessary to produce a just relation between all the valuations of real estate in the United Counties; but proceeded arbitrarily to classify the townships of the United Counties at certain rates per acre, without regard to the aggregate valuations of real property in such townships, towns and villages.

5th. Because such classification and valuation as regards new townships in Huron, compared with the valuations in older townships in the same county, was unjust and erroneous, and tends to impoverish and ruin the new townships.

6th. Because the by-law moved against, in apportioning the rate among the municipalities in the United Counties, relates to the valuations for the preceding financial year, rather than to those for the current year as compared with those of the preceding financial year, which is contrary to the statute.

7th. Because the by-law is in other respects illegal.

And the rule also called upon the Municipal Council of the United Counties to show cause why the by-law No. 9, entitled "A By-law to raise by assessment within the County of Huron the sum of forty-six thousand two hundred and thirteen dollars, for the purpose of paying interest and sinking fund on the gravel road debentures, and improvement of roads and bridges within the County of Huron," should not be set aside with costs.

1st. Because, for the reasons before stated (in relation to the by-law No. 8), the equalised assessment rolls of the townships, &c., in the United Counties, for the current year, are unjust and illegal, and have no just relation to the valuation made in such townships, towns and villages.

2nd. Because the Council did not proceed according to law in equalizing the valuations.

3rd. Because the pretended equalization so made bears oppressively upon the new townships, as compared with the older, more populous, and more wealthy townships.

4th. Because the by-law No. 9, instead of imposing a rate for the purposes mentioned in it, upon the whole ratable property within the jurisdiction of the United Counties of Huron and Bruce, restricts the rate to the former county, and expressly excludes the latter county from its operation.

5th. Because it is not shown on the face of the by-law that the debts mentioned in it are debts falling due within the current year.

6th. Because the by-law leaves it uncertain whether the money to be raised under it is to be applied to debts contracted before the passing of the by-law, or to debts contracted by it.

7th. Because, according to the recitals in by-law No. 9, the money is to be raised for *one* object, viz., for paying the interest and sinking fund on debentures issued for making gravel roads in the county of Huron, and in providing roads and bridges in that county, without stating where or for what account such debentures were issued, or when payable, and by what authority issued; and by the enacting clause it appears that the money is to be expended for *two* objects, viz., to pay the interest of the gravel road debentures, and for the improvement of roads and bridges (without stating what roads and bridges) in the county of Huron; and so the by-law is inconsistent and uncertain.

8th. Because, if the objects be two, it does not appear what portion of the money to be raised is intended for one, and how much for the other.

9th. Because no day is named in the financial year in which the by-law was passed, for its taking effect.

10th. Because the by-law does not state when the debts mentioned in it are payable, or their amount.

11th. Because the by-law is in other respects illegal.

And in this same term, *Mr. Harrison* obtained also a rule on the defendants, to show cause why a writ of mandamus should not issue, commanding them to examine the assessment rolls of the townships, towns and villages in the said United Counties, for 1859, for the purpose of ascertaining whether the valuation made in each township, town, &c., for the current year, bears a just relation to the valuations, &c., made in all such townships, &c.; adding or deducting so much per cent. as may be necessary to produce a just relation between all the valuations of real estate in the United Counties; but not to reduce the aggregate valuation thereof for the whole United Counties, as made by the assessors, according to the true intent of the statute in that respect; and to take care that the valuations in the townships of Morris, Grey, Howick and Turnberry, in the said county of Huron, bears a just relation to the valuations of real property in the townships of Tuckersmith, Goderich, Colborne and Biddulph, and all other the townships, towns and villages of the United Counties; and to do whatever the court may see fit to command in the premises.

The by-law No. 8 was passed on the 30th June, 1860. The by-law No. 9 was passed on the same day.

Mr. Harrison cited the Assessment Act, sec. 70, and *Regina* v. *The Commissioners of the Land Tax Fund for the Tower Division of Middlesex*, 2 E. & B. 694.

Stephen Richards, Q.C., contra.

ROBINSON, C. J., delivered the judgment of the court.

First, as to the application to quash those by-laws. By-law No. 8 recites that it is necessary to raise and levy upon all the ratable real and personal property liable to taxation in the United Counties of Huron and Bruce, fifty thousand dollars, for general county purposes, for the year 1860; and it specifies what those purposes are, and the sum required for each. Among these are, administration of justice, salaries, and councillors' fees, grammar school, printing, stationery, &c., jurors, contingencies, township treasurer's commission—giving an amount for each—and besides those the following: Court-house debentures, $1,160; Maitland bridge debentures, $2,596; Biddulph gravel road debentures, $1,280; Municipal loan fund debentures, $26,640;—the whole making up the $51,000. It then recites that the amount of ratable property within the counties of Huron and Bruce, amounts to $11,182,040, according to the equalised valuation of the different municipalities within the said United Counties for 1859; and that it will require the sum of 4½ mills in the dollar, to be raised upon the equalised assessed value of all the ratable real and personal property within the said United Counties of Huron and Bruce, to make the sum of $51,000, to be expended as set forth above. And it enacts, that there be raised, levied and collected from all the ratable real and personal property within the United Counties, liable to be assessed within the then present year (1860), $51,000, to be expended as set forth in the foregoing schedule. Sec. 2.—And that the $51,000 be apportioned and levied from the respective municipalities within the said United Counties, according to the equalized value of the assessments for 1859, as their contingent proportion respectively of the sum required for the purposes before mentioned, and which are more particularly set forth in the schedule at the end of the by-law, and forming part of the same. Sec. 3.—And that the sum to be collected shall be paid to the county treasurer by the collector, and be by him paid to the County Council on or before the 25th December, 1860, who shall apply the same to the purposes mentioned in the by-law. Then in the schedule is set down the proportion that each municipality has to pay of the $51,000. This forms the whole of that by-law.

The by-law No. 9 recites that it is necessary to raise $46,213, for paying the interest and sinking fund on the debentures issued for making gravel roads and bridges within *the said* county; and that the town reeves for the county of Bruce are unwilling that a like or any proportionate sum should be raised within the county of Bruce; wherefore it was necessary to levy a special rate upon the county of Huron for the said purposes. It next recites that the amount of ratable property in the county of Huron is $7,675,229, according to the last equalized assessment rolls of the municipalities within the said county of Huron, being for the year 1859; and that it will require six mills in the dollar, fully to be raised upon the equalized value of all the ratable real and personal property in the County of Huron to make up the $46,213. And Sec. 1 enacts that there be raised, &c., upon the property, real and personal, within the County of Huron liable to be assessed during the present year 1860, $46,213 as a special tax over and above other rates and taxes, to be expended in the payment of the interest and sinking fund of the gravel road debentures, and the improvement of roads and bridges in the County of Huron. Sec.

2 enacts that the $46,218 shall be apportioned and levied upon the said respective municipalities within the said County of Huron, according to the equalized value of their *assessments for the year* 1859, as their contingent portion respectively of the sums required for the purposes before mentioned, and which are more particularly set forth in the schedule at the end of the by-law, and forming part of the same. Sec. 3. And that the sums so to be levied, &c., shall be paid over by the collectors to the proper officers as provided by law, and by them paid over to the County Treasurer on or before the 25th December, 1860, who shall apply and pay the same to the purposes for which they have been specially appropriated by this by-law. Then follows a schedule specifying the proportion of the $46,218 that each municipality has to pay. This forms the whole of By-law No. 9.

The applicant Gibson makes an affidavit that he is an inhabitant and ratepayer of the Township of Howick in the County of Huron, and as such has an interest in the by-law, and a copy of the by-laws is stated by him to have been received by him from the Clerk of the United Counties, as they stand in the printed pamphlet annexed to his affidavit. The clerk certifies them to be true copies, and that they were passed on 30th June, 1860. Gibson swears that he received them certified under the corporate seal. The clerk refused, Gibson says, to give him a copy otherwise than by certifying at the foot of each by-law as printed in the pamphlet. The by-law seems to be sufficiently verified, though I confess I was long in detecting the seal, if it can be called one, to the clerk's certificate.

Then as to the by-law No. 8, I do not see that we should be justified in setting it aside on the grounds stated, when we find how the complaints and objections of Gibson are met. Most clearly we have no authority to place ourselves in the situation of the Council and to judge for them, still less to place ourselves above them and overrule their valuation upon our ideas merely of what would be more just and more reasonable in regard to amount. They are to be judges, and undoubtedly they have better means of judging than we have. I speak now merely in reference to what is complained of as to the hard and unequal effect of the valuation. There is no question that they were bound to conform to the directions of the statutes in the method of proceeding; that is, they are not to violate them. It is imputed to them that they have done so in this case; but I do not see that is made out satisfactorily, when we look at the affidavits on both sides.

The affidavits filed in answer to this application state positively that the Council did examine the assessment rolls of the year 1859, as well as those of the current year 1860, and we cannot therefore assume that the contrary statements are true, and act upon them as if they were undisputed. So also as regards the alleged unequal operation of the by-law, the statements are denied on oath and in a very circumstantial manner, and I repeat that as regards the reasonableness of the valuations and the conclusions to be come to on that point, by comparing the value set upon land in one municipality with the value set upon land in another, it is not our province to judge of that; and if it were, still there are various circumstances to be taken into consideration as bearing upon the question of computation and value, which we have not the means of judging of, for want of that local knowledge which the members of the Council, chosen by the people themselves, must be supposed to possess, and doubtless do possess. It is not merely the fact that one township has been long settled, and another not so long, that should alone influence the judgment in making the comparison, nor the number of inhabitants, though these are circumstances that naturally should have been, and we may suppose must have been taken into consideration. Quality of soil and of timber, abundance or scarcity of water, convenience of communication by land or water, distance from market, and the description of inhabitants as well as their numbers, are matters that require to be considered in comparing one township with another; and when these and all other matters have been considered, the conclusions which they may seem to lead to are by law to be formed by the Council and not by the Court. I do not mean to say that there might not be some case so extraordinary in its circumstances as to warrant this Court in giving effect to complaints urged against a by-law of this nature, which might be more or less connected with the propriety of the valuations settled by the Council under the 70th and 71st clauses of the existing Assessment Act (ch. 55). It is not necessary to determine that point, for certainly this does not appear to be a case in which injustice can be shown to have been done, so monstrous and so manifest as to leave no doubt that the Council did not exercise that authority with an honest intention. Doubtless the Council were bound to follow the directions of the statute in their method of proceeding; but having read the affidavits on both sides, we think we cannot say that they have disregarded the directions of the legislature. As to the land in the one county being valued independently, and without regard to the value of the lands in the other county, that appears to be satisfactorily disproved. The fourth objection is repelled by the affidavits filed on the part of the Council. The Legislature, indeed, have not attempted to prescribe by what method of proceeding the townships, towns and villages, shall all be made to bear a just relation to each other in regard to the assessed value of property. They could hardly have succeeded in any attempt to do so. It must of necessity be left to the judgment of those who are to conduct the operation. We may suppose the Council fixing upon some one township or town, &c., in the first place, as that in which the value appears to have been assigned with the strictest regard to truth and justice, and then having selected such a standard we may suppose them taking up each other township, town, &c., and adjusting the valuation by such standard. In doing this the Council must be governed by their own judgment, and could not in the nature of things have any rule given to them by which they could arrive at any particular result. It must be entirely a matter of opinion, whether if land cleared or uncleared in township A. is valued at such a sum per acre, land in township B. ought to be valued at any and what other sum per acre. When the Council shall have adjusted the proportionate value which land in one township bears to land in the other, and shall have compared them all by some one standard, then they have to ascertain and express how much per cent. must be added to or deducted from the assessments in each township respectively to make them all bear a just relation to each other. That is not given as a rule or method of proceeding that can guide or assist the Council in adjusting the relation between the several townships, but as a method by which they are to express to the collectors the effect of the relation which they have established as leading to an addition or deduction of so much per cent. to or from the assessment of each individual, according as they have found the assessment that had been made in the particular township too high or too low as compared with the standard which they have resolved to abide by. This direction to the collector makes his duty afterwards simple and precise enough. But the business of the Council in equalizing the assessments so as to make all the townships, &c., bear a just relation to each other, is one that cannot be accomplished by any arithmetical calculation. No two bodies of men, and no two individuals, could be expected to arrive at the same conclusions if they attempted to make the adjustment independently of each other. The Legislature have not attempted to instruct them how they are to proceed in order to do equal justice; they have done the best they could in committing the duty to them, in general terms, of equalizing *the assessments* so as *to produce a just relation*, but have necessarily left it to them to work out the problem as they best can. It is a thing more easily talked of than done. I confess I think that although the person who framed the 70th and 71st clauses of ch. 55, may have understood very clearly himself what he intended, *he has not succeeded in making his meaning quite intelligible to others.*

As regards the other by-law, No. 9, besides taking some of the objections to it which were made grounds of complaint against by by-law No. 8, an additional objection is taken (the 4th objection), for which there certainly is no foundation, for the 288th section of the Municipal Act expressly provides "that the Councils of United Counties may make appropriations and raise funds to enable either county separately to carry on such improvements as may be required by the inhabitants thereof." In that respect therefore there has been nothing wrong done by this by-law.*

There are objections of another kind made to this by-law, which

* This objection having been raised by inadvertence was abandoned by counsel on argument.

are all founded upon the assumption that it is a by-law passed for raising money for services not belonging to the current year, or to pay debts not falling due within that year. But we do not see that we should be warranted in treating this by-law as one of that description. For all that appears on the face of it, it is open to no such objection. The interest and sinking fund spoken of may have no relation to any other than the current year, and the same may be said as to the improvement of roads and bridges, which required money to be laid out upon them. The Statutes do require that by-laws to be passed for certain purposes shall contain particular recitals and provisions, but from the absence of any such recitals nnd provisions, we are not at liberty to infer anything against the validity of the by-law, unless we can see clearly on the face of the by-law, or have otherwise shown to us, that the by-law was passed for a purpose which required them to be inserted. If, for all that appears, the by-law may be legal, we are not to conjecture the existence of facts that would render it illegal. It is upon this principle that awards made by individuals are dealt with, and we should not be less considerate in upholding by-laws made by municipal councils, which are chosen by the people, and are intrusted by the legislature with extensive powers. It is difficult to foresee how much public inconvenience may be sometimes occasioned by quashing by-laws after they have been acted upon, and though this can never be admitted as a reason for sustaining what has been clearly shown to be illegal, it is a strong reason for declining to quash a by-law except on some clear grounds. We do not see any case of illegality clearly made out against the by-laws now moved against, and therefore discharge the rule for quashing them, with costs.

As to the application for a mandamus, we do not see the necessity for giviug any such general directions to the Municipal Council as we are asked to give. We do not find that they have violated the statute in their mode of proceeding, or that they have left anything undone which they were required to do. The case cited of *The Queen* v. *The Commissioners of Land Tax Fund for the Tower Division of Middlesex*, 2 Ell. & Bl. 694, is only an authority for showing that the Court may issue a mandamus to compel a legal and just assessment, when they see a clear ground to interpose, but the reasoning in the case and the manner in which it was disposed of, shows that the Court will not interpose unless upon some specific and clear ground.

We think this rule also must be discharged with costs.

COMMON PLEAS.

Reported by E. C. JONES, Esq., *Barrister-at-Law.*

RETTINGER v. MACDOUGALL

The plaintiff was employed by defendant as foreman in a printing office, and brought this action to recover wages due him, proving on the trial that the defendant was in the habit of settling the amount thereof weekly. The jury on this evidence found that the hiring was a weekly one, and the court refused to disturb the verdict. When the hiring is general, it is presumed by law to be by the year.

Declaration for work and labour, account stated, and for wages as the hired servant of defendant.

Plea, never indebted.

The case was tried at Guelph, in November, 1859, before *Burns*, J. The plaintiff went into defendant's employ, as foreman in a printing office, in March 1857, and received $13 per week up to December, 1857; after that time he was to get $10 per week. A statement had been made up of his wages on the 10th April, 1858, by one Macpherson, who was defendant's book-keeper, when the balance due to the plaintiff was stated to be $399 99. Another statement was made up by Macpherson, up to 1st October, 1859, showing a balance due the plaintiff of $531 66. After which the plaintiff left the defendant's employ. The day before he told the defendant of his intention to leave. Defendant said he did not want the plaintiff to go; but if he wanted to go he might go; if determined to go he might go. Between April, 1856, and Oct., 1859. plaintiff had been paid $638 32. No evidence was given as to any agreement between the plaintiff and the defendant of the term for which he was engaged; it was only shewn that his wages were to be computed and allowed by the week. For the defendant it was contended that on the evidence the hiring was a general hiring, which in law amounted to a yearly hiring, and therefore the plaintiff was not entitled to recover any wages for the year 1859, until that year was expired. The learned judge left it an open question to the jury to say whether it was a weekly hiring or no. They found it was a weekly hiring, and gave plaintiff a verdict for the full amount of his claim.

In Michaelmas term, *M. C. Cameron* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection in not directing that without evidence of a hiring for specified time, the law would presume a yearly hiring.

In the following term, *Boulbee* showed cause. He cited *Baxter* v. *Nurse*, 6 M. & G., 935; *Huttman* and *Bulnois*, 2 C. & P. 510; and insisted also that if the hiring had been by the year, there was evidence that the defendant agreed that the plaintiff might leave when he did, citing *Fawcett* v. *Cash*, 5 B. & Ad. 904; *Lilley* v. *Elwin*, 11 Q. B. 742.

DRAPER, C. J.—The first point, and indeed I think the only important one which we are called upon to determine, is the objection to the direction of the learned judge at the trial. It was insisted then, and has been again argued before us, that he should have told the jury that as the only evidence was that of a general hiring, they should therefore find that it was a hiring by the year, and that the plaintiff could not therefore recover for any part of the last year, as he quitted the defendant's service before that year expired. The judgment of *Tindal*, C. J., in *Baxter* v. *Nurse* (6 M. & G. 935) appears to me to afford a complete answer to this objection. He remarks that in cases where a general rule with regard to questions of hiring have been established, it has been in conformity with some established usage to be gathered from evidence, and that the finding of a jury in such a case, in conformity with such general usage cannot be considered a rule of law, and after stating that in the case before him, he thought the evidence was of a weekly hiring, still even if it had shewn a general hiring, he thought the question ought to have been left to the jury whether, under the circumstances of the case, there had been a hiring by the year. And *Cresswell*, J., said that though an indefinite hiring was a hiring for a year, if any other facts appeared, *such as payment by the week*, the presumption of a yearly hiring might be rebutted, and that he thought this was an open question for the jury. It appears to me unnecessary to go further to sustain the correctness of the mode in which this case went to the jury.

The doctrine that a general hiring is (in the absence of any thing to qualify it) a hiring for a year, is clearly settled by *Fawcett* v. *Cash*, 5 B. & Ad,, 904, and *Beeston* v. *Collyer*, 4 Bing., 309; and there is nothing in *Baxter* v. *Nurse* conflicting with that doctrine. If the jury had found a general hiring, they would have declared the plaintiff's engagement was by the year, and have given damages only in relation to such service. But the question was specially left to them, and they have found there was a particular hiring—a hiring by the week; and if they are right the plaintiff should retain this verdict.

If they had found that the hiring was general, I should not have thought the verdict contrary to evidence; but I cannot say there was not evidence to sustain the conclusion that the hiring was by the week, and it is on that ground that in my opinion this rule should be discharged. I do not think the evidence justified the conclusion that the defendants assented to the plaintiff's leaving his employment. If anything had turned upon that, I should have been inclined to grant a new trial.

COUNTY COURTS.

In the County Court of the United Counties of Frontenac, Lennox & Addington, before his Honor JUDGE MACKENZIE.

THE CITY OF KINGSTON v. SHAW.

Held, that a Sheriff is not liable under Statute 8 Anne, cap. 14, for the removal or goods off premises in respect of which rent is due unless at the time of removal he either had notice or otherwise received knowledge of the rent being due, and afterwards removed the goods without paying the rent.

(October 18, 1860.)

This was an action under the Statute 8 Anne, chap. 14, against the defendant, as one of the Coroners of the United Counties of

Frontenac, Lennox and Addington, for taking goods off certain premises of the plaintiffs demised by them to one Thomas Mulhall, and which goods were seized by the defendant, under a writ of *fieri facias* issued out of this Court at the suit of the Sheriff of the Counties against the goods of one Isaac T. Hance, without first paying half a year's rent, which was in arrear by Mulhall to the plaintiffs at the time of the seizure.

There were two counts in the declaration. The first count contained the usual allegations of a demise by the plaintiffs of the premises in question to one Thomas Mulhall; of six months rent being due and in arrear from Mulhall to the plaintiffs, of the seizure of goods on the demised premises under a *fieri facias* at the suit of the Sheriff against Hance by the defendant as Coroner of the United Counties, and of the removal and sale of the goods, with the following averment as to notice.

And the plaintiffs, in fact, say that after the said seizure and taking of the said goods, and the said removal thereof by the defendant, and before the sale of the said goods by the defendant under pretence of and to satisfy said execution, and while the tenancy of the said Thomas Mulhall so still subsisted, the plaintiffs gave notice to the defendant as such Coroner charged with the execution of the said writ of the aforesaid rent being due and in arrear to the plaintiffs from Mulhall in respect of six months rent of said premises, and then requested the defendant that the plaintiffs might be paid their rent so due and in arrear, but which the defendant wrongfully refused to do.

The second count alleged that the plaintiffs issued a warrant of distress to a Bailiff, who distrained the goods to satisfy the rent aforesaid; and that the defendant, as Coroner as aforesaid, removed the goods under the pretence of the said writ of *fieri facias*, without paying the rent aforesaid to the plaintiffs, with an averment as to notice to the defendant as in the first count, with an addition that the plaintiffs forebade the defendant to sell the goods until the said arrears of rent had been paid to the plaintiffs.

The defendant, among other pleas, pleaded to the first count—"That the plaintiffs did not, after the taking of the said goods and chattels in the said messuage and tenement by the defendant, as in the first count mentioned, or at any time before the removal of the same, giving notice to the defendant; nor had the defendant at any time before the removal of the said goods any notice or knowledge whatsoever of the said rent or any part thereof, or any rent whatsoever being due and in arrear from the said Thomas Mulhall to the plaintiffs."

To this plea the plaintiffs demurred.—The principal ground of demurrer assigned by them being, that no such notice as in the plea mentioned is necessary before the removal of goods.

To the second count, the defendant pleaded, among other things, "That, after the removal of the goods by the defendant, there remained goods on the said premises sufficient to satisfy the rent in the declaration alleged to be due."

To this plea the plaintiff demurred also, assigning as grounds of demurrer, that it was not pleaded to any particular count, and that it disclosed no ground of defence whatever. At the argument the learned counsel for the defendant very properly abandoned this plea as untenable.

The defendant gave due notice that he intended, at the argument, to take exception to the first count of the declaration, "That it is not sufficient to aver in the declaration that the Coroner had notice that rent was in arrear after the removal of the goods from the premises; on the other hand, that it should contain an averment that the Coroner had notice of the rent being in arrear before the removal and sale."

And to the second count, "That it should contain an averment that the Coroner had notice that there was rent in arrear before the removal of the goods from the premises."

Agnew for demurrer.

A. S. Kirpatrick, contra.

MACKENZIE, JUDGE.—By the Statute 8 Anne, cap. 14, section 1, it is enacted: "That no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements which are or shall be leased for life or lives terms of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent."

It will be seen that nothing is said in the statute about notice being given by the landlord to the Sheriff or party charged with the execution of the writ. I find in the form of a declaration under the Statute of Anne, given in 2 Chitty on Pleading, 630, an averment of a notice being given by the landlord to the Sheriff after the taking of the goods on the messuage, and during the continuance of the tenancy and before the removal of the goods from the premises under pretence of the execution. And in a note annexed to it, it is stated the omission of the averment would be fatal, unless after verdict. In Archibold's Treatise on the Law of Landlord and Tenant, published in 1855, at page 250, I find a form of a declaration under the Statute in question given, containing the following averment in reference to notice: "And the plaintiff saith that after the said seizing and taking of the said goods so being in the said messuage as aforesaid, and before the removal of the same under the pretence of the said writ, the plaintiff gave notice to the defendant so being then Sheriff of the said County as aforesaid, of the aforesaid rent being due and in arrear to the plaintiff from the tenant, and then requested the defendant that the plaintiff might be paid his rent so due, in arrear and unpaid before the said goods and chattels or any part thereof should be removed from or out of the said messuage and premises." There is also, at page 249, a form of notice given. And the author, at page 250, makes the following observation: "Although the Sheriff will not be liable to the landlord unless he have notice of the landlord's claim; yet, if the Sheriff or his officer have knowledge of it in any other way—from the landlord, or from any other person—it will be sufficient." In a precedent given in the case of *Riseley* v. *Ryle*, 11 M. & W. 16, there is a similar averment of notice. And, indeed, in every precedent and form of declaration I find in the books under the Statute 8 Anne, cap. 14, I find an averment that the landlord gave notice to the Sheriff, before the removal of the goods from the demised premises, of the rent being in arrear and unpaid. In the case of *Palgrave* v. *Windham*, 1 Strange, 212, the Court seemed to hold that such notice from the landlord, to the Sheriff or his officer, was necessary to sustain the action. In the case of *Warin* v. *Dewbery*, 1 Strange, 67, the same doctrine was countenanced by the Court. The case of *Smith* v. *Russell*, 3 Taunt, 400 and the case of *Coyler* v. *Speer*, 4 Moore, 473, are in favor of this view of the case. In the case of *Arnett* v. *Garnett*, 3 B. & Ald. 440, ABBOTT, C. J., said: "It is true that the Sheriff does not become a wrong-doer by the act of removing the goods until he has notice of the landlord's claim; and, perhaps a notice may be necessary to support an action against him as a wrong-doer." HOLYROOD, J., said: "It is true that no action would lie against the Sheriff, for any act done by him, before he had notice of the landlord's claim." And in the case of *Andrews* v. *Dixson*, 3 B. & Ald. 645, the Court said: "If, indeed, a Sheriff has no reason to suppose any rent to be due, he will be protected in case he pays over the money to the execution creditor. The notice to the Sheriff is only for the purpose of establishing, beyond doubt, his knowledge of the landlord's claim. If that knowledge can, by any other means be brought home to the Sheriff, he will be liable." In Lush's edition of Saunders on Pleading and evidence, at page 888, I find it laid down, "That the Sheriff must be proved to have had notice of the landlord's claim; but, if it appear that the sale had been conducted with great secrecy and despatch, it is for the jury to say whether he knew of the fact that the rent was in arrear, though no notice had been given to him before the sale." And there seems to be a distinction between a proceeding against the Sheriff by way of motion, and an action for Tort, for removing the goods. In Archibold's Landlord and Tenant, 250, it is laid down, that "Where it is intended to proceed by way of motion, it will be sufficient if such claim came to the knowledge of the Sheriff or his officer at any time whilst the goods remained in his hands, although after the removal of them from the demised premises." But it would appear to be otherwise, when an action at law is brought against the Sheriff, for wrongfully removing the goods

from the premises, without paying the landlord his rent. In Archibold's Landlord and Tenant, 251, I find it stated, "care must be taken not to omit stating, in the declaration, the notice to the Sheriff."

I find in all the precedents and forms of declaration in the books, under the Statute 8 Anne, cap. 14, containing averments of notice to the Sheriff of the landlords claim for rent, before the removal of the goods from the demised premises. And the general run of the authorities, for the last 150 years, has countenanced the necessity of such averments of notice, before the removal of the goods. I must hold, therefore, that both the counts in the present declaration, are insufficient, for want of averments that the defendant had notice of the plaintiff's claim for rent, before he removed the goods from the premises demised by them to Thomas Mulhall. The judgment of the Court must, consequently, be for the defendant, on the demurrer. I do not mean to hold, that it is necessary to aver, in the declaration, that the notice was given by the plaintiff to the defendant. I think it would be sufficient to aver, in the declaration, that the defendant knew the plaintiff's claim for rent before he removed the goods from the premises; or that he had notice of such claim before such removal.

Judgment for the defendant on the demurrer.

ROSS v. FRASER.

Summons—Mistake in Copy—Service—Appearance—Effect thereof.

An original writ of summons at the suit of A. B., was issued from the County Court on 13th August, 1860. On same day defendant was served with what purported to be a copy of the summons, but contained the name of C. D. as plaintiff instead of that of A. B. On 14th August an appearance was entered for defendant at the suit of C. D.

Held, that the service was a mere irregularity and the appearance a nullity.

(Chambers, Oct. 28th, 1860.)

Macarow for the defendant obtained a summons to set aside the judgment, the writ of *fi. fa.* and all proceedings had in this cause, upon the ground that no copy of any writ of summons was served upon the defendant, and upon grounds disclosed in affidavits filed.

Agnew showed cause.

MACKENZIE, JUDGE—An original writ of summons against the defendant, was issued out of this court at the suit of Hugh Ross, the present plaintiff, on the 13th August, 1860. On the same day, the defendant was served with a copy of a writ of summons, purporting to have been issued on the same day, out of the same court, at the suit of Hugh Fraser, instead of Hugh Ross. On the 4th August, an appearance was entered by D. Macarow, Esq., for the defendant, at the suit of Hugh Fraser, the plaintiff named in the copy of summons served upon the defendant. On the 27th August, the original writ of summons, at the suit of Hugh Ross, together with an affidavit of service thereof was filed. On the same day, costs were taxed and judgment signed against the defendant, at the suit of Hugh Ross; and, subsequently, the goods of the defendant were seized under a writ of *fi. fa.*, issued at the suit of Hugh Ross.

It will be seen that the original writ of summons had not been filed until thirteen days after the appearance was so entered for the defendant, at the suit of Hugh Fraser.

The defendant contends that, in entering an appearance, at the suit of Hugh Fraser, he did all that he was required to do by the copy of the writ of summons served upon him, and that the plaintiff had no right to sign judgment after such appearance had been entered. The plaintiff, on the other hand, contends that the service of a copy of summons, having the name of Hugh Fraser in it, instead of Hugh Ross, in the original, is a mere irregularity and not a nullity, and that the defendant should have moved to set aside the service as irregular, instead of entering an appearance to a defective copy. In support of this position the plaintiff's counsel, Mr. Agnew, cited *Cinquemars* v. *Equitable Insurance Company*, 2, U. C. P. R., 207, where an application was made to set a judgment aside, on the ground that no writ of summons was ever served. Robinson, C. J., in giving judgment, said: "Independently of the delay in moving, it is fatal to this application that we are not asked to set aside the service of process, nor any of the proceedings anterior to the judgment. The case of *Brooks* v. *Roberts*, 1 C. B. 686, and of *Wardle* v. *Hardwicke*, 4, D. & L. 740, are in point to show that the defendant should not succeed in his present motion, for it supposes all before the judgment to be regular, and excepts to the signing of judgment only, which, for all that appears, is perfectly regular, if the previous proceedings are regular, and they are not moved against." He also cites the case of *Wilson* v. *Story*, 2 U. C. P. R., 304; the case of *Street* v. *Macdonell*, 1, U. C. P. R., 65, and the case of the *Bank of Upper Canada* v. *Vanvochis, et al.*, 2, U. C. P. R., 382, and *Holmes* v. *Russell*, 9 Dowl. 487.

By the 2nd section of the Common Law Procedure Act, it is enacted, "That all personal actions, not bailable, shall be commenced by writ of summons, according to the form given." All writs issued must be under the seal of the Court out of which they issue; and by the 15th section it is enacted, "That the writ of summons issued may be served in any county in Upper Canada, and the service thereof, whenever practicable, shall be personal." Personal service means serving the defendant with a copy of the process, and showing him the original, if he desire—1 D. & L., 599. It is held that the original writ need not be shown to defendant unless he at or within a reasonable time after service, make a demand to see it—*Petel* v. *Ambrose*, 2, B. & C., 761. The copy of the writ is a very different thing from the original writ. The copy is an act of the party; the original is an act of the court itself; its own process accredited by its own seal, and signed, certified and issued by its own officer on a proper præcipe filed. Originally, when a writ was issued, it was entered upon a roll. Now a præcipe is filed. The appearance directed by the statute, and mentioned in the writ of summons, means an appearance to the *original* writ of summons, and not an appearance to a copy of a writ.

When formerly actions were commenced by a writ of capias, the Sheriff was commanded to have the body of the defendant in Court upon a certain day; but the exigency of writ of non-bailable process was answered by the defendant filing a common appearance with the proper officer. This appearance was always to the original writ issued by the Court, and not to the copy served by the party. When a defendant is served with a copy of a writ of summons, in my opinion the effect of such service is to inform him that an action has been commenced against him in the Court, and that the court had issued an original writ of summons against him. He may demand to see the original at the time of service, or he may go to the office and examine the præcipe or the writ itself if filed, and if he find that the copy served upon him differs from the original, he should move to set the process aside for irregularity. The Courts have held over and over again that such a proceeding as the defendant complains of is a mere irregularity and not a nullity. If the Court should uphold the principle that a party who may be served with a piece of paper purporting to be a copy of an original writ of summons, may, without knowing whether an original writ was ever issued or not, file an appearance to such copy, it might be called upon to adjudicate upon—unauthorized copies which might be served on parties out of malice or amusement by mischief-makers. Before a party can properly enter an appearance to a writ of summons, he should be certain that an original is issued. This can be effected by demanding to see the original at the time of service, or by examining the præcipe or the original writ in the proper office; for if a defendant enters an appearance to a copy of a writ of summons not authorized by an original, the appearance may be treated as a nullity.

In the case under consideration, the original writ of summons and the copy served upon the defendant are the same in every respect (excepting the name of the plaintiff.) In the original it is Hugh Ross, the correct name; in the copy it is Hugh Fraser. When a party is served with a copy of a writ of summons, he should take care before he enters an appearance to see that an original is issued, as his appearance must be to the original writ issued under the seal of the Court, and certified by its officer, and not to the copy; and if such party find a variance between the original writ issued and the copy served, he should take proper steps to put the matter right, and not enter an appearance to an unauthorized copy, as the present defendant has done.

I find in Harrison's excellent Manual of Costs, at page 33, tha an allowance of 2s. 6d. is made in the tariff to defendants "for attending to examine writ and præcipe." If the present defendant had taken the trouble to examine, as I think he ought to have done, the records of the Court, he would find that no original

writ of summons issued against him on the 18th day of August last, at the suit of Hugh Fraser; but he would find that one had issued at the suit of the present plaintiff, Hugh Ross, on the very day by the præcipe on file.

On the authority of the cases cited, I must hold that service of the copy in question is a mere irregularity, and that the appearance entered by the defendant to a copy unauthorized by an original was a nullity, and that the plaintiff had a right under the statute to treat it so, and to enter his judgment as he did. The summons to set aside the judgment, therefore must be discharged. But as the plaintiff himself has committed the first error by serving an irregular copy of the original writ of summons on the defendant, I will allow him no costs.

Summons discharged without costs.

DISTRICT COURT. PHILADELPHIA,

Western R. R. Co. v. Roberts.

A broker or other agent vested with a mere authority to sell, without authority to deliver, will not be presumed to be also authorized to receive the purchase money, even though the article is delivered by his principal to the purchasers, without demanding from them the payment of the purchase money at the place of shipment. A purchaser who has bought from an agent for cash, cannot pay in anything other than the cash without the principal's consent; and if the purchaser pay the agent in notes, to be by him turned into cash for the account of the principal, the purchaser will subject himself to the risk incident to the process of conversion, and to responsibility for any loss that might happen from a want of fidelity on the agent's part while about the conversion of the notes.

If the purchaser employ the agent of the vendor, to sell the notes given for the article purchased, for his (the purchaser's) account and risk, any loss incident of the fulfilment obligation will fall on him, and not on the vendor, toward whom the obligation is to be fulfilled, unless the agent agrees before he sells them, and has authority from the vendor to agree, that the notes are taken and held at the risk of his principal, the vendor.

Hare, J.—In May, 1857, Francis H. Jackson, a broker, residing and doing business in Boston, was employed by the Western R. R. Company of Massachusetts, to sell one hundred tons of old railroad iron, for their account. Jackson, who was not entrusted with the possession or custody of the iron, and who, so far as the evidence given at the trial went, acted throughout as a broker, and not as a factor, sold the iron to the defendants through the instrumentality of Lewis Ralston, a broker of this city. The iron was to be delivered by the railroad company, at Hudson, in the State of New York, and the terms were cash, payable on delivery. When the delivery was effected, is not clearly apparent, all the evidence on the subject being a receipt or bill of lading, dated June 15, 1857, and given at Hudson, by the master of the barge N. F. Barnes, for one hundred tons of railroad iron, shipped by the Hudson and Boston Railroad Co. for the account of, and to be delivered to the defendants; but it must have taken place either at or before the date of this receipt, and there was nothing to show that neither Jackson or Ralston, had anything to do with it; Jackson, who alone had any direct relations with the railroad, stating in his answer to the third interrogatory of the commission issued to take his testimony, that he did not know where the iron was when sold, nor when or where it was actually delivered. On the 23rd of June, 1857, the defendants placed two notes in the hands of Lewis W. Ralston, each for $1,800, at six months, with directions to sell or discount them for their account, and took his receipt for the notes. On the 6th of July, 1857, Ralston gave the defendants another receipt, in the following language:

"Received, Philad'a, July 6, 1857, three thousand three hundred and sixty dollars, being nett proceeds of two notes dated June 1, at six months, for eighteen hundred dollars, and June 5, at six months, for eighteen hundred dollars, of Messrs. A. & P. Roberts. given me to be sold on account of purchase of old rails off of the Western Railroad.

"$3,360. (Signed) "Lewis W. Ralston."

At the trial, Ralston was called to the stand by the plaintiffs, for the purpose of proving the sale, and on being cross-examined by the defendants, stated that he received the money as mentioned in the receipt. That he had sold the iron for the account of the plaintiffs. That he had received the notes from the defendants, and for their account. That he had paid no part of the proceeds to them or to the plaintiffs, but had on the contrary, appropriated the whole to his own purposes. That the proceeds of the notes were to have been paid to the defendants, or appropriated according to their directions. That the proceeds were intended to be applied to the payment of the iron that such was the defendants intention.

Three questions were left by the court to the jury. First, whether Ralston had authority to receive payment? Secondly, whether the payment alleged to have been made to him was of such a nature as to fall within the scope of his authority, if he had it? And, finally, whether the proceeds of the notes were or were not received and held by him as a payment, or in other words, whether he received and held them for the account of the plaintiffs or of the defendants. The jury found a verdict for the whole amount of the purchase money; and their finding cannot be set aside and a new trial granted, if any one of the questions submitted to them was properly found for the plaintiffs, nor unless all of them should have been answered affirmatively and in favour of the defendants.

All the authorities on the subject concur, that while a factor, or other agent armed with an authority to sell, and entrusted with the possession of and right to deliver the thing sold, will be presumed, in the absence of evidence to the contrary, to be also authorized to receive the price; (for the protection of the principal, who would otherwise have no means of enforcing his lien for the purchase money,) a mere authority to sell, without authority to deliver, will not extend to the receipt of the purchase money, and will cease to exist with the negotiation and completion of the contract of sale. No one can imagine that the mere employment of A. by B. to find a purchaser, and make a bargain for the sale of his horse or house, will authorize A. to take the price and acquit the purchaser, although the case is widely different if A. be entrusted with the possession of the horse, or armed with the right to give a deed for the house. The evidence here was that neither Jackson nor Ralston, who was, be it observed, employed solely by Jackson, had the possession of the iron, which formed the subject of this sale, and it was, on the contrary, delivered at Hudson, at a distance from their residences and places of business, without there being anything to show that this delay was in consequence of an instruction or order proceeding from them, and was not made directly by the plaintiffs to the defendants. The only circumstance appearing at the trial to vary the case, or render it different from that of a naked authority to sell, was that the iron was delivered by the vendors to the purchasers at Hudson, without asking for the purchase money, from which it is argued that the jury should have inferred that Ralston was authorized to receive that here, which the Western Railroad Company omitted to demand and receive at the place of shipment. Had the iron been consigned, or made deliverable to or by Ralston, the argument would have been a strong one, and perhaps irresistible. But as it was not, the only conclusion that can legitimately be drawn from the failure of the vendors to exact payment on delivery, is that they were willing to trust the solvency of the purchasers, and not that they meant to enlarge the authority of the agent by whom the sale had been effected, or render a payment to him equivalent to a payment to themselves personally. That a man who has employed an agent to sell a horse, which he retains in his own stable, and does not place in the keeping of the agent, sends the horse to the purchaser on receiving a notification of the sale from the agent, proves that he trusts the purchaser, but not that he places any larger confidence in the agent. If, therefore, the delivery of the iron was a circumstance in favor of the defendants, it was but a circumstance, which must be presumed to have been considered by the jury, and it is not a sufficient reason for assuming, in opposition to their verdict, that Ralston was authorized to receive payment for the iron, as well as to sell it.

But even if Ralston possessed full authority both to sell and receive payment, it will not help the defendants, unless he was paid: and here the case is perhaps more strongly with the plaintiffs than on the former point. For nothing is plainer than that a purchaser who has bought from an agent for cash, cannot pay in anything other than the cash, which has been promised, without the consent of the principal, nor in any way that varies the terms of the contract or of the agency, and charges the principal with a greater responsibility than he would have to bear if those terms had been pursued and complied with. Some of the cases on this head will be found collected in the argument of counsel in the case

of *Parkison* v. *The Guardians*, 1 Hurlstone & Homan, 524, 525, and although held by the Court to be inapplicable there, are of unquestioned authority when the circumstances are such as to fall within them; *Sykes* v. *Gyles*, 5 M. & W. 645; *Scott* v. *Irving*, 1 B. & Ad. 605; *Partridge* v. *The Bank of England*, 9 Q. B. 396. It is therefore plain, and was indeed conceded, that the defendants, who had bought from Ralston for cash, could neither pay him in notes, nor give him notes to be turned into cash for the account of his principals, without subjecting themselves to the risk incident to the process of conversion, and submitting to any loss that might happen from a want of fidelity on his part while he was about it. It is however argued that although the defendants would necessarily have been answerable for the laches or misfeasance of Ralston in selling the notes, there was nothing to prevent them from agreeing with him before the sale, and at the time when the notes were placed in his possession, that they should be sold for their account and risk, but that the proceeds should be received and held for the account and at the risk of the plaintiffs. This position however, is exceedingly questionable. A party who employs the agent of another, and in one sense, adverse party, to act in a business common to both, employs one whose duty and loyalty are in fact pre-engaged; and ought to derive no advantage from this course, which he would not have had from the employment of a third person. If the defendants had employed an agent of their own to sell their notes, instead of employing the plaintiffs' agent, the proceeds would have been at their risk, until they had not only accounted with, but obtained payment from their agent; and they certainly cannot be in a better position because they choose to employ the plaintiffs' agent to transact that which was essentially their own business. It was their duty, and not the duty of the vendors, to find the means of payment, and to sell notes for the purpose, if there was no better course open; and the loss incident to the fulfilment of this obligation, ought to fall on them, and not on those towards whom the obligation was to be fulfilled. And it is at all events plain, that the money received from the sale of the defendants' notes, cannot be viewed as being the money, and at the risk of the plaintiffs, and not of the defendants, in the absence of proof of a binding agreement to that effect, before the notes were sold, or of an appropriation to the use of the plaintiffs afterwards. That an agent employed by a debtor to sell a horse for the purpose of procuring the means of payment, is also the agent of the creditor, does not render the horse less the debtor's, nor deprive him of the right to countermand the sale, or say what use shall be made of the purchase money, after a sale has been effected, unless there is some agreement to the contrary with the agent, and the latter is authorized so to agree. *Prima facie* the horse is still the debtor's, until sold, and the price received for it his afterwards; and it necessarily follows that the risk must also be his, and not the creditor's; and if he would get rid of this responsibility, he must show when and in what manner it passed from his shoulders, and was shifted to those of the opposite party. Now here there was an entire absence of proof that Ralston either agreed or had authority to agree, to take and hold the notes at the risk of his principals, before he sold them, and the preponderance, if not the whole weight of the evidence, was that there was no appropriation of the proceeds of the notes to the payment of the iron, while they remained in his hands, and before they were misapplied to his own purposes. The utmost, therefore which the defendants could ask, consistently with the evidence, was an instruction that the money produced by the sale of the notes might he rendered the plaintiffs money, and put at their risk by an order or direction to that effect from the defendants, or a mere exchange of receipts with Ralston after it had been received by him, and before he had devoted it to any other purpose. And the jury were told that if such a direction was in fact given to, or agreement made with him while he still held the money, there was no necessity for his handing it over in order to get it back again, and the payment would be a good one, if he was duly authorized to receive it. That a verdict was rendered for the plaintiffs under this instruction, and not for the defendants, was no doubt because Ralston himself testified positively, although not without some embarrassment arising from the situation in which he had unfortunately placed himself, that although the intention was that the money should go in payment of the iron, it had never been actually so appropriated, and had consequently, always remained in his hands, so long as it did remain there as the money, and subject to the control of the defendants, and not of the plaintiffs. I regard this testimony as being nothing more than the conclusion which the law would have drawn, had he not so testified, in the absence of proof of a specific appropriation of the money after he had received it, other than that recited in the receipt of July 6th. For even if the recital that the money receipted for, was the proceeds of notes "given to be sold on account of the purchase of railroad iron," is to be considered as meaning that the notes were given on account or in payment of the price of the iron, it would not be less true that the defendants could not in law give notes as a substitute for cash, or bargain that an agent solely authorized to receive cash, should take and sell notes at the risk of his principals, instead of cash. And even if this were not so, the jury would still have been fully entitled to give credence to the statements of Ralston, that no such bargain or agreement was in fact made, in preference to his previous written or unwrttten declarations.

I have hitherto considered this case as it arose, and was presented by both parties at the trial, in obedience to the well known rule that everything which is not made to appear by some legitimate means of proof, it is to be regarded as if it did not exist in fact. But some additional matter is now brought forward, consisting of a correspondence of the plaintiffs with their agents, and of the agents with each other, which the plaintiffs have with much liberality, placed at the disposition of the defendants since the verdict, and which the defendants wish to have examined in aid of their motion for a new trial. This correspondence is not, in any proper sense of the word, after-discovered evidence, because the defendants might have obtained and produced it at the trial if they had thought proper, as readily as at the present moment. Still, if the letters thus laid before us showed, or even tended materially to show, that the defendants had in point of right and justice, paid a demand once which the verdict would compel them to pay again, I should have been disposed to go to the utmost verge of the discretion given by the law, for the sake of preventing injustice by granting a new trial. But on looking at the documents in question, it appears that although Jackson was empowered to direct the delivery of the iron, and it was in fact delivered on his order, Ralston had no such authority, and on the contrary, acted in a merely subordinate position to Jackson, exercising no control over the property sold, and having nothing to do with its delivery. And when Jackson, who remained or had been kept in ignorance of the payment alleged to have been made to Ralston, wrote to the latter, urging him to press the defendants to pay, he did not outhorize or request Ralston to receive the money, and on the contrary. required that the defendants should remit it directly to plaintiffs, But even if the correspondence showed, which it fails to do, that Ralston was authorized to receive payment, it would still fall far short of showing that the defendants were authorized to pay him in notes instead of money, or that the funds which came to his hands from them, were received not for their account, but for that of the plaintiffs. There is nothing in the evidence now laid before us, to change the conclusion at which we had arrived without it, and it is, consequently, unnecessary to consider whether the circumstances under which it is presented, are such as to render it admissable as an element in our decision.

The result of the whole is, that there is no sufficient reason in point either of fact or of law, for setting aside the verdict, and we discharge the rule for a new trial.

SUPREME COURT OF PENNSYLVANIA.

BARCLAY RAILROAD & COAL CO. v. JOSEPH INGHAM.

Where damages are claimed for any injury, caused by a nuisance, it is competent for the defendant to show that the whole cause of mischief could have been removed for a small sum, with a view to the admeasurement of damages.

The right to erect a mill-dam, conferred by the Act of 1803, is but a license to the riparian owner, subject to be revoked whenever the public interest requires it.

But in respect to the creeks and smaller streams of Pennsylvania, the practice of the Land Office has been to include them in warrants and surveys as part of the public lands; they belong to the owners of the tracts within which they lay, who may convey the bodies of the streams to one and the adjoining land to another.

Nature of "creeks and small rivers" in Pennsylvania defined and expounded.

Error to Common Pleas of Bradford Co. The opinion of the court was delivered by

WOODWARD, J.—The first error assigned is for rejecting the defendants' offer to prove that it would not cost more than $140 to remove the bar in the creek from the head of Mason's pond and upwards, so as to admit a free flow of water. It would seem that this bar was the principal nuisance complained of by the plaintiff. It was this, that according to his views, caused the back water in his tail-race, to the injury of his machinery. It was chiefly, if not altogether, for this, that his witnesses estimated his damages at from $3,000 to $8,000, and for which the jury gave him a verdict of $3,472.

Now, why it was not competent for the defendant to show, in an answer to a claim for so large damages, that the whole cause of mischief could be remedied for $140, we cannot understand. It was alleged on the part of the defendant, that this bar was in part, at least, the result of the natural action of the water, but whatever the cause of its growth, whether the natural flow of water or the artificial embankments of the Railroad Company, or both combined, the company claimed that it could be removed for the inconsiderable sum mentioned in the offer. Had the jury been persuaded of this, they could never have given the verdict they did. The court should have given the company a chance to persuade the jury, and to this end should have admitted the evidence. It went directly to the admeasurement of damages. It was much more certain proof in its nature, than those speculative views on which damages in such cases are too often assessed. For this error of the trial the cause must go back.

But we find no other error upon the record. The second point of the defendants' was answered in their favour, and the court refused, properly, to affirm their first point. That the defendants had a legal right to erect the embankment in the construction of their railroad on the plaintiff's land, was a truism under the law of their incorporation, which the learned judge did not mean to deny, but the other proposition that the company were not liable for damage done to the plaintiff's *water power*, if it was situated on the part of Towanda creek which had been declared a public highway, was the pith of the first point, and this was negatived, as it should have been.

In respect to the great rivers of the State, such as are navigable by nature, and therefore public highways by the common law, it has been repeatedly declared that the Mill-dam Act of 23rd March, 1803, is but a license to the riparian owner, subject to be revoked whenever the interests of the public requires it. This doctrine was applied in *Monongahela Nav. Co.* v. *Koons*, 6 W. & S. 112, to the Youghiogeny, which is one of the streams enumerated by C. J. Tilgham, in *Shrunk* v. *The Schuylkill Nav. Co.*, 14 S. & R. 79, as among the "principal rivers" of Pennsylvania. And again, in *Susquehanna Canal Co* v. *Wright*, 9 W. & S. 11, the same doctrine was applied to the Susquehanna river, which, as well as its principal branches, has always been considered a public river. And once again, in the *New York and Erie Railroad Co.* v. *Young*, 9 Casey, 181, it was applied to the North Branch of the Susquehanna, always a navigable river, according to the common law definition that has obtained in Pennsylvania.

In all these cases, the right claimed by the riparian owner was a permissive right to use rivers, the soil of which had never been granted by William Penn, his successors, or the Commonwealth. The rivers, and the bed of the rivers, belonged to the Commonwealth, and constituted part of the eminent domain. Private surveys bounding on them were stopped at low-water mark. Where the Commonwealth, by its legislature, authorized riparian owners along *such* streams to erect dams for their own convenience and profit, it was a sort of public license, like the fisheries and ferries which, by numerous Acts of Assembly, were granted in all our public rivers. And being a mere license to trespass on the public domain without any consideration received therefor, it had none of the indefeasibility of a contract, and might be revoked at the will of the sovereign, or to be granted to another.

But in respect to the creeks and smaller streams everywhere found in Pennsylvania, the practice of the land office, whether under the Pproprietaries or the Commonwealth, has been to include them in warrants and surveys, as part of the public lands. Streams thus falling within the lines of a survey, were covered by it, and belonged to the owner of the tract, who might afterwards convey the body of the stream to one person, and the adjoining land to another. When any of this class of streams formed the boundary of such tract, the grantee acquired title *ad filum aquæ*. *Coovert* v. *O'Conner*, 8 W. 477. There is but one difference between a stream running through a man's land, and one which runs by the side of it; in the former case he owns the whole, and in the latter but half. *Starr* v. *Child*, 20 Wend. 149. It is customary to speak of these streams as not navigable, in contradistinction to those larger rivers not granted by the Commonwealth, and which are called navigable.

In England, those streams only are called navigable, in which the tides ebb add flow; but with us, all our public rivers, whether fresh or salt, are navigable, and hence a very erroneous idea has sprung, that such rivers only are public highways, and that in the lesser streams granted by the Commonwealth to purchasers, the public have no right until they are declared by law to be highways. This is a misconception, produced no doubt by the very indefinite term navigable—a word which may mean an ascending, as well as descending navigation, by boats of considerable burthen, or merely a descending navigation by arks and rafts, at all seasons, or by arks and rafts in seasons of freshets. Our ideas of public and private rights in streams of water, ought not to be dependent on so vague and indeterminate a word.

If we go back to Magna Charta, we shall find it written in the xxiii. cap. *Omnes Kidelli deponantur*, &c., a clause which has been translated, "All rivers from henceforth, shall be utterly put down by Thames and Medway, and through all England, but only by the sea coasts." This I understand to have been a formal declaration and vindication of the right of all up-stream people to have an unobstructed channel in streams capable of being used for transportation, not only for purposes of trade and commerce, but also for the assent of fish, which sometimes were indispensable for subsistence. Accordingly, it is laid down by Lord Hale, (see Hargrave's Tracts De Inre Maris, cited in Angell on Water-courses, s. 535,) "All rivers above the flow of tide-water, are by the common law, *prima facie* private; but when they are naturally of a sufficient depth for valuable floodage, the public have an easement therein, for the purpose of transportation and commercial intercourse; and in fact, they are public highways by water."

This I apprehend is an exact definition of our creeks and smaller rivers, such as have been granted by warrant and survey. They are private property, but if of sufficient capacity at any stages of water to be used for transportation of lumber or other goods, they are held subject to that public easment which our English ancestry guarded with great jealously, as numerous old statutes subsequent to Magna Charta abundantly attest. When, therefore, our legislature declares such streams to be public highways, the act is merely declaratory of the common law, but beneficial nevertheless, as bringing the stream within the protection of the remedial provisions of the Mill-dam Act of 1803. This latter act is by its terms applicable to "any navigable stream of water *declared by law* a public highway," and it is itself declaratory of the common law, in the clause which forbids him who erects or maintains a dam "to obstruct or impede the navigation of such stream, or prevent the fish from passing up the same."

Now, to apply these rules and principles to the case in hand, Ingham was the owner of land under a patent issued 3rd November, 1786, and which was bounded by Towanda creek. He was thus the absolute owner of one-half of the stream—of the bed of it, and of all the water-power it contained, subject only to the public right of passage for such craft as was suitable to the capacity of the stream, and to an unobstructed passage of fish. In 1803 the legislature declared this part of Towanda creek "a public highway for the passing of rafts, floats, or other vessels." This did not abridge Ingham's right of property. The legislature could not take away without compensation, property fairly vested in him. He was as truly and as entirely the proprietor of the premises after the Act of 1813 as before. The water-power was property, and it was his property. He might improve it by damming his half of the stream, or with the consent of his opposite neighbour, the whole of it, and of the water-power so improved he could no more be despoiled, without compensation made to him in the forms of

the Constitution, that he could be deprived of the solid acres granted to him by the Commonwealth.

His dam must not obstruct the navigation of the fish, because he took title from the Commonwealth subject to that servitude or public right—one of the ancient English "liberties" which Magna Charta rescued from oblivion—which numerous old statutes, in the times of Henry IV. and the Edwards, defined and defended—which the immigrants brought over with them, and which Penn expressly recognized in the 22nd Sect. of his first frame of Government, adopted in 1803—and which became, in this manner, an indefeasible condition of Pennsylvania tenures. The Mill-dam Act of 1803, was a fuller provision for the regulation of this public right, and supplied a statutory remedy for its infringment, but was not a *license* to Ingham to build on his own land. When he improved his water-power, he did it, not as tenant at will, under a revocable license, but on the sure footing of that dominion which an owner exercises over soil that he holds, in fee simple, from his sovereign. This conceit, that the Commonwealth granted a license in 1803 to build on land she sold and was paid for before 1786, may lead very logically to the conclusion that it was competent for the Commonwealth to revoke the license in 1803 and grant to the Railroad Co. the right to destroy Ingham's water-power, without compensation, but it is only a conceit after all, and can afford no solid basis for the conclusion claimed. It may be harmless if not strictly correct language to speak of the Act of 1803 as licensing riparian owners along our "principal" rivers to use water-power which, never having been granted to a citizen, belongs to the State as a sovereign, but when applied to such streams as the Towanda creek, which having been granted by the sovereign, are private property, it is false language, and it begets false ideas. If it were, indeed so, that the Act of 1803 makes every mill owner along these lesser streams a mere tenant at will, it would be palpably unconstitutional; but regarded as an act for the regulation and defence of a supervening common law right of the public, subject to which the mill owner bought and has always held his land and water-power, it is constitutional and wholesome legislation.

For these reasons we are of opinion that the main proposition in the defendants' first point was correctly denied, and the judgment is reversed only because of the rejection of the evidence mentioned in the first bill of exceptions.

Judgment reversed and a *venire facias de novo* awarded.

MONTHLY REPERTORY.

CHANCERY.

M. R. FRANKS v. BROOKER. *Jan.* 25.

Will—Legacy—Ambiguity.

Testator bequeathed a certain sum of money to trustees in trust for his daughter E. for her separate use independent of her husband, and after the decease of E. to her husband for his life with remainder to all and every the children of E. by her present or any future husband.

After testator's decease E's husband died and she married again. E. died leaving her second husband her surviving. On bill filed by second husband against trustee of the will. *Held*, that the benefit of the gift was confined to the husband living at the date of the will and the death of the testator.

V. C. K. DAVIES v. BOULCOTT. *Jan.* 25.

Practice—Appointment of representative.

Where a decree for sale has been made of an insolvent estate, and the legatees have disclaimed, the executors renounced, and an administrator *ad litem* is dead, the court will *ex parte* on motion appoint a personal representative on production of an affidavit as to the insolvency of the estate and notice to the parties entitled to administer.

V. C. K. FORWARD v. EDGINTON. *Jan.* 27, 31.

Assignment—Priority—Notice—Husband and wife.

Where a husband in right of his wife who is one of the representatives of an intestates' estate assigns his share in the estate for value, and becomes insolvent, notice to the wife, if proved is not notice to both the representatives, a wife being under the dominion of her husband has constructive notice of his acts.

The principle applicable to a trustee who is also a *cestui que trust* and assignor of a fund applies also to a *feme covert* on the question of notice.

V. C. W. DRUMMOND v. TRACY. *Jan.* 30.

Judgment—Power of sale—Executor—Abstract of title.

Real and personal estate was given by the testator's will to A. one of his daughters and his sole executrix upon trust to sell and convert (with power nevertheless to suspend such sale for such period as she should think fit) and stand possessed of the clear moneys arising from such sale in trust for the testators three daughters A. B. and C. it being declared that A's receipt should be a good discharge to purchasers.

After the testator's death, A. married and with the concurrence of her husband caused the real estate to be sold by auction E. becoming the purchaser. Shortly after the contract for sale but before the completion of the purchase judgments were entered up against A's husband to an amount far exceeding the purchase money. Upon the refusal of E. to complete his purchase until the judgments had been satisfied, specific performance decreed with costs, the court holding that the judgment creditor could not interfere with the sale out of the proceeds of which no beneficial interest accrued to A. and the other *cestui que* trusts, until the testators debts, &c., had been discharged and his estate administered.

Although it may not be necessary to insert upon the abstract the particulars of an equitable charge which has been already paid off, the fact of such a charge having effected the property should not be concealed from the purchaser.

V. C. W. MITCHELL v. COLLS. *Jan.* 30.

Settlement—Construction—"Unmarried"—next of kin of wife.

By the settlement made upon the marriage between A. and B. a sum of stock was settled to the separate use of B. (the wife) for her life with trusts after her death as to one moiety for children of the marriage as to the other moiety for the husband for his life after his death upon the same trusts as had been declared of the first moiety. In default of children taking vested interests (attaining 21 or dying under that age leaving issue) upon trust as to the whole for the husband for life and after his death according to the appointment of B.; and in default of such appointment upon trust for the person or persons who at the death of B. should be of her blood and in kin to her and would have been entitled under the statute of disiributions "in case B. had died possessed thereof intestate and unmarried."

B. died in child birth, leaving an infant daughter who survived one day only.

Held, that the infant daughter was entitled under the ultimate limitations in default of appointment as B's next of kin under the statute of distributions.

L. C. PARISH v. SLEEMAN. *Feb.* 11.

Landlord and tenant—"All outgoings."

Agreement between landlord and tenant for the lease of a farm for a term of years at a yearly rent "free of all out goings."

Held, that the word "out goings" included the land tax and title commutation rent charge.

L. J. NELSON v. SEAMAN. *Feb.* 24.

Practice—Parties—Trustee of an equity.

A fund was paid into court by the executors of a deceased trustee. A. *cestui que* trust appointed now trustees under a power in the settlement, but the property was not assigned to them or transferred into their names. An incumbrancer filed a bill to secure the fund to which he made the executors parties.

Held, that the new trustees were also necessary parties.

In re WILTSHIRE'S ESTATE.

Will—Administration summons—Admission of assets—Priority of legacies—Annuity.

An executor cannot be charged upon an admission of assets on an administration summons.

A testatrix bequeathed the residue of the monies to arise from her real and personal estate to the children of W., and directed that her trustee should in the first instance out of such residue pay an annuity of £20. The assets were insufficient.

Held, that the pecuniary legatees were entitled to be paid in priority to the annuitant.

V. C. K. CRAIG v. WHEELER. *Jan* 28.

Will—Conversion—Annuities—Leaseholds—Lands—Rents—Reference.

If a testator gives personalty or personalty and realty combined, whether charged or not to one for life with remainder over, and there is no specific indication of intention, either that he wishes it to be held in specie or converted, an intention that he wishes it to be converted will be presumed. But if there is on the face of the will any specific indication of intention either way this rule as to conversion does not apply.

An inference that a testator contemplated an appropriation of a fund for a particular purpose is not a sufficient indication of a wish that there should be a conversion.

The words "lands" and "rents and profits" do not point to leaseholds if there be freeholds although sufficient to pass leaseholds. If the Court considers that there ought to be a conversion it may still direct a reference to chambers to ascertain whether it will be for the benefit of the parties that the property should be held in specie.

V. C. S. GREENWAY v. GREENWAY. *Jan.* 16, 17.

Will—Construction—Real and personal estate blended together—Estate tail—Conversion.

A testator gave his real and personal estate in trust as to the annual income for E & C or the heirs of their bodies, and if either should die leaving heirs of his body his share should go to such heirs, but if one die without issue then the whole income should go the survivor, and in case of his death to his heirs. But in case both should die without issue, then the whole property to be equally divided among his next of kin. And he appointed executors with power to sell, dispose of and convert into money his real and personal estate by public auction on private contract as to them should seem meet.

Held, that upon the whole language of the will, there was a conversion of the real estate, and that there was no devise in specie to E and C as tenants in tail.

COMMON LAW.

Q. B. REGINA v. JOHNSON. *Feb.* 8.

Practice—Indictment for obstructing highway—New trial.

Where a defendant is acquitted on an indictment for obstructing a highway the court will not grant a new trial on the ground that the verdict is against the evidence.

C. P. WARNE v. HILL. *Jan.* 30.

Costs of the day—How suit entered—Both parties in default.

A case was called on at the sittings of the court and the plaintiff and his witness not being present the judge ordered a non-suit to be entered upon which the defendant immediately left the court. Soon after he had gone the plaintiff arrived and discovered that the jury had not been sworn upon which the learned judge said that he would wait for the defendant till one o'clock.

The defendant however had left the town and therefore did not appear and the judge then ordered the words "struck out" to be substituted for "non-suit." The plaintiff it appeared had mistaken the judge to say the day before that common jury cases were not to be taken on that day and therefore he and his witnesses had not come into court.

Held, that as the defendant was in default in not seeing that the jury were sworn and the plaintiff in default in not being in court when the cause was called on, the costs of the day and this rule should be costs in the cause.

EX. C. *Feb.* 4.

CAZENOVE ET AL ASSIGNEES v. B. E. ASSURANCE CO.

Policy of insurance—Condition—Forfeiture—Untrue statement.

A policy of insurance effected by A. on his own life was subject to a condition that it was to be void in case any untrue statement was contained in any document deposited with the Insurance Company in relation to the insurance by the assured. Certain documents were so deposited with the company containing, among other matters the questions following:—*Q.* "Whether assured had since infancy had disease requiring confinement?" *A.* "No." *Q.* "How often had medical attendance been required?" *A.* "One year ago." *Q.* "For what period confined to bed or house?" *A.* "A week." *Q.* "Name and address of medical attendant employed on occasion of such disease?" *A.* Dr. B." In fact the assured had subsequently to the disease attended by Dr. B. another and a dangerous illness, for which three other medical men had attended him.

Held, that the above answers were untrue and also the policy void.

Q. B. PRIOR AND OTHERS v. WILSON. *Feb.* 7.

Damages—Contract over—Notice.

A ship belonging to the defendant was taken by the plaintiffs for the purpose of carrying coals to the coast of Africa. It was known by the defendant that Admiralty contracts were out for sending coals to this coast and that the bills of lading were to be sent in by the 31st of December. The defendant having failed to perform his contract. *Held*, that he was liable in damages for the expenses incurred by the plaintiffs in consequence of such failure in the performance of their contract with the admiralty, the above notice of that contract being sufficient to render him in law so liable.

REVIEWS.

Among our late exchanges we have received—

THE WESTMINSTER REVIEW, for October. New York; Leonard Scott & Co.

The first article under the head of Neo-Christianity, contains a review of a book now in its second edition, formed of a chain of essays by several of the leaders of thought in the English universities.

The second article is a review of "*Seven years Residence in the Great Deserts of North America*," and gives some statistical information regarding the Indian population of this continent, the extent of their territory, the usual reference as to the origin of the American tribes, with some remarks upon the character, social organization and form of government of the Aboriginals.

There next appears a just and well written paper upon the Biography of Robert Owen, the great Social Reformer.

The *Organization of Italy*, affords some interesting pages upon the laws and particular government of the Italian States.

A very learned paper upon the *Antiquity of the Human Race*, forms a fitting conclusion to the criticism which the theory of Darwin as to its origin, has produced, but like much of that disunion there appears a hesitation in offering a strong support to any opinion.

In succeeding papers we have a view of the social position of Russia and the improvement promised to, by the generous efforts of Alexander II, an article upon the English National Defences, and an interesting paper upon Thackeray as a *Novelist and Photographer*.

THE NEW YORK DAILY TRANSCRIPT.—We regularly receive this well-known daily. We understand that the proprietors have in contemplation the establishment of the weekly Transcript, which, containing the latest rulings of the English and American Courts, will afford to the legal profession convenient and useful information.

THE LUZERNE LEGAL OBSERVER; published at Scranton, in the State of Pennsylvania, has reached us. We shall be glad to exchange.

THE AMERICAN RAILWAY REVIEW; published in New York, is also received. This weekly publication is entirely devoted to the interests of the Railway community in America, from whom the Review should command a generous support. The editorial and other matter indicates the presence of ability, very necessary in dealing successfully with the important interests which it represents.

In the UNITED STATES INSURANCE GAZETTE, with a large quantity of statistics, is contained a continued article upon "The Law of Fire and Life Insurance," which, in view of the amount of litigation upon this matter, possesses peculiar interest. It is edited by G. E. Currie, New York City.

THE LOWER CANADA REPORTS; edited by M. Lelievre, of Quebec, contains as usual reports of the most important cases decided by the courts of the Eastern section of the Province.

THE MONTHLY LAW REPORTER; published at Boston, by George P. Sauger, has come to hand. A well-written article upon an Elective Judiciary, offers the decided opinions of some distinguished professional men of the New England States against the system of elective judges; and indicates the existence of an extended belief that the attempt, as made particularly in the State of New York, has been a lamentable failure. This, with the decisions of the Supreme Courts of several States, forms the matter of a most valuable pamphlet containing about one hundred pages.

THE LAW MAGAZINE AND LAW REVIEW; THE CHRISTIAN EXAMINER AND THE EDINBURGH AND LONDON QUARTERLIES have been received.

In the first named Review we see a critical article upon the Law of Torts; an interesting condensation of the judicial statistics of England and Wales for the years 1858 and 1859, wherein is shown the chief statistical particulars developed by the criminal investigations of those years; a lecture upon commercial law gives the reader a connected and interesting account of the early efforts of the nations about the shores of the Eastern Mediterranean; the character of the commercial laws of Greece; and under the influence of the much discussed *De Lege Rhodiante Jactu* the laws which Rome framed for the guidance of that people who in her later ages, though the occupation of the shopkeeper not so ignoble as her orator and philosopher of earlier days had pronounced him.

THE CHRISTIAN EXAMINER of Boston is an adherent of th doctrines of the Unitarian Church and an exponent of what is styled the advanced religious thought of America. Conducted with a confessed ability it occupies a foremost place among the literary periodicals of this continent. The motto of the magazine is from the pen of St. Augustine: "*Pono si sapientia Deus est—verus philosophus est amator Dei.*"

THE TOUR OF H. R. H. THE PRINCE OF WALES THROUGH BRITISH AMERICA AND THE UNITED STATES; By a BRITISH CANADIAN. Montreal: Printed for the Compiler by John Lovell, 1860.

This is the title of a very useful brochure from the pen of a young Canadian. The volume, containing nearly 300 pages, preceded by a striking likeness of the Prince, is most handsomely bound. It reflects much credit upon the industrious compiler, and the enterprising publisher. Here we have preserved what a few years hence will be found no where else a faithful and detailed account of the progress of H. R. H. Albert Edward through Canada and the United States.

The compilation is evidently the work of a young man of little experience in book-writing, but we expect that a few years hence he will be in that capacity better known to the public. He is at present known to us, and we sincerely congratulate him upon this his first production in the book line. When we mention that he is not only very young, but self-educated, and the occupant of a humble post in the public service, we are sure that the readers of the volume who may chance to see these remarks will, while profiting by his industry applaud his well-directed efforts. It is much to his credit that he so employs his leisore moments as to produce a volume that would be a credit to a person much older, more experienced, and more learned than himself. While many in the subordinate offices of the public service are passing their leisure time in idleness, or perhaps worse than idleness, this young man—the son of a widow, and her chief support—is steadily pushing forward so as to make himself a more useful and more distinguished member of the community in which he lives. We wish him—and every young man like him—full success. Horace Greely, the powerful editor of the *Tribune*, was once a poor boy, with prospects much less slender than those of "The British Canadian" who compiled the volume about which we have made these remarks.

GODEY'S LADY BOOK for January, 1861, is received. It is really a superb number. It opens with a magnificent title, comprising six distinct engravings and five Statuettes. The fashion plate also is superior to any in coloring that we have hitherto seen in any published magazine. The proprietor, however, admits that he is still improving, and promises that future fashion plates will be better than that contained in the number under review. It is said that "Godey" contains at least 400 pages more reading than any other similar magazine, twice as many engravings, at least 48 more colored fashion plates, and full 300 engravings more than any other magazine. The circulation is now about 150,000. It is only by reason of this immense circulation that such a magazine can be sold at a price so low as $3 per annum, or 25 cents per number. This is the answer to the London *Times*, that says, "How Mr. Godey can afford to give so much matter for about one English shilling, we cannot comprehend." Now is the time to subscribe, and to the wives and daughters of our patrons who have not yet subscribed we say, allow not the new year to begin without sending your subscription to Godey. Address, Louis A. Godey, Philadelphia.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC, UPPER CANADA.

CORNELIUS DANFORD PAUL, of St. Thomas, Esquire.—(Gazetted Nov. 24, 1860.)
HENRY FRANCIS ELLIS, of St. Thomas, Esquire.—(Gazetted Nov. 24, 1860.)
LEWIS J. C. FREDERICK, Esquire.—(Gazetted November 24, 1860.)
DONALD PROCTOR ROSS, of Toronto, Esquire, Attorney-at-Law.—(Gazetted November 24, 1860.)
EDWARD M. CHADWICK, of Waterloo, Esquire.—(Gazetted Nov. 24, 1860.)

TO CORRESPONDENTS.

"T." and "D."—Under "Division Courts," page 277.

We have received another communication from "B." on the subject of "exemption from distress under landlord's warrant," which came to hand too late for publication in this number. We will gladly give it a place in our next; and we may state now, for the benefit of those interested in the question at issue, that the writer further upholds the view of the matter put forward by him in our last number.

The letter of a correspondent as to the effect of registered judgments, is mislaid,

THE

UPPER CANADA LAW JOURNAL

AND

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W. D. ARDAGH, ESQ., AND ROBERT A. HARRISON, ESQ., B.C.L.,

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DIARY FOR JANUARY.

1. Tuesday..... Circumcision. Taxes to be computed from this day.
2. Wednesday..... Last day for notice of Trial for Toronto Assizes.
6. SUNDAY ..... *Epiphany.*
7. Monday ..... County Court Term begins. Surrogate Court Term beg. Heir and Devisee Sittings commence. Municipal Elections.
9. Wednesday ... Election of School Trustees.
10. Thursday..... Toronto Winter Assizes commence.
12. Saturday..... County Court and Surrogate Court Terms end.
13. SUNDAY ..... *1st Sunday after Epiphany.*
14. Monday ..... Recorder's Court sits. Election Police Trustees in Pol. Villages.
15. Tuesday ..... Treasurer or Chamberlain of Municipalities to make return to Board of Audit.
19. Saturday ..... Articles, &c., to be left with Secretary of Law Society.
20. SUNDAY ..... *2nd Sunday after Epiphany.*
21. Monday ..... Members of Municipal Councils (except Counties) and Trustees of Police Villages to hold first meeting.
22. Tuesday..... Members of County Councils to hold first meeting. Last day for notice Chan. Ex. Toronto. Heir and Devisee Sittings end.
27. SUNDAY..... *Septuagesima.*
31. Thursday ..... Last day for Cities & Counties to make returns to Government. Day for Grammar School Trustees to retire.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JANUARY, 1861.

NOTICE TO SUBSCRIBERS.

As some Subscribers do not yet understand our new method of addressing the "Law Journal," we take this opportunity of giving an explanation.

The object of the system is to inform each individual Subscriber of the amount due by him to us to the end of the CURRENT *year of publication.*

This object is effected by printing on the wrapper of each number— 1. *The name of the Subscriber.* 2. *The amount in arrear.* 3. *The current year to the end of which the computation is made.*

THUS "*John Smith* $5 '60." *This signifies that, at the end of the year* 1860, *John Smith will be indebted to us in the sum of* $5, *for the current volume.*

So "*Henry Tompkins* $25 '60." *By this is signified that, at the end of the year* 1860, *Henry Tompkins will be indebted to us in the sum of* $25, *for* 5 *volumes of the "Law Journal."*

Many persons take $5 '60 *to mean* 5 *dollars and* 60 *cents. This is a mistake. The "*60*" has reference to the year, and not to the amount represented as due.*

TO OUR READERS.

It is no small satisfaction to us to be enabled to issue the index, title page, &c., to Vol. 6, and Calendar for 1861, with the current number of the *Law Journal.*

During the year just expired, it has been one of our chief aims to issue the different numbers of the *Law Journal* with regularity and despatch, and in future we hall endeavour to continue to do so.

It is a subject of surprise to some readers that we are able to present so much original matter in each number of the *Journal.* We admit that it costs us much time and labor to do so, but at the same time feel no inclination to abate our exertions in this respect.

We are ambitious of retaining the good opinion which kindred English and American publications have been pleased to express in relation to us. Should there be any change in the editorial management of the *Law Journal*, we hope that the change will be an improvement. At present, however, no change is contemplated, and we are not informed that any is desired.

It is our duty in an especial manner to acknowledge our obligations to the able editors of the *Law Times*, the *Solicitor's Journal*, and *Law Magazine and Review*, for the kindly and we confess flattering notices of the *Upper Canada Law Journal*, which from time to time have appeared in the pages of those well known organs of the legal profession in the mother country. Praise from such a source has been to us not merely a just subject of pride, but an incentive to increased exertion.

Proud, however, as we feel of praise from such high quarters, we feel still more so of the steady and increasing support which we receive, not only from the Legal Profession of Upper Canada, but from Division Court and Municipal Officers, Magistrates, and all others concerned in the administration of justice. As the successful lawyer points to the number and respectability of his clients in proof of his success, so do we point to the number, respectability, and intelligence of our readers, in proof of our success and our influence.

More than one rival has been started in the hope of diverting some of our municipal and other patronage, and, after a sickly existence, has died a premature death. We need do no more at present than refer to the fate of the *Municipal Economist*, and we do so in feelings of sadness rather than of triumph. While we fear no opposition, we entertain no feelings of jealousy. We are glad to learn that the *Municipal and School Reports* are likely to succeed. There is room enough for us both. Our spheres are not precisely the same; and even were they so, these Reports would not suffer any injury from any wilful act of ours. We wish them every success, and shall not fail to lend a helping hand, if in our power, to contribute to their success.

In the volume which with this number we commence, increased attention will be given to the claims of Division Courts upon us. A treatise on the practice of Division Courts is already announced, which, in addition to the information ordinarily furnished by us, will appear in the *Law Journal.* As in times past, so in the future, we

shall solicit inquiries from Division Court officers and others, when in doubt as to the practice or procedure in Division Courts, or as to the construction of the statute or rules governing and regulating that practice and procedure. We are never more happy than when giving information of this kind, and therefore constantly and continually solicit inquiries. We also invite candid discussion on all matters of interest to the courts. Discussions of such a nature, conducted in a proper spirit, do much to promote the well being of the courts, and for this reason will always find ready admission to our columns.

The number of Chamber decisions on points of practice in the Superior Courts has not been as great as we could have desired. This has been owing rather to a paucity of decisions than to neglect to report decisions. When the Common Law Procedure Act, 1856, first came into existence, an entirely new practice was established, and every day brought its new points decided. Then our columns teemed with reports of points of practice decided in Chambers. But now the scene is changed. The new, ill-understood, uncertain practice of 1856 is the settled and well-understood practice of 1860–1. For twenty cases then decided on points of practice, there is not one now to report. Still new points, though few, do arise, and it shall be one of our objects to chronicle them as decided. Our readers may rely upon attention to this important branch of our duty.

Nothing more occurs to us at present. Our anxiety is to make the *Law Journal* as useful as possible to its patrons. Acting in this spirit, we shall be at all times glad to receive suggestions from its readers. While, however, making this declaration, we cannot promise to adopt every suggestion offered to us. To do so would be both absurd in itself and destructive to our stability. Our chief concern is in the first instance to satisfy all subscribers; failing this, our next is to satisfy the greatest possible number. While such is our desire and such our line of conduct, we cannot be expected to adopt extreme views, or to do out-of-the-way things, in order to satisfy the caprice or mistaken zeal of any individual subscriber.

COUNTY COURTS—JURISDICTION IN EJECTMENT.

(*Continued from page* 207.)

The jurisdiction in ejectment is limited to the County Court of the county in which the premises sought to be recovered lie. (Sec. 7, County Courts Act.)

It is just possible that premises may be partly in one county and partly in another, and in that case a recovery could only extend to the portions lying in the particular county. In *Re Ellis* v. *Peachey*, 5 Dowl. & L. 675, will be found a decision on an analogous enactment.

The action of ejectment in the County Courts is restricted to the following cases: Where the term and interest of the tenant of any such corporeal hereditament shall have expired, or been determined by the landlord or tenant by a legal notice to quit: Where the rent of any such corporeal hereditament shall be sixty days in arrear, and the landlord shall have right by law to re-enter for non-payment thereof.

There is ample room to dilate upon the grounds stated, but, as they involve for the most part matters of general law, we purpose merely to refer to a few points.

Where a tenancy is once created, it can only be determined by effluxion of time—by surrender—by forfeiture—by notice to quit.

If the tenancy be for a term certain, on the expiration of that term the tenancy ends without any act done by either party. No notice to quit is necessary; both the parties have notice from the lease of the period at which it determines. The lease constitutes the tenant's title to the possession; with its expiration the right of possession ends. He is only a tenant by sufferance, and may be treated as a trespasser. The landlord's reversion becomes a right to *the possession*. (*Right* v. *Darby*, 1 T. R. 162; *Cobb* v. *Stokes*, 8 East. 358; *Hey* v. *Moorhouse*, 6 Bing. N.C. 57; *Butcher* v. *Butcher*, 7 B. & C. 399.)

A tenancy, however, from year to year, from month to month, or the like, is a continuing interest until determined by one of the parties; and under a lease for seven, fourteen, or twenty-one years, without specifying at whose option it may be determined, the lessee only has the option of determining it at the end of the seventh or fourteenth year, and this option passes to the devisee. (*Doe Duckett* v. *Watts*, 9 East. 16.)

A surrender in express terms and *by operation of law* is briefly but most ably treated of in Smith's Landlord and Tenant, page 223.

With regard to a tenancy from year to year, as it is a continuing interest it must be determined by notice to quit; and in proceedings in the County Court, under the enactment before us, it will be often important to determine what is a tenancy from year to year, and in this connexion what agreement operates as a demise, and when and as to notice to quit what notice is sufficient—waiver of notice—the obligations attendant on a demise, &c. &c. &c.

To enter upon these topics would be to open up an extensive branch of the law of landlord and tenant, which, with all the valuable text books on the subject easily attainable by the reader, would be idle work on our part; and it would little benefit the practitioner to string together a

number of cases, which may be easily found better arranged than we would undertake to give them in an editorial.

If ejectment be brought for non-payment of rent, it ought to be borne in mind that the landlord must "have right by law to enter for non-payment thereof," and so the forfeiture must be in force at the time of action brought. If there be any waiver by landlord, his right of action is gone; therefore the bearing of the doctrine of waiver upon the particular case may be considered.

The most common acts of waiver are receiving rent or suing for rent accruing after forfeiture. And here again we must refer the reader to the many valuable works which treat *in extenso* of this division of the law.

The third section of the Act provides for procedure by extending the practice of the Superior Courts to the County Courts; and the fourth section confers upon these courts the same powers that may be exercised by the Superior Courts in the action of ejectment.

It seems clear that, at the trial of the action, proof must be given to bring the case within the statute, *e. g.* that the plaintiff is landlord; of the existence of a tenancy, and the yearly value of the premises, and, of course, of the landlord's right to possession.

WRITS OF INJUNCTION AT LAW.

One of the recent amendments of the law has been that of conferring jurisdiction upon courts of common law to grant writs of injunction.

In case of breach of contract or other injury where the party is entitled to maintain and has brought an action, he may in like case and manner, as provided with respect to writs of Mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right. (Consol. Stat. U. C., cap. 23, s. 9).

But it is one thing to command obedience, and it is another to enforce it. However valuable the power to issue a writ of injunction might be, that value is much impaired if the power to enforce obedience is not fully equal to every emergency that may arise

The Act above cited provides that the writ of injunction may be enforced by attachment by the court, or when such court is not sitting by a judge (Ib. s. 12). No direction is given as to the steps necessary upon breach of the injunction to procure an attachment. That is left to conjecture.

The practice of the Court of Chancery was formerly upon an affidavit of the service of the injunction and of its breach in the first instance to issue a writ of attachment, (Edin. 75). That left no means of escape. While such was the practice the process of the court was calculated to inspire respect.

The modern practice, however, is to give notice to the party of the intended application (Edin. 76), and if upon receiving that friendly warning he is wise enough to snap his fingers at the court and change his residence, the court smiles benignly while forgetting the contempt of its process.

Is this all that the legislature has done when conferring the right to issue writs of injunction upon courts of common law? If so, the jurisdiction must prove in some cases where relief is much required to be a miserable abortion. Indeed, in one case, and the only case in which, to our knowledge, the jurisdiction of a court of common law to punish for breach of an injunction has been involved, the jurisdiction has proved to be a failure.

We refer to *Melling* v. *Ellis*, reported in other columns. It appeared that defendant was in possession of a quarry situate at Queenston, on the confines of Upper Canada, and of quarrying implements to the value of $2000 belonging to the plaintiff, and when plaintiff sought possession of his property he was set at defiance by defendant—a man of no means, and as it afterwards turned, of a very reckless disposition. Plaintiff, under these circumstances, rather than resort to a breach of the peace, commenced an action against defendant to recover possession of the loose property so wrongfully witheld, and in that action claimed a writ of injunction to restrain the defendant during its pendency from removing or otherwise disposing of the property in dispute. Defendant was (to use the language of the writ) strictly enjoined altogether and absolutely to desist from selling or disposing to his own use, or removing any of the quarrying implements, &c., until the court should make an order to the contrary.

The writ was duly served, and the defendant did not choose to obey it. On the contrary, living as he did on the borders of the United States, he availed himself of the opportunity while defending the suit, and so gaining time of removing every article, probably to the United States of America, and afterwards, when conducting his defence in court, gloried in the fact that he had done so.

Of course, therefore, our reader remarks, he was duly punished for this flagrant contempt; in all probability he was imprisoned till he restored every article to the plaintiff according to the judgment of the court. Nothing of the kind. When application was made for a writ of attachment against him, the learned judge to whom the application was made, was compelled, by "the practice" to adjudge, that if the defendant did not forthwith follow the property into the United States he would run a serious risk of being

imprisoned. In other words, it was held to be necessary to give the defendant notice of the intended application for a writ of attachment, so that if he chose he might to a certainty make his arrangements on the day named to be *without* the jurisdiction of the court.

Can any one fancy a greater farce? The upshot of it is, that a man who wilfully and knowingly sets the process of the court at defiance, is told by the court that he is in danger and had better get out of Upper Canada as soon as possible. It may be said that one good effect at all events of this state of things will be, that we shall get rid of undesirable citizens. Probably so. But what satisfaction is this to the man who, relying upon the process of the court, loses probably all that he is worth in the world? What satisfaction (in the case above referred to) is it to the plaintiff who has lost his $2000 worth of property to say, the defendant is gone, and he is no loss to the country—you will never see him again! Truly such commisseration is bitterly sarcastic, better calculated to wound the feelings, better calculated to insult the common sense, than to replenish the pockets of the victim, who, relying upon the process of the court to protect his property, finds that he has been relying on a broken reed.

If the proceeding by injunction is to be retained it should be made effective, and if not made effective it had better be repealed. Better far that the process should never issue than be issued only to be derided. The man who blusters as to what he will do when it is well known that he is powerless to do anything, is laughed at for his pains. So the court that commands what it cannot effectively enforce is itself brought into contempt.

We do not advocate that in every case an attachment should, in the first instance, issue for the breach of an injunction. The liberty of the subject is too important to be at the mercy of a disappointed or revengeful suitor. But we do say, that in some cases the court should have the power, *if it see fit*, to issue process of attachment in the first instance.

If a creditor, having reason to believe that his debtor is about to abscond, desires to arrest him, the court does not require that notice shall be given to the debtor of an intended application on a particular day for process to arrest him, and simply because to require such a thing would be to require the perpetration of a downright absurdity. To require a notice to be served upon a man who violated the terms of an injunction under the circumstances of *Melling* v. *Ellis*, of an intended application for a writ of attachment, is not, to our mind, one whit less an absurdity. It is in truth worse than an absurdity—it is holding out a premium to a man to violate the strict injunction of the court, and protecting instead of punishing him when he does so.

We presume that the liberty of the subject could be safely placed in the hands of the court in cases of contempt. If not satisfied of the contempt, then let a notice be served, but if satisfied, the hands of the court should not be powerless to act.

We repeat, that the law which presents such an incongruity should either be wholly repealed or judiciously amended. We have done our duty in directing attention to it, and must leave to others the consideration of legislative action.

SUMMARY CONVICTIONS AND APPEALS THEREFROM.

BY A BARRISTER.

(*Continued from Vol. VI. page* 271.)

Appeals from summary convictions, or decisions of magistrates, are now governed by chap. 114 of the Consolidated Statutes for Upper Canada, and by chap. 99, sec. 117 of the Consolidated Statutes of Canada. The first mentioned act regulates the practice in cases of appeal from convictions for offences or breaches of the law, *not being crimes*, and the other the practice in appeals from summary convictions under any of the criminal statutes of Canada.

The difference in the practice under these two acts is chiefly, that under the first, or Upper Canada Appeal Act, the notice of appeal must be given within *four* days after the conviction, order, or decision, and *eight* days before the first quarter sessions to be held not sooner than twelve days after such order, &c.; and under the other act, the notice must be given within *three* days after the conviction and *seven* days before the first quarter sessions.

If the first quarter sessions are held within twelve days after the conviction, the appeal under either act must be to the next following sessions.

The words "within four days" after the conviction, exclude the day of conviction; (*Scott* v. *Dickson*, 1 U. C. Pr. Rep., 366.) and the words "eight days before" the first quarter sessions, exclude the first day of the sessions. (See as to the computation of time in cases of a similar nature, 2 U. C. Pr. Rep., 122, 126, 144, 145, 227, 230, 231, 233 & 259.)

The terms "conviction," "order," or "decision," in the statute, refer to the judgment or decision pronounced by the magistrate, not to the formal record of that decision which may not be drawn for some time after. Courts of quarter sessions have discretionary power to make rules of practice respecting the hearing of appeals, and the superior courts will not interfere unless the rules are manifestly wrong or unjust. (*Rex* v. *Lancashire*, (Justices) 7 B. & C., 692; *Rex* v. *Wiltshire* (Justices) 10 East. 404; *Rex* v. *Essex*, (Justices) 2 Chit., 385; *Regina* v. *Mont-*

gomerysnire (Justices), 3 Dowl. & L., 119; *Regina* v. *Bakewell*, 7 Q. B., 601; *Regina* v. *Gloucester* (Justices), 11 Jur., 674; 16 L. J., 57.

The time within which an appeal must be entered, is fixed by the practice of each sessions. If no time is fixed the appeals may be entered and brought up at any time during the sessions. It is advisable, however, that a time should be fixed by each quarter sessions, in order that the magistrates in sessions may know what business they have to dispose of; and that the respondent may know whether or not the appellant intends to prosecute the appeal, and that he may not be compelled to keep his witnesses at court longer than necessary. In some counties it is a standing order of sessions, that all appeals be entered with the clerk of the peace during the first day of the sessions, and an appeal list made up by him for the information of the court.

Upon the hearing of appeals, the first step in all cases, after the appeal is called on and the jury sworn (if a jury is required), is that the appellant should prove his notice of appeal. The notice of appeal is the only instrument which brings the appeal before the court, and by general practice great nicety is required in drawing it. (Burns, Jus., Sessions, 206.) The notice of appeal by the statutes above mentioned, must be in writing. But in any case not coming under either of these acts, and the act creating the offence merely requires notice to be given, a verbal notice would be sufficient. *Rex* v. *Salop*, (Justices) 4 B. & Ald., 626; *Rex* v. *Surrey*, (Justices) 5 B. & Ald., 538; *Rex* v. *Lincoln*, (Justices) 3 B. & C., 548; *Rex* v. *Yorkshire*, (Justices) 4 B. & Ald., 685.)

The service of the notice of appeal may be proved by affidavit or *viva voce* in open court. Being a preliminary step to the hearing of the cause by the jury, and the sufficiency of the notice being a question for the court to determine, it is perhaps preferable to prove the service by affidavit.

As to the form of the notice, it must contain an intimation of the intention to appeal, and of the cause and matter thereof, and should be directed to the other party, and be intitled in the same manner as the conviction intended to be appealed against, and which may be recited in it. (Dick, Qr. Sess., 633.)

Under the Upper Canada Appeal Act, which provides that notice be given to the other party, or left with the convicting Justice for him, a notice directed to the convicting magistrate, and served upon him, has been held sufficient; but under the other act such a direction and service would not, it is apprehended, be sufficient. The notice of appeal should state, that the appellant is a party aggrieved by the act complained of (*Rex* v. *W. R. Yorkshire*, (Justices) 1 M. & R., 547; 7 B. & C., 678) The cause and matter must also be set forth in the notice; but it has been held sufficient to state as the ground of the appeal, that the appellant "*was not guilty of the said offence.*" (*Rex* v. *Newcastle-upon-Tyne* (Justices), 1 B. & Ad., 933; *Rex.* v. *Justices of Devon*, 1 M. & S., 411.)

Unless personal service is made necessary by statute, leaving the notice at the residence of the respondent would be sufficient. (Dick. Qr. Sess., 634.) It is doubtful if under the acts above mentioned, such a service would be sufficient, but if made upon the convicting magistrate it must be personal.

If the respondent does not appear at the sessions the appellant will not be allowed to quash the conviction appealed against, until he has proved notice of appeal.

After proof of notice of appeal, the respondent may show that the appellant has remained in custody, or entered into the recognizance required by the statute, or he may shew that the recognizance is insufficient. If the recognizance has not been entered into or is defective, the appeal will be dismissed. (See *Kent* v. *Olds et al.*, reported in this number of the *Law Journal.*)

When notice of appeal is proved, and a jury sworn, the party making the complaint to the magistrate (generally the respondent) begins. The distinction between an appeal from a court of record, and an inferior court not of record, is thus stated by Lord Kenyon, in *Rex* v. *The Inhabitants of Newbury*, 4 T. R., 476: "In writs of errror and appeals to the House of Lords, where each party is in possession of all the evidence on both sides, the party who impeaches the decision below, always begins; but in a case of this kind, and where the appeal comes on to be heard naked and destitute of all evidence before the court, those who have done the act ought to establish the propriety of it by evidence."

There is this additional reason why the party making the complaint in the court below should begin—that the parties are not restricted to the evidence adduced before the convicting magistrate, but may adduce new evidence. Where, however, by the practice of the Sessions, the appellant was bound to begin, and the appeal was dismissed on account of his refusal so to do, the court above refused to interfere. (*Rex* v. *Suffolk*, Justices, 6 M. & S. 57).

Upon the verdict of the jury being given, on order of court should be made in accordance with their finding, and that with or without costs as the court shall think fit.

The magistrates in Sessions have by the statute general power over the costs. But they cannot order the person charged with an offence, and who has been acquitted by the jury, to pay any part of the costs of the appeal, or convict him of an offence for disobeying such order, (*Regina* v. *Orr*, 12 U.C. Q.B., 57). It is a general rule in

courts of Quarter Sessions to award costs to the successful party; but where the conviction has been quashed for matter of form merely, it is usual in several counties to quash the conviction without costs, for the reason that as the conviction is drawn up by the magistrate, and not by the party seeking to uphold it, it would be unreasonable to make the respondent pay costs for an informality not committed by him or by any person under his controul. The party objecting to the form may waive the objection and try the appeal on the merits. The defect in the conviction may, however, be of such a nature as to go directly to the merits, and in that case it would not be unreasonable to make the respondent pay the costs of the appeal.

Where costs are awarded they form a part of the judgment, and the amount should be fixed and stated in the order of Sessions. The court cannot grant costs to be taxed by the Clerk of the Peace or by any other person; though they may obtain the opinion of third persons, and if they think fit adopt that opinion. They must themselves fix the amount during the same Sessions, (*Rex* v. *St. Mary's, Nottingham*, 13 East. 57; *Rex* v. *Skinn*, cited in *Rex* v. *Sweet*, 9 East. 27; *Regina* v. *Long*, 1 Q.B., 740; *Selwood* v. *Mount*, 1 Q.B., 726; *Regina* v. *Clark*, 13 L. J., 91; but contra per Coleridge, J., in *Regina* v. *Westmorland* (Justices), 12 L.J., 113.)

It is stated by Dickinson to be the practice at many Sessions to allow forty shillings to the successful party where costs are given.

The usual practice in courts of Quarter Sessions is to have the costs taxed by the Chairman or Clerk of the Peace, and upon such taxation the amount is inserted in the order of Sessions made in the matter of the appeal, and the order is then passed by the court. In the taxation of costs a counsel fee of $5 is allowed in some counties to the successful party; in other counties it is refused. And in some counties counsel fees are allowed only to the county attorney.

A court of Quarter Sessions cannot delegate its authority to a third party as a referee to decide an appeal even by consent, (16 Vin. Abr. 417, *Rex* v. *Harding*, 2 Salk. 477). However, they may refer a matter to a committee of their own body in order to report to them, and may adopt the report without further exercising their judgment (*Rex* v. *Harding*, 2 Salk., 477; *Rex* v. *Natland*, cited 5 Tyr., 1056).

A second conviction, it appears, may be filed with the Clerk of the Peace after the first has been returned, (*Wilson* v. *Graybiel*, 5 U. C., Q. B., 287:) but after the case has been called on and the matter is in the hands of the court, a new or amended conviction cannot be filed; because, when the case is taken up, and is under the consideration of the court, it becomes a part of the records of the court, and therefore no longer under the control of the magistrate: and the court of Quarter Sessions have no power to amend or change the record of the proceedings of an inferior court.

Appeals may be respited from one court of Quarter Sessions to another, and no notice of trial or of intention to proceed at such subsequent Sessions is required under the Statutes in force in this Province relating to appeals.

The judgment of the court of Quarter Sessions may be appealed from if the conviction is bad on the face of it, (*Shaw* v. *Hespeler*, 16 U.C., Q.B., 104), but not on the merits, (*Regina* v. *Impey*, Hil. Term, 4 Vic., P.C., Jones, J., M.S.R. & H. Dig. Appeal, 1; *Regina* v. *Hussey*, 2 U.C. Pr. Rep., 194, but see *Victoria Plank Road Company* v. *Simmons*, 15 U.C., Q.B., 303, and *Regina* v. *Watson*, 7 U.C., C.P., 495, where a doubt is expressed on the point.) These cases were, however, decided before the passing of the Criminal Appeal Act, 20 Vic. chap. 61. The effect of that act upon the right of appeal remains to be decided.

HARRISON'S C. L. P. ACTS.

Messrs. Maclear & Co., 17 & 19 King Street East, Toronto, the publishers of this work, have caused to be compiled and published a Table showing the sections of the C. L. P. Acts of 1856 and 1857, and the sections of the Consolidated Statutes of Upper Canada with which they correspond.

This Table will be of incalculable benefit to all who desire with facility to make use of Mr. Harrison's notes on the different sections of the old Acts as applicable to the present Consolidated Statutes.

Bearing in mind that the Consolidated Statutes are not new laws, but only a different arrangement of the old Acts, Mr. Harrison's work on the old Acts, accompanied by the table to which we have referred, will be nearly as useful to the practitioner as when first published.

We understand that every person who has purchased or who may purchase a copy of Harrison's C. L. P. Acts, can receive without cost, upon application to Messrs. Maclear & Co., a copy of the Table, and we presume that upon these terms there will be no lack of applicants.

We are requested to mention that Messrs. Maclear & Co. still have for sale a few copies of Mr. Harrison's work on the Common Law Procedure Acts; and as the Editor of the work has no present intention of issuing a new edition, these copies ought to be in good demand.

THE MUNICIPAL MANUAL.

In reply to the inquiry of a correspondent as to the best work on municipal law of Upper Canada, we have olny to state that Harrison's Municipal Manual is the only work of the kind in Upper Canada.

THE GRAND TRUNK RAILWAY COMPANY.

It is generally known that at the last Assizes for the County of Ontario verdicts were recovered against this Company for very large amounts, by Glyn, Mills & Co., and Messrs. Baring, Brothers, the well-known London Bankers.

It was at the time said that the right of these creditors to the Rolling Stock, under any executions they might issue, would be disputed by the First Preference bondholders.

We now find that a bondholder has submitted the question of priority to eminent English counsel, and subjoined is published as their opinion, for which we are indebted to our esteemed cotemporary, the *Law Times*.

OPINION.

1. We are of opinion that, by the terms of their bonds and of the Canadian statutes, the first preferential bond-holders of the Grand Trunk Railway of Canada possess a hypothic, mortgage, charge, or lien, of the same nature, covering the same kinds of property and ranking in the same order of priority with that which the province had previous to the Act of 1856, stat. 19 & 20 Vict. c. 111; and that such charge extends to the rolling stock and plant of the company as well as to the road and works, and is a first charge thereon.

2. We are of opinion that the said first preferential bondholders are entitled, in case of any danger to their security, to have receivers appointed, or such other means employed as by the laws of the respective jurisdictions through which the railway passes may be provided for protecting and making available the property included in their charge; and assuming that there is an evident prospect of the revenue of the company proving insufficient to pay the interest becoming due on their bonds, and that judgments to large amounts have been obtained against the company in Upper Canada, we consider that an application to the Court of Chancery in Upper Canada for a receiver, and an injunction to restrain the judgment-creditors from issuing execution, would be successful.

H. M. Cairns.
R. Paul Amphlett, Q.C.
John Westlake.

MICHAELMAS TERM JUDGMENTS.

QUEEN'S BENCH.

Present: Robinson, C. J.; McLean, J.; Burns, J.

December 15, 1860.

The Queen v. *Rapelle.*—Question: whether instrument forged by defendant was an order for payment of money? *Held*, only to be a request, and not an order. Conviction reversed. Prisoner discharged.

The Queen v. *Pahmahgay.*—Question: whether the testimony of an Indian, who was not a Christian, sworn on the Gospels, is admissible? *Held*, admissible. Conviction affirmed.

The Queen v. *Robert Armstrong.*—Question: whether defendant, under the circumstances of the case, was an agent within meaning of Con. Stat. Can. cap. 92, sec. 44? *Held*, not. Conviction reversed.

The Queen v. *Tisdale & Shaver.*—Criminal case. Application for a new trial. Rule *nisi* refused.

Prosser v. *Henderson.*—Rule *nisi* for new trial granted.

Costin v. *Knaggs.*—Rule *nisi* for new trial refused.

Commercial Bank v. *The London Gas Company.*—*Held*, that defendants, a gas company, are not justified in withholding gas from plaintiffs, because plaintiffs dispute an account of defendants as excessive, and refuse to pay it; but that a mandamus is not the proper remedy. Rule for mandamus, therefore, refused.

Pogue v. *Pogue.*—Rule *nisi* for new trial on affidavits.

Aigla v. *Baldwin et al.*—Rule *nisi* for new trial refused.

Chapple v. *The Great Western Railway Co.*—Action by administratrix for negligently causing the death of deceased. Verdict for defendants. Application for new trial. Rule refused.

Rees v. *The City of Toronto.*—Action for debt against defendants. Nonsuit. Application to set it aside. Rule refused.

Canada Life Assurance Co. v. *Jarvis et al.*—Rule *nisi* for new trial granted.

Addison v. *Burrill.*—Rule *nisi* for new trial granted.

Purdon v. *Playfair.*—Application for new trial upon affidavits of some jurors that they believed their verdict incorrect. Rule *nisi* discharged.

Carlisle v. *Hoshell.*—Application for new trial. Rule *nisi* refused. Equitable plea held bad, and not proved by evidence.

Wright v. *McGinnis.*—Application for new trial. Rule *nisi* refused.

Hutt v. *The Welland Railway Co.*—Rule absolute to enter nonsuit pursuant to leave reserved.

O'Mullin v. *Bishop.*—Rule *nisi* to set aside verdict discharged.

In the matter of John Anderson.—Prisoner remanded.

School Trustees of City of Toronto v. *City of Toronto.*—Application for a mandamus on the city of Toronto to levy a school rate. Rule absolute.

McDougall v. *Elliott.*—Rule absolute to add £27 10s. to verdict for plaintiff.

Tyson v. *The Grand Trunk Railway Co.*—Action for loss of a mare and destruction of a waggon by negligence of defendants. Verdict for plaintiff, with leave to move to enter a nonsuit. Rule *nisi* discharged.

Sage v. *Callaghan.*—Rule *nisi* for new trial discharged.

Brown v. *Brockville and Ottawa Railway Co.*—Action by plaintiff for injury to himself and destruction of his waggon through negligence of defendants. Verdict for plaintiff, with leave to defendants to move to enter a nonsuit upon, among other grounds, the ground that the action was not brought within six months. Rule absolute to enter nonsuit.

Corporation of County of Perth v. *McGregor.*—Rule absolute for new trial, with costs to abide the event.

Robinson v. *Grange.*—Rule discharged, but without costs.

McGee v. *Baird.*—Rule absolute to postpone execution in this case to two other executions, under the Consol. Stat. U. C. ch. 26, sec. 17.

December 22nd, 1860.

McArthur v. *Cool.*—Former judgment in this cause must be held good until reversed by appeal. Postea to defendant.

Whitehouse v. *Roots.*—Replication good, and plaintiff entitled to judgment on demurrer.

Cross v. *Goodman.*—Defendant entitled to judgment on demurrer.

Williams v. *Marshall.*—Rule absolute for new trial, without costs.

Great Western Railway Co. v. *Corporation of Dundas.*—Judgment for plaintiffs on demurrer.

Evans v. *Morley*.—Judgment for plaintiff on demurrer to 1st, and 3rd pleas, and for defendant on demurrer to 2nd and 4th pleas. Either party may apply in Chambers to amend within one month.

Hard v. *Palmer*.—Judgment for plaintiff on demurrer, with leave to apply in Chambers within a fortnight.

Cartwright v. *McPherson*.—Rule *nisi* discharged. *Burns, J.* dissenting.

Garrett, exor. of Taylor v. *Provincial Insurance Co.*—Judgment for defendants.

Henderson v. *Fortune*, (Belleville case.)—Though verdict excessive new trial could only be granted on payment of costs. Questionable benefit to defendant. Rule *nisi* discharged. Verdict for defendant stands.

Higgins v. *Corporation of Whitby*.—Verdict to be entered for defendant on 2nd plea, and judgment for defendants on demurrer to same plea.

McKay v. *Fee*.—Action for 24 per cent. interest on a note after recovery of judgment in detinue for the note, and six per cent. interest cannot be maintained.

Ferguson v. *Grant*.—Appeal from County Court of Wellington. Judge exercised a proper discretion in granting new trial. Appeal dismissed with costs.

Johnston v. *Burger*.—Appeal from County Court of Welland on rule for a new trial. Judgment not erroneous. The learned judge exercised a proper discretion on the facts before him. Judgment discharging rule affirmed, on plaintiff remitting all damages above $135. Appeal dismissed with costs.

United Counties of Northumberland and Durham v. *Town of Cobourg*.—Rule obtained to set aside award. So much of award as to costs void. Rule absolute to set that part aside.

McLeod v. *McKay*.—Appeal from a county court on demurrer. Appeal dismissed with costs.

Marshall v. *McAulay*. — Appeal from a county court. Dismissed with costs,

Stewart v. *Cameron*.—Rule *nisi* for new trial discharged.

Smith v. *Paisley et al.*—Action against three defendants in tort. Verdict for one of defendants, and for plaintiff as to remaining defendants. Rule *nisi* for new trial on application of defendants. Nothing to shew that defendant in whose favor verdict given a consenting party. Stands till consent given or shewn.

Ferris v. *Waddel et al.*—Action by plaintiff against defendants as sureties of defendant Waddel. Rule absolute to strike out $85 from plaintiff's verdict.

Clark v. *Donaldson et al.* — Stands till decision of *Moffatt* v. *Robertson* in appeal.

Stebbins v. *Anderson*.—Rule *nisi* discharged.

Matheson v. *Cummings*.—Rule *nisi* discharged.

Gladstone et al v. *McDougall et al.*—Rule upon defendant to shew cause why he should not pay plaintiff's costs of garnishee proceedings, and answer matters alleged in affidavit against him.

Kesteven v. *The Buffalo and Lake Huron Railway Co.*—Rule *nisi* discharged.

Haworth et al v. *Fletcher*.—Judgment of court below reversed, as to old lumber, &c., but stands for Fletcher as to horses, cow, waggon, &c.

COMMON PLEAS.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

December 15, 1860.

Cullen v. *Nicherson*.—Postea to plaintiff.

Smith v. *Cluxton*.—Rule *nisi* discharged.

Grant v. *McMillan*.—Rule *nisi* discharged.

Kelly v. *McDermott*.—Judgment for plaintiff on demurrer.

Kindley v. *Gildersleeve*.—Judgment for plaintiff on demurrer.

Churchwardens of St. James v. *Daly*.—Judgment for defendant.

Manly v. *Hill*.—Peremptory mandamus granted.

In re Grover and the United Counties of Northumberland and Durham.—Return quashed. Peremptory mandamus to issue.

Smith v. *Cleghorn*.—Rule *nisi* to enter nonsuit discharged, and rule for postea to plaintiff.

Mitchell v. *The City of Toronto*.—Rule *nisi* granted.

Ladies of Sacred Heart v. *Matheson*.—Rule absolute for nonsuit.

Miller v. *Cummings*.—Rule for nonsuit absolute.

Drew v. *McAulay*.—Rule absolute for new trial, without costs.

Lund v. *Smith*.—Rule *nisi* to set aside award. Discharged with costs.

Rogers v. *Dickson*.—Rule *nisi* for new trial absolute, with costs to abide the event.

Clapp v. *The Corporation of the Township of Thurlow*.—Rule absolute to quash by-law, with costs, as by-law within sec. 223 of the Municipal Act, and requirements of that section not complied with.

Dobbie v. *Tully*.—Rule *nisi* for new trial discharged.

Higgins v. *The City of Toronto*.—*Held*, that notice on Monday, 1st October, for Monday, 8th October, not sufficient. Rule absolute for new trial, with costs.

Baldwin v. *Bird*.—Rule *nisi* for new trial discharged.

Wilson v. *Wilson*.—Rule *nisi* to enter nonsuit, pursuant to leave reserved, discharged.

Caldwell v. *Potter*.—Entry of stet process recommended.

O'Reilly v. *Utter*.—Rule *nisi* discharged.

Crouch v. *Crawford*.—Rule *nisi* refused.

Murney v. *Conolly*.—Rule *nisi* refused.

December 22nd, 1860.

Ryland v. *King*.—Judgment for plaintiff on demurrer. Leave granted to apply to a judge in Chambers to amend within one month.

Wilson v. *The Corporation of Huron and Bruce*.—Judgment for plaintiff on all the breaches except the 9th, and on that judgment for defendant. Per Hagarty, J.: If the pleader had set out the agreement in its own words, our judgment would, in all probability have been the other way. Per Draper, C. J.: The pleadings are so badly copied that we have found it very difficult to understand the breaches: no division of sentences, or capitals to show the sentences.

Fraser v. *Armstrong*.—Merger. Mortgage taken for a promissory note. *Parker* v. *McCrea*, 7 U. C. C. P. 124, upheld. Rule *nisi* discharged.

Lyman v. *Snarr*.—Leave to amend within one month; and rule for new trial discharged without costs (four trials having taken place), otherwise new trial granted without costs.

Bank of Upper Canada v. *Upton*.—Action on promissory note that Upton and Brown made note and gave to Cotton, to get C. E. Anderson to discount it for Cotton. That C. E. A. handed it over to Wm. J. Anderson, and after W. J. A. had endorsed it, he handed it over to the plaintiffs, who gave no consideration: and that they are trustees for Wm. J. Anderson. Rule discharged. Leave to appeal granted.

Bank of Upper Canada v. *Upton and Brown*.—Rule to allow plaintiff to come in and plead. Not shewn that defendant has any other defence than that in the previous case. Rule *nisi* discharged.

Moore v. *Gray*.—New trial on payment of costs.

McGowan v. *Farley*.—Rule absolute for nonsuit.

Roe v. *Southard*.—Special case. Postea to defendant.

Campbell v. *Greer*.—Motion to arrest judgment on new trial. New trial without costs. (Hagarty, J., *dissentiente*.)

Kraeaer v. *Glass*.—*Held*, that Con. Stat. U. C. cap. 73 does not alter the law as to the disability of a feme covert to make contracts; and that the note given by plaintiff's wife was as against her void. New trial without costs.

Foster v. *Smith*.—Setting down a cause for appeal from county court after time limited by statute an irregularity, and application in such a case should be made to Practice Court.

In re S. B. C., one, &c.—Rule absolute to strike an attorney off the rolls.

Caldwell v. *Potter.*—New trial without costs.

Ferguson v. *Bell.*—Under Fraudulent Assignment Act to set aside a fraudulent confession of judgment. *Per cur.*: Do not see that we can interfere summarily; but it might be proper to entertain it in ordinary course. Sheriff having notice of the fraudulent confession of judgment must exercise his discretion in paying. Rule discharged.

In re Abbot, one, &c.—No rule.

Keene v. *Steadman.*—Rule *nisi* discharged.

Hooker v. *Gamble.*—To be argued again.

Smith v. *Dempsey.*—Plea as it stands no answer; if amended the evidence given would not support it. *Per cur.*: If not amended within a month, then a venire de novo. If amended then, new trial without costs.

Manly v. *Hill.*—Rule absolute without costs.

THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE.

(*From the Solicitor's Journal.*)

The annual meeting of this association was held on September 24th, at Glasgow, when Lord Brougham delivered an inaugural address. On the following day (Tuesday) his lordship again took the chair, when the proceedings commenced with an address by the Lord Advocate as President of the first or Jurisprudence department.

JURISPRUDENCE.

The Lord Advocate.—After the very comprehensive view of the duties and objects of this association which was delivered last night by your noble President, I shall proceed to fulfil the duty imposed upon me by the kindness of the committee in asking me to preside over the section devoted to jurisprudence, by a few introductory remarks, confined entirely to the proper business of that section, and devoted to elucidating shortly, the principles upon which we should seek for the reformation and improvement of the law in respect of its relation to social science, and some of the more salient and important topics which may probably fall under our attention in the course of our deliberations. We are to consider in this section law as a branch of social science—that is, in its immediate practical relation to common life. In one sense, it is nothing, but a department, or rather the embodiment, of social science, inasmuch as it is the mainspring of all social movements and relations. But the science of jurisprudence, in its more specific acceptation, is apart from its social results. It deals with what is, not with what ought to be; and the tendency of the study is rather to shut out than to enlarge the contemplation of its practical effects. It is, indeed, a science of the highest order, tasking the intellectual powers by demands on them for all the qualities combined which the exact and the more general sciences require—the grasp of generalisation which is essential to mental philosophy, with the careful analysis or indication characteristic of mathematical inquiry. But it is not in its scientific character that we are to deal with jurisprudence in our meetings here. We are to try this great science by its existing results as compared with existing necessities, to see how far this great machine corresponds in its effects with the great object for which alone it was created. But it is impossible to deny the great benefit which must ensue from bringing in contact, not only the legal professors of different systems, but the trained and experienced lawyer, with the opinions and interests of those for whom laws are made, and who profit or suffer by them. Lord Bacon says, in his Essay on the Advancement of Learning:—"All those who have written of laws have written either as philosophers or as lawyers, none as statesmen. As for the philosophers, they make imaginary laws for imaginary commonwealths, and their discourses are as the stars which give little light because they are so high. For the lawyers, they write according to the States where they live, what is received as law, and not what ought to be law; for the wisdom of a lawmaker is one, and of a lawyer is another." Jeremy Bentham, in his Treatise on Legislation, treats the lawyers with still more suspicion. He says,—"When a religion falls, its ministers fall with it. Everything which diminshes respect for the idol enfeebles that felt for those who sacrifice to it; so the voice of all jurists is raised in concert to celebrate an established system, and the people, misled by their unanimity, do not stop to discover the self interest which produces it." It is impossible to deny the justice of this sentiment. The jurist deals with men as with the pieces on a chess board: the debtor and the creditor, the man with security and the man without, the grasping landlord or the refractory tenant, are so many *dramatis personæ* who are to play their part and be removed, according to the most approved rules of the art. But in the intellectual absorption of the struggle, the flesh and blood of the matter is necessarily forgotten. The unlucky suitor, who has dropped a link in his title, and has become the unwilling hero of a leading case, is looked upon with a malignant triumph as a traitor to the first principles of conveyancing. The law has retained its purity. The judgment has established the foundations of the science against his attempt, and the lawyer recurs with pride to the decision. No thought all the while for the litigant, who paid his money and lost his property. No question how it came about that he could not tell how to take his title until instructed by a lawsuit, and canonised in the reports of Shaw and Dunlop. No reflection that, although the judgment was approved by the soundest jurists of the day, it has produced to the parties immediately concerned nothing but injustice. Such is the inevitable tendency of the exclusive pursuit of any science; but in the study of the law and the practice of it, which entails such stern demands on a life's erection, it is inevitable. Men acquire a kind of personal attachment to the implements with which they work, and it costs them a pang to see destroyed, by a sudden and innovating hand, the weapons which it has cost them such toil to find, and such labour to learn to use. Of course, this criticism, or rather confession, of the necessary tendency of legal training, is only comparative. I need not, in this presence, tell you that a great lawyer may rise above the trammels of his art and combine the grasp of the philosopher with the knowledge of the jurist, and superadded to both the practical sagacity of the statesman. Still less am I disposed to encourage socialist or empirical innovation, springing generally out of specific cases, and propounded in ignorance of the system to which it is proposed to apply them. If high scientific acquirements in jurisprudence have a tendency to produce too exclusive devotion to things as they are, it does not by any means follow that enlarged views and wholesome change are only to be looked for as the companions of ignorance. Still, in our prosecution of the objects of the department over which you have asked me to preside, we must be content to throw behind us the professional fetters of our training. In our meetings here we have all the elements Lord Bacon enunciates, and one he did not recognise. We have the lawyers, the philosophers, the statesmen, and, in addition to all, in this great emporium of the transactions of life, where men and money come and go with such startling rapidity, we have the presence, the co-operation, and the practical wisdom of those who are trained in the lessons of daily business, and who form their opinions of what laws ought to be from their recurring experience of what they are. I therefore come to consider in what spirit and on what principles the social results of our system of law are to be canvassed and reformed. I shall start with a caution on the other side. If the jurist be too apt to hug the chains of his science, and magnify the importance of time-honoured forms and axioms, the unskilled reformer has also perils of his own; and, among the chief, is the danger of unsettling much in order

to rectify a little. The legal system of a country like ours, in which the laws have not been dictated by a Justinian or a Napoleon, but have been made by the people for their own use, is a plant for slow and gradual growth, spreading its tendrils widely, and striking its roots deeply around and throughout the whole social economy of the community; just as our system of civil liberty and Parliamentary government subsists and flourishes by a secret spell, the fruit of gradual accommodation to the habits and associations of the people, notwithstanding many anomalies and theoretical contradictions. So it is with our laws. The law which is most imperfect in theory may be most useful in practice—or may, through length of time or repeated judicial consideration, have become, while retaining its outward form, animated by a spirit never contemplated by its authors. We shall be merely shallow innovators, and undeserving the name of reformers, if we neglect this unseen but potent element—that which, in truth, is the very life-blood of a nation's prosperity. For experience tells us every day that it is not by laws which are written in a statute-book, nor by constitutions proclaimed in public, that nations flourish or are free. Freedom and laws are the products of time as well as of patriotism and wisdom; and must be accommodated not only to the abstract rules of justice, but to the habits and tendencies of those who are to receive them. It might, I believe, be said of our law, as was said of political constitution, that if the whole fabric were swept away at once, and the greatest wisdom which the land could furnish were to devise a new system, they would not produce anything which would be comparable to that which they had destroyed. I may here remark, that the element of which I speak is one of which the legal reformer cannot avail himself. What he does in the way of change, must be done by specific enactments. He cannot provide for the effect which his new law may have, when a century of application and decision has passed over its head. Lord Bacon felt this so strongly, that in a sketch which he entitles "A Proposal for Amending the Laws of England," he has hardly courage to propose proceeding by Act of Parliament. He says:—"It is objected that labour were better bestowed in bringing the common laws of England to a text law, as the statutes are, and setting both of them down in method and by titles." To which he replies:—"It is too long a business to debate whether *lex scripta, aut non scripta*, a text law, or customs well registered, with received and approved grounds and maxims, and Acts and resolutions judicial, from time to time duly entered and reported, be the better form of declaring and authorising laws. It was the principal reason or oracle of Lycurgus that none of his laws should be written. Customs are laws written in living tables, and some traditions the Church doth not disauthorise. In all sciences they are the soundest that keep close to particulars; and, sure I am, there are more doubts that rise upon our statutes, which are a text law, than upon the common law, which is no text law. But howsoever that question be determined, I dare not advise to cast the law into a new mould. The work which I propound tendeth to pruning and grafting the law, and not to ploughing up and pruning it again; for such a remove I should hold indeed for a perilous innovation." Yet Lord Bacon in this, and some other of his fragments on the same subject, shows himself to have had large and enlightened views on the subject of legal reform, and was not unprepared to have proceeded boldly enough in the direction of repeal. Lord Stair, a name not unworthy to be placed alongside that of Bacon in respect of power and learning, but who does not disclose the same tendencies in favour of freedom, thus treats the same subject in strong and serious language. He says:—"Yea, and the nations are more happy whose laws have entered by long custom, wrung out from their debates upon particular cases, until it came to the consistence of a fixed and known custom; for thereby the convenience and inconveniences thereof, through a tract of time, are experimentally seen: so that which is found in some cases convenient, if in other cases afterwards it be found inconvenient, it proves abortive in the womb of time before it attain the maturity of a law. But in statutes the lawgiver must at once balance the conveniences and inconveniences, wherein he may and often doth fall short; and there do arise *casus incogitati*, wherein the statute is out, and then recourse must be had to equity. But those statutes are best which are approbatory or correctory of experienced customs; and in customary law, though the people run some hazard at first of their judges' arbitrement, yet, when that law is come to a full consistence, they have by much the advantage in this, that what custom hath changed is thrown away and obliterate without memory or mention of it; but in statutory written law the vestiges of all the alterations remain, and ordinarily increase to such a mass that they cease to be evidences and securities to the people, and become labyrinths wherein they are fair to lose their rights, if not themselves; at least they must have an implicit faith in those who cannot comprehend them without making it the work of their whole life." There is not wanting in these sentences a tinge of the predilection for the arbitrary power of courts, which was characteristic of our Scottish system for many years afterwards. But in both there is much truth; and herein lies the great difficulty, in England especially, of dealing with the great mass of the statute law.

CODIFICATION OF THE STATUTES.

There would be no great difficulty in expurgating the Statute Book of laws wholly repealed; but the next step is surrounded by obstacles. The re-enactment of statutes partially repealed, and the consolidation of laws relating to the same subject, bring the legal reformer at once into contact with that unwritten law which has sprung from the stem of the statute, and has been engrafted on it by judicial decision. This difficulty has always appeared to me so great, that I am rather inclined to think that either more or less should be attempted; and that if we are ambitious of more than publishing a compendious edition of the statutes, embracing those in ordinary use, it will be found impossible to effect any very material improvement short of codification in some branches of the law. It is worthy of consideration whether in the more important branches of the law codification should not supplement the attempt to consolidate. It would be presumptuous in me to do more than offer a suggestion on this important subject in so far as it relates to the sister kingdom. But looking to the enormous and heterogeneous mass of statute law under which the jurisprudence of England lies, and through which the precious ears of grain are to be searched, it would seem a task more likely to succeed to sweep away much that exists, and supply its place, not by new words, professing to repeat old provisions, but by clear and specific codification. With us the case is different; the statute law of England was the bulwark and protection of her liberties. If, in Scotland's earlier history, we could not boast of similar protection, on the other hand our statute book is not similarly encumbered; unlike those of England, a Scottish Act of Parliament is abrogated by disuse, and those that remain are short general enactments, drawn to be the basis of future law, to be founded on them by judicial interpretation; and so, as Lord Stair expresses it, "attain the maturity of a law." This, however, is a subject which the members of this section will be better able to discuss than I can pretend to be.

BANKRUPTCY AND INSOLVENCY.

This leads us naturally to say a word on the subject of the law of bankruptcy. In common with all who take an interest in legal progress, I lamented the fate—the undeserved fate—of the Bill of my friend the Attorney-General during the last session. Smothered as it was under the heavy pile of unproductive and unremembered loquacity, which met with such unsparing castigation last night, I hope it still retains its vitality and will re-appear under happier auspices. It is a measure worthy of the reputation of its author, who unites, with pro-

found learning, and unrivalled powers as an advocate, the enlarged and statesmanlike views of a great reformer of the laws. In this respect, we in Scotland have already tried the experiment he was anxious to introduce, and with what success, I believe, in the course of our discussions, we shall have opportunity of obtaining useful and interesting information. The general feature of a useful system of bankrupt law may be very safely gathered from what I call the instinct of trade. When we find traders flying from the laws made for their benefit, and recurring to private tribunals of their own constitution, we may conclude, with absolute certainty, first, that there must be some radical defect in the law as it exists; and, secondly, that the true remedy is to be sought in the direction to which, with all its difficulties and uncertainty, the creditors of insolvent debtors have had recourse. In other words, let the creditors, as the Attorney-General proposed, manage their own affairs when they prefer to do so. Too much still survives of the old notion, that bankruptcy demands the intervention of the State for its degradation and punishment. So, of old, our debtors were denounced rebel to the Sovereign, were exposed to the *justos careeres*, wore a distinctive dress, and were subject to manifold indignities, superadded to the total loss of their worldly goods. These severities were the clumsy weapons of a ruder age, to compel the disclosure of hidden resources, and punished the innocent and the guilty alike. But the true object of the law of bankruptcy should be the rapid, thorough, and economical application of the whole available funds of the debtor to pay his creditors. That is the main and primary object of a system of bankrupt administration. The discharge of an innocent, the punishment of a fraudulent debtor, are subsidiary objects, important in themselves, but which should not be allowed for a moment to interfere with the main object of realising and distributing the debtor's estate with economy, certainty, and despatch. I do not altogether sympathise with the feeling which seems to prevail in some quarters that the main object of Bankrupt Law ought to be to check undue speculation, and that the interest of the creditors themselves should be subservient to the exposure and punishment of rash and improvident merchants. It is right enough to give to the creditors themselves the power of dealing differently with the debtor who has suffered from misfortune, and the debtor who has ruined himself by folly. And it is not only right, but essential, that the fraudulent debtor should be stringently and summarily dealt with. But a system of Bankrupt Law cannot be converted into a machine for regenerating mercantile morality, or restraining within bounds the spirit of speculation. It may, acting in its proper province, be of assistance in a work which is greatly needed: but it should never be forgotten, that the end and aim of all proceedings in bankruptcy is the benefit of the creditors; and no element which interferes with or retards the accomplishment of that object ought to be admitted. Thus, it may be true that settlements by composition have a tendency to prevent investigation, and encourage the reckless trader. Still, if the creditors thereby receive their shares of the debtor's estate more rapidly and cheaply, these contracts ought to be encouraged. We must look to more general and deeper sources for the repression of the gambling spirit in commerce. A sounder and more heathly tone of mercantile morality, and the instinct of self-preservation, are the only real safeguards against it, while, by endeavouring, to the prejudice of the creditors, to make our bankrupt system one of rewards and punishments, we shall accomplish little in the way of improvment, and promote much individual injustice. I cannot say that in the recent discussions on Sir Richard Bethell's Bill, I was much impressed by the objections which were raised to the extension of its provisions to non-traders. Indeed I am at a loss to understand what prejudice can possibly accrue to non-traders by the extension of a system beneficial to the mercantile community. The exclusion of non-traders from the provisions of the bankrupt law is not a privilege but a penalty. The vicissitudes and uncertainties of commerce were supposed to excuse the insolvency of those engaged in it, while, on the part of the community at large, bankruptcy is regarded as an offence. The law abated none of its rigour in regard to the ever-trading debtor, as the dismal walls of Whitecross-street, and the Fleet can so well attest; but it withheld, as a boon not deserved by him, the ready means of payment and discharge which it provided for the unfortunate trader. In all this, there is not favour but discouragement to the non-trader; it is exclusion from a privilege, not exemption from a penalty, which is the object of the law. There are many reasons which, to my mind, are conclusive for the abolition of this distinction. A non-trader is as much bound as a trader to pay his debts, and to pay them according to the precise time and manner of his contract. It is as desirable for the creditors of a non-trader, as for those of a trader, that his available estate should be rapidly, cheaply, and justly realised and divided. It is here that the real difficulty arises. Landed proprietors have a vision of their ancestral acres being seized and sold for some paltry debt: and even the man who knows at the bottom of his heart that his estate is no longer his, shrinks from the act which he feels to be just as well as inevitable, of permitting it to be applied to liquidate his debts. Far better for him, as well as far more just to his creditors, did the law leave him no choice in the matter; and thus would be saved many a long-lingering, heart-broken life—prolonged from day to day in vague hopes, which reason from the first disowned, and which, had the worst been faced from the beginning might have been vigorous and useful. But there are two special reasons for extending the operations of the bankrupt law to non-traders—one in which the public has an interest, and the other important to the debtor. The first is the equalizing operation of bankruptcy. Of all the frauds to which insolvency gives rise, collusive and secret preferences are the worst, and the greatest and most salutary benefit of a correct system of bankrupt administration is the even-handed justice it secures. There can be no reason why the creditors of a non-trader should be deprived of this protection. The other is the power of discharge. It has been said that the worst use you can put a man to is to hang him; certainly it is little more profitable to shut him up, or to leave him at large an incumbrance on society. It may be true that it is a homage to the virtues of prudence and foresight to nail unhappy debtors to our barn doors, and leave them there, to the terror of the lieges; but I doubt if mankind ever learn the lessons which such discipline teaches. The man may be useful, if free—he is worse than useless if he is not—and at all events, it is but reasonable to give him the chance of freedom, if those who have suffered through him be willing, and his own conduct has been honest. The distinction between traders and non-traders has become so shadowy, that the filmy line of principle which used to separate them is now utterly capricious in its operation. I conclude, therefore, that the bankrupt law of both countries should extend to all, and should have for its object the shortest and cheapest way of dividing the debtor's estate ratably among his creditors, subject to judicial inspection, but under the management of the creditors themselves.

PUBLIC PROSECUTOR.

I now turn to the subject of a minister of justice or public prosecutor, in the criminal department of the law. Now this is a very large and important matter, but more fitted to be dealt with by English hands than by mine. As regards ourselves, I suppose I am hardly an impartial witness as to the usefulness of a public prosecutor. At the same time, I think I am entitled to say—because I speak now from very considerable experience of that office—that every year that I have had the opportunity of seeing the working of the system has increased my conviction that it would be very difficult indeed to devise a mode of prosecuting criminal business which would accomplish the twofold object which the prosecutor ought to

have before him—the detection of the guilty and the protection of the innocent. No doubt, a public prosecutor in an arbitrary state is very dangerous to the liberties of the people; but a public prosecutor, under the influence of public opinion and Parliamentary responsibility, is, in my opinion, as far as the practical working of it is concerned, the best mode in which the criminal affairs of a country can be conducted. It is impossible to deny that as crimes are crimes against the public, so the public should be at the expense of prosecuting and punishing them. And whatever may be the practical operation of the system in England, of which I say nothing, because I do not know much—whatever may be the practical operation of it, it has no right to leave upon a private prosecutor—who may be supposed to prosecute only for the injury done to himself—the vindication of the great public law, the breach of which is truly at the ground-work of the proceedings. And, accordingly, it has been the desire in England for many years to accomplish, if possible, this most desirable change. Again we are beset, however, with the same difficulties that I have alluded to in speaking of other subjects. We work here upon a small scale—we can keep everything within bounds—the public prosecutor and his deputies are cognisant of every offence that takes place in all parts of the land. He knows the proceedings that have been going on, and therefore he can judge personally for himself, on his personal responsibility, of the things that are done. Well, a great minister of justice in England would find it difficult to undertake the work to this extent; and it is quite true that without direct personal responsibility the office is one unquestionably exposed to danger and risk. Then, again, from the enormous mass of the English population, it would be a very difficult thing to keep within the Crown office, as we do, the whole records of crime —of such crime as requires public prosecution. These are practical difficulties. Again I say I cannot deal with them—I have not even the knowledge or information to suggest how they should be dealt with. At the same time, I think I may say that if the system we have works well here, there must be the means, in one shape or other, of bringing it also unto practical operation in England. Well, there is another question that has been raised. If we are to give a public prosecutor to England, are we to take a coroner's inquest and grand juries from England? I think it is not impossible that a paper, of which I see my friend Mr. Smith has given notice, may propose to deal partly with that question, and therefore I do not think it necessary to enlarge upon it at any length. All I can say is, that if a coroner's inquest is intended for the protection of the subject, if it is intended for the purpose of taking care that the cases shall be investigated and examined, I think that object may be attained without the necessity of importing so large and wide a system from England. For my own part I believe that in no where in Europe is crime more uniformly investigated or more efficiently detected than it is with us.

CORONERS' INQUESTS.

But if a coroner's inquest is wished in order to detect crime —if the object is to ascertain and detect occult and latent crimes—I then say I would object to exchange a most efficient and philosophical machine for a very rough and doubtful one, because, if you are only dealing with the detection of the crime, can any man doubt that inquiry which is not public is the best and most efficient mode of detecting it? If you are to send a detective down to a remote county to ascertain the truth as to some act that had been committed in private, you would hardly put an advertisement in the newspaper that you had done so, and you would scarcely tell him, on his arrival, to proclaim at the market cross what he wanted. Quite the contrary, and there can be no doubt that the quiet investigation which goes on in the Crown Office in Scotland is infinitely better adapted to detect facts than the investigation which takes place before a coroner's inquest, which gives warning to the guilty, which throws suspicion upon the innocent, and which, for the most part, though it has served its turn nobly, as the production of England against arbitrary power—for the most part, I believe, not really to be conducive to the detection of the more secret and difficult crimes. But there is another object—another result which our system accomplishes, which the coroner's inquest was greatly against—I mean the protection of the innocent. I am not at this moment saying that the coroner's inquest should be abandoned in England. It is consonant to the feelings of the English people, and has been productive of good in England. I am only comparing it with our own system, and I say that any man who has experience of the Crown Office work in Scotland will admit that if it is good for the detection of crime, it is very potent in the protection of the innocent—in preventing false rumours from getting afloat—in discouraging false accusations—in preventing colourable appearances from being tortured by the public gossip into accusations of crime. For all these things I would deprecate the introduction into Scotland of the system of coroners' inquests as it exists in England, leading sometimes as it may to the unhappy man, who is thrown into circumstances of suspicion, having the finger of scorn pointed at him during all his days, and those who hear the accusation may never hear the refutation. But I own I do not very well see how the administration of criminal law can proceed much longer in England without some institution like that of a Minister of Justice. If our experience in Scotland can be of any assistance, I am sure it will be a pleasure for us as well as a duty to afford it.

ADMINISTRATION OF THE LAW.

The only other matter to which I intend to refer was the large and extensive question of the administration of the law —the mode of conducting cases, their expense, and the rapidity of decision and judgment. But I shall not enlarge on these topics. I thank you very heartily for the attention with which you have listened to me. There is also the question of the assimilation of the law of equity, which to English lawyers is interesting, and which is interesting also to us, but I shall not longer detain the session from its deliberations. Many nations have good systems of laws, but there is a stage and a progress in which we have now to a great extent outstripped the rest of the world. There have been many great and beneficient systems of law announced by despotic rulers—the next stage in a nation's history is the potent, free, and independent administration of them, and for this, more than anything else, have come the bloody wars on which the freedom of nations has been gradually built up; judges rising against the power of the Crown if it required them to decide contrary to the spirit of the constitution and the laws under which they lived. It is to England that we owe it chiefly, and it is a great boon, for which we never can be sufficiently thankful, that even in the very worst of times, and when political principles were forgotten, the noble spirit of her judges stood upright amidst the crash of everything else that was noble and free in that country, and asserted there, for the first time, I believe, in the history of the world, the majesty of the law above every other power in the country. But we are past that stage—the thing is done—we have vindicated the power of administering the law, unawed by terror from any side; and now we stand in the position—and few countries can say the same, happy is the country that can—that in perfect security, the law be it what it may, will be administered with honesty and vigour. We can call such an assembly as this, of those who are lawyers and those who are not—those who have transactions and have to regulate the law by which they proceed—we can call such a meeting as this to deliberate what the law ought to be, in the perfect conviction that if, in the end, public opinion shall come to think that there will be a change, that change will be effected by the most constitutional means.

His lordship concluded his powerful and talented address amid loud acclamations.

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "The Editors of the Law Journal, Toronto."

OFFICERS AND SUITORS.

THE LAW AND PRACTICE OF THE DIVISION COURTS.

We have received the first contribution upon the Law and Practice of the Division Courts, but too late for insertion in this number. This we regret, as we had fully intended to commence the publication with the new year.

A memorandum accompanies the sheets received, the contents of which our contributor desires should be made known. This we conceive will be best done in his own words.

A. V. (as our contributor chooses to designate himself) says, "The writer aims at producing a little manual of "practical utility upon the law and practice of the Division "Courts. The subject is somewhat wide, but he trusts "that a long experience and observation in these Courts "will enable him to make a selection, embracing as well "matters *necessary* to be done as matters of *most frequent* "*occurrence* in the Courts."

"The writer is desirous of aiding, so far as his abilities "permit, in giving practical value to the Division Court "system, believing that, so far, the Courts have, in a large "degree, accomplished the purpose for which they were "designed, and (while continued within reasonable limits "of judisdiction) are really useful and valuable tribunals."

"Such being his object and such his only motive, "County Judges and others connected with the Courts are "asked for cases or other information which their expe-"rience may point out as likely to aid him. All such will "be acknowledged if desired, and any suggestions made "will be gladly received."

"A similar arrangement to that in Lloyd's work on the "English County Courts seems most suitable in treating "the topics to be embraced, and will for the most part be "followed."

It is to be hoped so far as our valued contributor appeals to County Judges and others connected with Division Courts, for cases or other useful information in regard to the Courts, that his appeal will not be in vain.

We know that the County Judges in Upper Canada, as a body and as individuals, are not wanting in interest for the Courts over which they preside. We know also that the Division Court Clerks of Upper Canada, as a body and as individuals, have the success of the Courts, on which their livelihoods depend, at heart. Surely therefore "A. V." may reasonably look for that assistance which he asks, and which we trust he will abundantly receive.

Although "A. V." has given us no pledge to produce the matter he has undertaken within any limited time, yet he proposes giving as much in each number as other important engagements admit.

GOODS EXEMPT FROM SEIZURE.

CLAIM FOR RENT UPON EXECUTION FROM DIVISION COURT.

We have much pleasure in giving a further communication from "B.," on the subject of landlords' claims for rent when there is an execution from a Division Court against the tenant's goods.

A full discussion of doubtful questions of this kind in our pages (with an audience, so to speak, as numerous as our readers), cannot fail to prove beneficial to such of our readers as are interested in the point.

The most that any writer in a law periodical who examines questions of construction not expressly decided can do, is to argue the question on the materials before him, and give all that may be urged by those who take an opposite view.

In the question at issue between "B." and ourslves, our readers must judge for themselves. We cannot yet agree in the conclusion to which "B." has arrived. And when we say so, it is only proper we should add that our correspondent is one whose position and acquaintance with the subject is such as to entitle anything he may urge to great weight.

What we contend is this, that there is nothing in the exemption act to protect the goods of a tenant from distress or seizure by landlord for rent; that that act applies only to executions, and that by the Division Court Act the Bailiff of the Court is, upon claim served, made the Bailiff of the landlord for the purpose of the distress. He is not the Bailiff of the landlord for distraining the goods of a stranger, as was decided by the cases to which "B." refers, but it does not follow that he is not to be considered the Bailiff of the landlord for the purpose of distraining the goods of *the defendant* (the tenant) liable to seizure in distress for rent.

The argument in the cases referred to was, that there was nothing to restrict the landlord's right to have the rent satisfied out of the goods of a stranger on the premises, in case, after seizure, they are claimed by the owner, as he was entitled under the statute of Anne; but it was decided otherwise in *Beard* v. *Knight*, and *Fougler* v. *Taylor and others*.

The language of Watson, B., in delivering judgment in *Fougler* v. *Taylor*, we think, makes this very clear and strengthens our position. "The statute 8th of Anne, is by direct enactment declared not to apply to goods taken in execution under a warrant of a County Court. The whole frame of the section seems directed to the case *where the goods levied are the property of the tenant*. The overplus of the sale and the residue of the goods are to be returned to the defendant, and we do not feel disposed to extend further than we are compelled to do, the undue hardship and anomaly that one man's property may be taken to pay another man's debt."

The 176th section of our Division Courts Act is similar to that of the English Act. It enacts that so much of the 8th of Anne "as relates to liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken in execution under the process of the Divison Courts," &c.

"B." says, "if goods not liable to seizure or execution might in the one case be taken by the Bailiff, why not in the other, they being in both cases equally liable to be distrained by the landlord for rent?" We answer in the words of Baron Watson, "The *stranger* has a perfect right to remove his goods at any time or under any circumstances, to avoid the distress. This right is founded on the clearest principles of justice. The stranger has no interest in the tenancy and is under no obligation, legal or moral, to allow his goods to be applied to pay the debt of a third person."

The goods of a *stranger* being on land demised, no doubt may be distrained for rent service, and it was this hardship and anomaly that the Courts in both cases referred to, and were not disposed *to extend*; but there is no hardship in taking a man's goods to pay his rent.

To the Editors of the Law Journal.

Permit me again to trouble you with a few further remarks on the subject of claims for rent served on Bailiffs acting under warrants of execution from Division Courts, and the cases bearing thereon referred to in my previous communication. In both those cases, I find, on again referring to them, that the goods seized were claimed by and decided on Interpleader to be the property of a third person, and though seized on the premises of the defendant, were yet not held liable for the rent so claimed, *because* they were not the goods of the defendant and were not liable to seizure under executions against him. No one will pretend to deny, however, that as a general rule, with a few well known exceptions, such goods would be liable to distress, in the ordinary way, by the landlord.

Now, if the goods of a stranger found on the premises of a defendant are not liable to seizure for rent under an execution, I should like to know upon what principle the goods of defendant, exempt by law from seizure under execution can be taken under that process to satisfy a demand for rent. I endeavoured at first to solve the difficulty by assuming, that on receipt of the notice of claim, the law authorized the bailiff to distrain without any direct authority from the landlord for that purpose. But on testing that view I found it unsound. For if goods not liable to seizure on execution might in the one case be taken by the bailiff why not in the other also, they being in both cases equally liable to be distrained by the landlord for rent.

On more carefully reading the judgment of the court in *Beard* v. *Knight*, I find the learned Chief Justice expressly states, as a conclusive reason, in his opinion, why the goods in question might not be lawfully taken for the rent, "that they were not liable to seizure under the execution." Now if this be the correct principle in the one case, I humbly submit that it must be so in the other.

The earlier decision in the case of *Woodcock* v. *Prichard*, 17 L. T., 16 Q. B., is directly contrary to what I believe to be the law governing this question, and I think, contrary to the latter decision in appeal of *Wilcox et al* v. *Searly*, and must now be held to be overruled by the latter decision. I think the present law of the Division Courts is the same as it was under the statute of Anne, in regard to this matter, with the exception that the bailiff is not now obliged to pay the rent before removal of the goods; but proceeds to sell at once, first to pay rent and then the execution debt—and this he does I believe under the writ, as formerly, and not by any authority in the notice of claim.

I regret having to take up your valuable space by again recurring to this subject. I know, however, your anxiety to afford information to Division Court officers, when likely to be serviceable, will render apology unnecessary.

21st December, 1860. B.

U. C. REPORTS.

QUEEN'S BENCH.

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*)

IN RE LAWRENCE JOICE, CONVICTED BY ROBERT ANGLIN, ESQUIRE, A JUSTICE OF THE PEACE FOR THE COUNTIES OF FRONTENAC, LENNOX AND ADDINGTON.

Master and servant—Conviction—Application to quash nunc pro tunc—Limitation of action where conviction quashed.

The Master and Servant Act, 10 & 11 Vic., ch. 23, does not apply to the case of school trustees and school teacher. Where a trustee, therefore, had been convicted under it as a master, the conviction was quashed.

Owing to a misapprehension as to the office in which the return to the *certiorari* should be filed, a rule to return, and afterwards a rule for an attachment, issued, although a return had in fact been filed. More than six months having thus expired since the conviction, the court were asked to allow process to issue against the justice for the illegal conviction as of a previous term, but the application was refused.

Quære, whether the six months could be held to run only from the time of quashing the conviction?

Harrison, in Michaelmas Term, obtained a rule *nisi* calling on the justice to shew cause why the conviction should not be quashed as of Hilary Term last, on the ground that the said justice had no jurisdiction over the subject matter of the complaint, and the conviction was in other respects illegal and unlawful; and why the said Joice should not be allowed to issue process, and commence an action against the said justice in respect of the said conviction and the proceedings thereon, as of Hilary Term, or as of such other time as the court might direct, and why the said justice should not pay the costs of issuing the writ of *certiorari*, or the application for a writ of attachment, and of this application.

It appeared that Joice was one of the trustees of a school section in the township of Pittsburg, for the year 1857, and that he, with the other trustees, acting in their corporate capacity, in February, 1857, engaged a school teacher by a contract in writing, to teach in this section for ten months, which expired in January, 1858. Some dispute arose between the teacher and the trustees in regard to the teacher's salary, and upon a complaint made by the teacher to Mr. Anglin as a magistrate, the case was treated as one coming under the Master and Servant act, 10 & 11 Vic., ch. 23, and a conviction made of Joice as a master.

The conviction had been removed into this court, and it was sworn that while the proceeding upon the *certiorari* was pending, the justice had issued his warrant, and caused some of Joice's cattle to be seized and sold.

When the writ of *certiorari* was issued and served upon Mr. Anglin, he immediately made a return of the conviction under the advice and instruction of counsel, and the writ and return was without delay sent to the clerk of the court, Mr. Small, and filed in his office. Mr. Joice's attorney having been by mistake of the clerk informed that it had not been returned, a rule to return the writ of *certiorari* was taken out.

This rule was served in May or June last, and in consequence of it Mr. Anglin's attorney on the 5th of June, called at the office of Messrs. Patterson & Harrison, who had taken out the writ, and told them that it had been returned, and found the writ in the crown office.

Hearing afterwards that a rule for attachment had issued for not returning the writ, the attorney, Mr. Kirkpatrick, instructed his agent in Toronto to move to have the same rescinded, but it seemed it was understood between his agent and Messrs. Paterson & Harrison, that the attachment should not be acted upon.

Prince shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

The conviction is clearly illegal, and must be quashed, and the rule so far is to be made absolute. It was clearly no case under the statute 10 & 11 Vic., ch. 23, and the justice who convicted misapplied the statute.

But as to that part of the rule which asks that Mr. Joice should be allowed to issue process in the action against the justice on account of the illegal conviction as of Hilary Term last, or of any day other than the true time of suing out the writ, we should by that be depriving the justice of a protection which an act of parlia-

ment gives him, and we should be so far indirectly repealing the act. The seventh section of 16 Vic., ch. 180, provides that the six months within which the action must be brought are to reckon from the day on which the act was committed: in other words, from the time of the wrong done by the justice. At least, so we construe the act. If in consequence of the enactment in the second section of the act, which makes it necessary to have the conviction quashed before an action can be brought, the party is advised that the six months can be legally computed from the time of setting aside the conviction, he can proceed at the peril, perhaps, of having an application made to set aside the proceedings under the sixth clause of the act, or at any rate of having the lateness of the action urged in a more formal shape.

Conviction quashed.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*)

Munson v. Municipality of Collingwood.

School teacher—Salary—Action for—Mandamus.

Held, that the Municipal Corporation Act does not authorise the acceptance by the treasurer of orders for school teacher's salary, although permitted to pay such orders on presentation, nor has the treasurer authority to bind the corporation by his acceptance of orders.

Held, also that the board of school trustees of a town have authority to levy and collect a rate for the payment of school teacher's salaries and expenses, and that they are liable in an action for such expenses, or can be compelled by mandamus to raise the money.

The declaration contained five counts. 1st. On an order made by the chairman of the board of school trustees, directed to the treasurer of the defendants requiring him to pay plaintiff or order £37 10s., which order defendants under the hand of their treasurer accepted. 2nd. On a similar order for $150. 3rd. For money had and received. 4th. That plaintiff was a common school teacher for one year next before the 10th of January, 1859, in the town of Collingwood; that on the 28th of March, 1858, the trustees of that school prepared and laid before the defendants an estimate of the sum they judged expedient for paying the salary of the plaintiff as such school teacher by levying and collecting a rate, and it then became defendants' duty to provide the said sum in manner aforesaid. That the trustees, on the 10th of January, 1859, gave plaintiff an order for £37 10s. on the treasurer, being plaintiff's salary as aforesaid; yet defendants would not provide that sum, or levy, impose, or collect a rate for payment thereof, but wholly neglected, &c. 5th. A similar count to the fourth, for the plaintiff's salary for six months, ending the 4th of July, 1859, being $150.

Pleas.—1st. A denial of the defendant's acceptance of the order mentioned in the first count. 2nd. Payment to the first count. 3rd. To the second count denial of the defendants' acceptance of the order. 4th. To the third count, never indebted. 5th. To the fourth count, that the defendants did provide the sum in that count mentioned, and did levy, impose and collect a rate for payment thereof. 6th. To the fifth count, similar, to the 5th plea. 7th. To the fifth count, that on receiving the estimate of the school trustees the defendants did impose a rate, and delivered the roll containing the rate so imposed to the collectors of the town; that the time passed for the return of the collector's roll has not expired, and defendants have not as yet received money. Issues.

The trial took place at Barrie, in October, 1859, before Sir J. B. Robinson, C. J. The acceptance by the treasurer of the corporation of the town of Collingwood of the orders set out in the first and second counts was proved. The clerk of the defendants produced an estimate of the money to be raised in the year 1858 for school purposes, in which the plaintiff's salary was included, and he said a by-law was passed to raise that money, but on its being produced it appeared to be a by-law to raise money for school houses, library and apparatus, and it appeared that the sum required for school teachers was raised by a rate imposed by resolution. He produced the minutes of the council of the 19th of April, 1858, shewing what the estimate embraced; that money was levied. He also produced the estimates of school moneys required for the year 1859, which included the teacher's salary. A by-law was introduced to raise that money by assessment, but had not yet passed. It was read a second time on the 25th of July, 1859, and since then nothing had been done. A small portion only of the taxes for 1858 had been collected. The clerk thought enough had been collected generally on the roll to pay the teacher's salary, but he could not say whether enough of the rate imposed for that purpose had been collected. The chairman of the board of school trustees was also called. He stated that in 1858, the first year of the incorporation of the town of Collingwood, the corporation paid people employed by them on the streets, &c., by orders on the treasurer, and those orders got into circulation, and many people paid their taxes with them, so that enough has not been collected in money to pay the school teacher: the government grant would be received by the end of June; the rest for the year is to be raised by a rate. No separate rate was imposed in Collingwood. The government grant for the first six months of 1859 had not been paid to defendants. The witness was a member of the town council of Collingwood as well as chairman of the Board of school trustees.

On the defence it was objected: 1st. That this action will not lie against the defendants. 2nd. That no acceptance by defendants was proved.

The jury, under the direction of the learned Chief Justice, found a verdict for the plaintiff on the 1st, 2nd, 4th, and 5th counts, and £65 damages, it being admitted that £10 was paid, and for the defendants on the 3rd count.

In Michaelmas Term, *R. A. Harrison*, obtained a rule *nisi* to arrest the judgment on the 1st, 2nd, 4th and 5th counts, or for a new trial on the law and evidence, the acceptance proven not being under the seal of the corporation, and the treasurer having no authority to bind them by his acceptance, and as to the causes of action set forth in the 4th and 5th counts, that the plaintiff's remedy is not by action.

McMichael shewed cause in the following term. He referred to the Common School Act of U. C. 13 & 14 Vic., ch. 48, sec. 18, subsec. 1, and sec. 24, subsec. 6, 7, & 8, and *Gibbs* v. *Trustees of the Liverpool Docks* (in error) 3 H. & N. 164.

Harrison, contra, contended the action would not lie, that the plaintiff had a remedy under 16 Vic., ch. 185, sec. 22, subsec. 6, and a mandamus also would lie. The complaint in the 4th and 5th counts is the right to pass a by-law, which is a matter between the school trustees and these defendants,—Tapping on Mandamus, 93 & 347. Even if the treasurer has funds he holds them as the servant of the corporation, and must apply them according to the direction he receives. As to the 1st and 2nd counts, no authority has been shewn for the treasurer binding the municipal corporation of which he is a member by his acceptance.

Draper, C. J.—The School Act of 1850, section 18: 1st Enacts, that it shall be the duty of the municipality of each township to levy such sums by assessment upon the taxable school property in any school sections for the purchase of a school site, the erection, repairs, renting, and furnishing of a school house, the purchase of apparatus and text books for the school, books for the library, and salary of the teacher, as shall be desired by the trustees of such school section on behalf of the majority of the freeholders or householders at a public meeting. Section 21.—The council of each incorporated town in Upper Canada shall be, and is hereby invested, and shall be subject to the same obligations as are the municipal council of each county, and the municipality of each township by the 18 & 27 sec. of this act. Section 24. The board of school trustees for each town are constituted a corporation, and it shall be their duty,

Sixthly.—To prepare from time to time, and lay before the municipal council of the town an estimate of the sums which they shall judge expedient for paying the whole or part of the salaries of teachers, for purchasing or renting premises, &c., and it shall be the duty of the council of such town to provide such sum or sums in such manner as shall be desired by the said boards of school trustees.

Seventhly.—The board of school trustees may levy at their discretion any rates upon the parents or guardians of children attending any school under their charge, and may employ the same means for collecting such rates as trustees of common schools in any townships may do under the 12th sec. of this act.

The 12th section authorises the trustees of every school section to apply to the treasurer of the township, or employ their own

lawful authority as they may deem expedient for the raising and collecting of all sums authorised in the manner hereinbefore provided to be collected from the freeholders and householders of such section, by rate according to the valuation of taxable property, as expressed in the assessor's or collector's roll.

Section 24. Seventhly continued.—Provided always that all monies thus collected shall be paid into the hands of the chamberlain or treasurer of such town for the common school purposes of the same, and shall be subject to the order of the said board of school trustees.

Eighthly.—To give orders to teachers and other school officers and creditors upon the treasurer of such town, for the sum or sums which shall be due them.

The first and second counts are rested upon the provisions in the common school act of 1850, sec. 24. Eighthly. The giving to the plaintiff an order on the treasurer for her salary is sufficient evidence of her right to receive the sum therein named. The treasurer's duty is defined in the Consolidated Statutes of Upper Canada, ch. 54, sec. 160, to be, to pay out the moneys belonging to the corporation to such persons and in such manner as the laws of the province and the lawful by-laws or resolutions of the council direct.

The acceptance by the treasurer of such an order as set forth in these counts, must import an undertaking to pay it to the person entitled according to its terms. The duty of the treasurer as officer of the corporation required him to pay, but the statute does not in terms at least authorise him to accept such an order. He is a depository of the corporation and school moneys; these or similar orders would be authorities to him to make immediate payment, and vouchers that he had done so; but he was not, so far as I can see, authorised to turn them into evidences of debt on the part of the corporation, and against them.

The evidence given at the trial shews, however, that a practice had grown up for the defendants to give orders on their treasurer, which, when he had accepted them, got into circulation, and at last found their way into the collectors' hands in payment of taxes. Such a practice seem to me at variance with the spirit, if not the intention of the municipal act, (Consolidated statutes, U C., ch. 34, sec. 215,) which enacts that no council shall act as a banker, or issue any bond, bill, note, debenture, or other undertaking of any kind or in any form in the nature of a bank bill or note, or intended to form a circulating medium, or to pass as money, and any bond, bill, note, debenture, or other undertaking issued in contravention of this section shall be void. The orders drawn by the defendants themselves upon, and accepted by the treasurer and left outstanding, might soon produce the mischief this enactment was intended to prevent, and orders drawn by other bodies or parties on the treasurer and accepted by him, would, if such acceptance was binding on the defendants, tend to a similar result. But it appears to me that the treasurer had no legal authority to bind this municipal corporation, even if an acceptance of these particular orders under their corporate seal would have bound them, on which it is unnecessary to pronounce. I think, therefore, that these counts founded upon orders drawn by the board of school trustees upon the defendants' treasurer, and accepted under his hand, do not give the plaintiffs a right to recover.

The fourth and fifth counts are framed in tort; they vary only in respect to the period for which the plaintiff was entitled to a salary as school teacher; the one setting forth that she was such teacher for 1858, the other for the first six months in 1859. Then each states that the board of school trustees did prepare and lay before the defendants an estimate of the sum which they judged expedient for the purpose of paying the whole of the salary (respectively) by levying and collecting a rate on the taxable inhabitants of the town that it became defendants duty to provide the sum in manner aforesaid, and that although the trustees gave the plaintiff an order for her said salary so required to be levied and raised on the defendants' treasurer, yet defendants would not provide the said sum, nor levy, impose, or collect a rate for the same, but neglected and refused so to do, whereby the plaintiff is deprived of her said salary.

It has not, I believe, been actually decided whether the board of school trustees of a town have "lawful authority," such as is given to the trustees of a school section by the 13 & 14 Vic., ch. 48, sec. 12, ninthly,—and by 16 Vic.. ch. 184, sec. 6, to raise and collect moneys for school purposes without reference to the municipal corporation. The first section of 16 Vic., ch. 185, is large enough at first sight to confer the authority, through the 13 & 14 Vic. certainly did not give it. By the first section it is enacted, that the board of school trustees in each town shall, *in addition* to the powers with which they are now legally invested, possess and exercise as far as they shall judge expedient in regard to such town, *all the powers* with which the trustees of each school section are or may be invested by law, in regard to such school section. In the case of *The School Trustees of Galt* v. *The Municipality of Galt*, (13 U. C. Q. B. 511,) I expressed an opinion that the 6th section of that act of 16 Vic., did not extend to boards of school trustees, from the conflict that a contrary conclusion would create with other provisions of the school acts affecting such boards. The language used in the first section shews that the new powers are *in addition to*, not in abrogation of the powers previously possessed, and still less of duties previously imposed, and the words, "shall possess and exercise *as far as they shall deem expedient*," seems to imply, that they may possess a power and yet be under no obligation or duty to make use of it.

The sixth section of the 16 Vic. has, however, no application to teachers' salaries, or the other school expenses which under section 12 of 13 & 14 Vic., the trustees of school sections had power to raise and collect by the employment of "their own lawful authority;" and in the case of *The School Trustees of Port Hope* v. *The Town Council of Port Hope*, (4 U. C. C. P. 418.) *Macaulay*, C. J., was disposed to think the board of school trustees might levy a rate for such purposes. I am unable to make a consistent construction of all the enactments if this view be adopted, but it has in its favour the consideration that it tends to assimilate the powers and duties of school trustees in townships, and in cities and towns, and I am therefore disposed to adopt the suggestion as the proper mode of construing the statute.

But in determining that the board of trustees could themselves have raised and collected the sums for which they laid an estimate before the defendants, it appears to me a great obstacle is thrown in the way of the plaintiff's recovery. Her contract was with the board, and the power to give an order on the treasurer of the municipality is a very different thing from what it was when they had no power to raise the money themselves. It appears to me, that if no order had been given to the plaintiff on the defendants' treasurer, it would have been impossible for her to have sustained either the fourth or fifth counts, and I feel great difficulty in holding that the giving the order vests in her such a right that she can treat, the non-compliance with the requisition of the board of trustees as a breach of duty for which she can maintain an action. If such a consequence follows in her case, it must follow in the case of every other school officer and creditor of the board whose demand was included in the estimate prepared and laid before the defendants. This alone would, I think, be a great inconvenience, while at the same time the board of trustees, having the power to raise the money, would, as appears to me, still remain liable to the different claimants. Besides, it appears to me, it cannot be truly said that this alleged damage to the plaintiff is so immediately connected with the nonfeasance of the defendants that she can be said to have lost her salary by reason therof. If I am right as to the board of trustees, she has a claim on them, and if an action would not be maintainable, I should think she might sustain an application for a mandamus to them to raise the money.

Per cur.—New trial without costs.

SCHOOL TRUSTEES OF ARTHUR V. TOWNSHIP COUNCIL OF ARTHUR AND LUTHER.

School rate on non-resident lands—How collectable.

Held, that it is the duty of the local municipality to make up and supply out of their general fund any deficiency that may exist in the school rate of any township, upon notice being given them at the end of the current year by the collector of school rates, and that such notice need not be under the seal of the trustees.

(C. P., H. T., 28 Vic.)

The declaration stated that the collector appointed by plaintiffs for the said school section for 1856, being unable to collect the

school rates charged on certain lands liable to assessment within the said school section, amounting to £100, by reason of there being no residents on the said lands and no goods and chattels to distrain, the plaintiffs made a return to the clerk of the defendants before the end of the year 1856, of all such lands, and of the uncollected rates thereon, but the defendants have not paid the said sum of money, contrary to the statute, although often requested.

2nd count.—A similar cause of action for the unpaid rates for 1857.

3rd. count.—For the unpaid rates of 1858.

Pleas.—To each count, that the plaintiffs did not duly make a return to the clerk before the end of the current year, never indebted, and payment.

The case was tried in November, 1859, at Guelph, before Burns, J. It was proved that the plaintiff's collector for the year 1858, before the close of that year, delivered to one Mitchell, the defendant's clerk, a statement of the school taxes due upon lands of non-residents in school section No. 1, of the township of Arthur. This statement included the sums due on such lands for the years 1856, 1857, and 1858; shewing due for 1856, $88.65; for 1857, $93.11; and for 1858, $100.77; total, $282.53. This collector swore that he handed Mitchell the return for 1858, and he put in those for 1856 and 1857. Mitchell swore that the only paper he got was one which he produced, which shewed the amounts in arrear for the three years as above stated, and that he never received any return for 1856 or 1857, but he stated that he received some of the non-resident taxes, of which $6 were for 1857, and $33.79 for 1858, and that these sums be paid over on the 16th of May, 1859, to the secretary-treasurer of the plaintiffs.

Then if plaintiffs could recover for the three years, the amount would be $232.53. less $33.79, paid over by Mitchell $192.74—£48 3s. 8d. If the plaintiffs could only recover for the third year, then the amount as shewn above for that year is $100.77, less $33.79=$66.98—£16 14s. 11d. If the plaintiff could recover for 1857 and 1858, on both which years Mitchell received payments, then 1857, $93.11; 1858, $100.77=$193.88, less $39.79=$153.9, or $38 5s. 8½d.

It was objected that no return was proved for 1856 and for 1857, and therefore that plaintiffs could not recover on the first and second counts: that the township council could not be called upon to pay until they received the money, or not until the end of five years, and that the declaration did not disclose any liability.

The learned judge reserved leave to defendant to move for a non-suit on these objections, and took a verdict for the plaintiff for the sum of £48 3s. 8d., being the arrearages for the three years, with leave to the defendants also to remove to reduce the verdict by reducing either or both the amounts for 1856 and 1857. If both were ordered to be deducted, then the verdict was to be entered for £19 9s. 5d. (an error apparently arising from the first witness' statement of the amount due for 1858, and should be £16 14s. 11d.) on the third count, and a verdict for the defendants to be entered on the first and second counts.

In Michaelmas Term, Lemon obtained a rule *nisi* to enter a non-suit on the leave reserved, or to reduce the verdict to the amount due for the unpaid rates of 1858, or why judgment should not be arrested on the ground that the record showed no liability on the part of the defendants to the plaintiffs.

In the following term Adam Crooks shewed cause. He referred to the Consolidated Statutes of Upper Canada, ch. 64, s. 127, under which the plaintiffs claimed a right of action, and contended that the declaration was sufficient if the action would lie at all; and in support of the claim to recover generally, he cited *Hopkins* v. *The Mayor of Swansea*, 4 M. & W. 621, and in error 8 M. & W. 901; and *Addison* v. *The Mayor Aldermen and Burgesses of the Borough of Preston*, 12 C. B. 108.

M. C. Cameron contra, insisted that none of the returns were properly made, for they were not under the hands and seals of the school trustees, and he objected that the declaration should have shewn that there were funds in the hands of the municipality to pay the demand.

Draper, C. J.—The 127 section of ch. 64, Consolidated Statutes of Upper Canada (16 Vic., ch. 185, sec. 22), enacts that if the collector appointed by the trustees of any school section be unable to collect that portion of any school rate which has been charged on any parcel of land liable to assessment by reason of there being no person resident thereon, or no goods and chattels to distrain, the trustees shall make a return to the clerk of the municipality before the end of the then current year, of all such parcels of land, and the uncollected rates thereon; and the clerk shall make a return to the county treasurer of all such lands and the arrears of school rates thereon, and such arrears shall be collected and accounted for by such treasurer in the same manner as the arrears of other taxes, and the township, village, town or city, shall make up the deficiency arrising from uncollected rates on lands liable to assessment out of the general funds of the municipality.

Section 27, sub-sec. 15, makes it the duty of the school trustees to make their return before the end of the then current year.

By the assessment law, (Consolidated Statutes U. C. ch. 55, sec. 110,) the treasurer of each local municipality is to furnish the treasurer of the county with a correct copy of the collector's roll, so far as the same relates to lands in the municipality, "and also with an account of all arrears remaining due upon lands on account of any rate imposed by school trustees." This seems at variance with the direction contained in ch. 64, sec. 127, quoted above.

Sections 123, *et seq.*, provide for the sale of lands after taxes have been in arrears for five years, under a warrant from the county treasurer. Section 154, provides for the creation in every county of a non-resident land fund to consist of all moneys received by the county treasurer on account of the taxes on non-residents' lands, whether paid to him directly or levied by the sheriff, and by the following sections he is to open an account for each local municipality with such fund; and by section 163, surplus money belonging to such fund are to be ratably apportioned by the county council among the municipalities. Section 158 particularly provides, that every local municipal council on paying over any school or local rate, shall supply out of the general funds of the municipality any deficiency arising from the non-payment of the tax on land.

I think, that taking the 16 Vic., ch. 185, sec. 22, and the 16 Vic., ch. 182, sec. 69, into consideration, it is made the duty of the local municipality to make up and supply any deficiency arising to the school fund which arises from the inability of the collector of school rates to collect the same by reason of there being no resident on such land, or no goods and chattels thereon which can be distrained, and it is equally my opinion that the legislature intended such deficiency should be made up out of the general funds of the municipality immediately after the return made to the clerk of the municipality of what school rates are so in arrear. The provisions of the assessment law remove all doubt, if there was room for any, under the school law.

I can see no reason for holding that this return need be under the seal of the corporation of school trustees, it is in effect no more than a statement of what their collector has reported to them.

These statutory provisions are sufficient to establish the legal right of the school trustees to recover the amount of the deficiency so required to be made up. The legal liability of the local municipal corporation to pay out of their general funds rests upon the same foundation, and this is strengthened by the 69th section of the 16 Vic., ch. 182, (Consolidated Statutes, U. C., ch. 55, sec. 159,) which provides that all sums that may at any time be paid to a municipality out of the non-resident land fund of the county shall form part of the *general funds* of such municipality, which non-resident land fund is in part composed of the unpaid school rates returned by the trustees of the school section to the clerk of the municipality, and by him to the county treasurer. But it was assumed by Jervis, C. J., in *Addison* v. *The Mayor, &c., of Preston*, that if legal right on one side to receive the money, and legal right on the other to pay it, co-exist, an action of debt will lie, and each count of this declaration sets out in substance the section of the statute upon which the right is founded.

I felt some difficulty about the proper construction of the words, "the then current year." It is contended on the part of the defendants, that the return of taxes so uncollected must be made before the end of the year within which they are imposed, or the trustees of the school section cannot claim them from the local municipality. I think it quite clear that if this be so, the trustees cannot claim them at all; not from the land owner, or by any process against the land, for no authority is left in them so to collect after the current year; nor yet from the county treasurer, if by

the returns made to him he discovers the arrearages and charges the land in his books, for the law strictly prescribes what appropriation of it shall be made when he receives it. The effect then of the defendants' argument is, that the school, sections must lose the money, and either the landowner will get the benefit by not paying his school rate, or the non-resident land fund will be increased by the amount, and so the municipality will ultimately receive it without having previously made up the deficiency caused by its non-payment as part of their general funds. I am satisfied this was not meant by the legislature, and though it is not easy to deal with the section as it stands, and yet under such circumstances to prevent a consequence plainly contrary to the intention of the two acts, I think we may hold that the trustees may before the end of each current year, return all school rates upon lands not collected, for the reasons stated in the act, and of which no prior return has been made to the clerk of the municipality. With this construction the plaintiffs will be entitled to retain their verdict, otherwise it must be entered on the third count only for the plaintiffs' damages and for the defendants on the first and second counts.

Per Cur—Judgment for plaintiffs.

IN PRACTICE COURT.

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*

THE QUEEN V. CHARLES MERRIGOLD.

Writ of Extent—Lands—Issue of second of same teste as former writ—Grounds therefor.

Where, in the execution of a Writ of Extent the counsel for the Crown considering the property returned by the finding of the jury to be ample to cover the Crown debt designedly omits property sold before the execution of the writ by the Crown debtor to *bona fide* purchasers for value, and on an application subsequently made to quash that writ of extent and issue a second writ of the same teste as the former writ, in order to seize and make contribute the last mentioned property, there was no reason suggested for allowing the application but the fact that the Crown debtor appeared from the books of the County Register office to have been possessed of other property than that returned, the application was refused.

(Sittings after Mich. T., 1860.)

In Hilary Term, 1860, a Rule was obtained calling on the Defendant and George William Malloch, Matthew William Pruyn and others, to shew cause why the Writ of Extent issued in this cause on the twenty seventh of November, in the twenty second year of the reign of Her Majesty the Queen, and directed to the Sheriff of county of Brant, and all proceedings in this cause subsequent thereto should not be quashed and a new writ directed to the same county of the same teste as the former writ be issued upon the ground that there are certain lands situate in the said county of Brant now or at one time belonging to the said defendant which ought to have been extended under and by virtue of the said writ which were not so extended.

The affidavit filed on moving the Rule shewed the recovery of the judgment against the defendant, the issue of the Extent and the return of the Sheriff as to certain lands which the defendant was seized, the issue of a writ of *venditioni exponas* and that no lands had been sold, and then proceeded to state that as appears from the County Register Books in addition to the lands returned under the inquisition, the defendant was seised, on 10th April, 1849, of Lot No. 18 on North side of Dalhousie street in Brantford, and on the 11th February, 1852, of Lots No. 20 and 21 on the North side of said street as well as several other lots of land, as appeared from the certificate of the Registrar.

In Easter Term last *Mr. Long* shewed cause and filed an affidavit, stating that the Reverend Hugh McLeod of Cape Briton, who is the holder of a Mortgage in fee on the west half of Lot No. 17, on the south side of Darling street, made to him by the trustees of the congregation of the Presbyterian Church of Canada, in Brantford. Mr. Long appeared also for John Turner and the trustees of the Presbyterian Church.

Mr. E. B. Wood appeared for the estate of the late John Russell and stated that what was seized is sufficient to satisfy the crown debt.

It was admitted that the property seized under the writ exceeds in value one hundred and ninety-nine pounds, the claim of the Crown.

Mr. E. B. Wood also objected that the bond does not constitute a lien, and that it does not appear from it for how much it is to be considered as a lien.

Mr. R. A. Harrison for the Crown referred to *Rex* v. *Gibson*, Parker's Revenue Cases page 35—*Rex* v. *Buchanan*, *Ib.* page 176, and Imperial Statute 38 Henry VIII., chapter 39.

RICHARDS, J.—The case of the *King* v. *Gibson*, referred to by Mr. Harrison, shows that a second Extent may issue, tested the same day as a former one. But in the case referred to it appeared that a considerable portion of the defendant's effects were secreted so that they could not be discovered before the first writ of Extent, under which a portion of the defendants effects seized, was returned. A second writ was also sued out, but in consequence of the Bankruptcy of the party to whose hands the defendant's goods came after the issuing of the first writ and before the issuing of the second, the proceedings on the second writ were of no effect. The Court allowed the last or second writ, and the proceedings under it to be quashed and set aside, and directed that a new Extent should issue bearing the same teste as the first Extent.

The note of the case of the *King* v. *Buchanan et al*, does not show the facts very clearly, but states that after the issue of an Extent against the defendants, an inquisition was taken and goods were seized, but it was afterwards found that there were some cloths in the hands of a packer belonging to them. On an affidavit of this fact a motion was made to quash the Extent and inquisition and to have a new Extent of the same teste as the former, in order to find and seize these cloths. An order was made absolute to that effect.

It was stated in the argument, that the property, which it is now sought to cover by the writ, was designedly omitted in the finding of the jury, as the gentleman who acted on behalf of the Crown, considered the property returned by the finding of the jury ample to cover the debt of the Crown, and that he did not desire to interfere with "*bona fide*" purchasers from the Crown debtor. There was no affidavit filed on this point, and Mr. Harrison, who argued the case on behalf of the Crown, neither affirmed nor denied the statement, although it was admitted that the property returned by the jury was sufficient to satisfy the amount due the Crown.

There is no reason suggested for allowing the application, but the bald fact that Merrigold appears to from the abstract of title from the Registry office, to have been possessed of other property than that returned. As what is returned appears to be sufficient to satisfy the claim of the Crown, I cannot suppose there was any fraud used to prevent the Crown from covering as much property as they desired to include in the finding of the jury, particularly as a reference to the Registry office would have given all the information as to Merrigold's real estate that is now presented to the court. I think therefore I must assume that the Crown intentionally omitted the other property from the finding of the jury; if so then there is no reason suggested why the parties, who from their peculiar position, it was then thought, ought not to be compelled to contribute to the payment of this debt, should now be placed in a different position.

I do not therefore see my way clear in making this rule absolute.

IN CHAMBERS.

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*

JOHN MELLING V. JOSEPH ELLIS.

Consol. Stat. U. C. cap. 23, ss. 9, 11, 12, 13—Writ of Injunction—Violation—Contempt—Attachment.

No order can be made for the issue of a writ of attachment for violating the terms of a writ of injunction without a previous notice of some kind to the defendant.

Where the injunction operates strictly by way of restraint, the proper course is either to move that the defendant be committed for breach of the injunction, or to move that he be committed unless he show cause at a future day to the contrary.

If the first course be adopted, the motion must be made on personal service of a notice of motion on defendant.

(December 18, 1860.)

On 14th June, 1855, George Tate became the purchaser of about 10½ acres of land near Queenston, known as "The Grand Trunk Quarries"

Subsequently, Mr. Tate caused to be conveyed and placed on the quarries, for the use thereof, various implements used in quarrying, in value exceeding $2,000.

During the month of July, 1858, the defendant Joseph Ellis, as a caretaker, was placed by Mr. Tate in possession of the quarries and quarrying implements.

On 9th December, 1859, John Melling, the plaintiff, became the purchaser of the quarries, quarrying implements, &c., defendant then still being in possession.

When plaintiff so purchased he forbid defendant to quarry or to remove or meddle with any of the quarrying implements. Notwithstanding, defendant set plaintiff at defiance.

Plaintiff then instituted an action of ejectment to recover possession of the quarry, and an action of detinue to recover possession of the quarrying implements, and in the latter action claimed a writ of injunction to restrain the defendant from selling, removing or disposing of the quarrying implements.

On 7th August last, plaintiff applied to Mr. Justice Burns and obtained an order for an *ad interim* writ of injunction, and on same day caused the writ of injunction to be issued.

The injunction, so far as material, was in the following form:

"Victoria, by the Grace of God, &c.

"To Joseph Ellis, of the Township of Niagara, in the County of Lincoln, his agents and servants, or any person under his direction or control, and every of them, greeting:

"Whereas, on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty, an order was made by the Honorable Robert Easton Burns, one of the Justices of our Court of Queen's Bench at Toronto, pursuant to the Common Law Procedure Act, 1856, in an action depending in our said Court, wherein John Melling is the plaintiff, and you, the said Joseph Ellis, are defendant, that a writ of injunction do issue to restrain you the said Joseph Ellis, and your agents and servants, or any person under your direction or control, from selling or disposing to your own use, or removing any of the quarrying tools, implements, goods or chattels, in or about the said premises, belonging to the plaintiff, and of which a list is hereinafter given.

"We therefore do hereby strictly enjoin and command you, the said Joseph Ellis, and your agents or servants, or any person under your direction or control, and every one of you, that you and every one of you do from henceforth altogether and absolutely desist from selling or disposing to your own use, or removing any of the quarrying tools, implements, goods or chattels in or about the premises belonging to the plaintiff, &c., &c., and of which the following is the list, namely, &c., until our said Court shall make order to the contrary.

"Witness, the Honorable Sir John Beverley Robinson, Baronet, Chief Justice of our said Court at Toronto, this seventh day of August, in the year of our Lord one thousand eight hundred and sixty. "C. C. SMALL."

On 8th August last, defendant was personally served with a duplicate original of this writ of injunction, and at the time of the service of the writ the quarrying implements, or a large portion of them, were in possession of the defendant.

Both the action of ejectment and the action of detinue were tried before Mr. Justice McLean, at the last assizes for the County of Lincoln.

Between the day of the service of the injunction and the commission day of the Assizes, the defendant and his agents, in violation of the terms of the writ of injunction, removed or caused to be removed from off the quarries, all the quarrying implements for which the action of detinue was brought.

The defendant defended the action of detinue in person, and in open court boasted that he had made away with the quarrying implements so that plaintiff should never see one of them. It was sworn that the defendant was not a man of means.

Mr. R. A. Harrison thereupon for plaintiff, on affidavits showing the foregoing facts, made application to a Judge in Chambers for an *ex parte* order for a writ of attachment against defendant. The affidavits showed good grounds to suppose that defendant, if informed of the application, would immediately abscond to escape the consequences of his contempt. *Mr. Harrison* argued that notice to defendant of an intended application for a writ of attachment would operate as a notice to defendant to leave the Province in order to escape the consequences of the writ if issued, and urged that the writ should issue without previous notice to defendant—leaving him when in custody to purge himself if possible of the contempt. Reference was made to Consol. Stat. U. C. cap. 28, ss. 9, 11, 12, 13, p. 275; Com. Dig. Chancery, D. 3 (Attachment); Eden on Injunction, 75; Drewry on Injunction, 405, 406; *St. John's College* v. *Carter*, 4 Ml. & Cr. 497; *Angerstein* v. *Hunt*, 6 Ves. 487.

The application having been the first of the kind made to a Court of Common Law since the Common Law Procedure Act, Mr. Justice Hagarty, to whom the application was made, took time to consider, and on the following day delivered judgment.

HAGARTY, J.—I can find no authority to warrant me in ordering the issue of a writ of attachment for the violation of the terms of a writ of injunction without a previous notice of some kind to the defendant. There is no instance in which personal service of a notice has been wholly dispensed with in case of an attachment, though there may be some cases in which an incomplete personal service has been ordered. I have consulted the Vice-Chancellors of Upper Canada, and they are not aware of any such authority. On the contrary, they inform me that the settled practice of their Court is otherwise

Where the injunction operates strictly by way of restraint, the proper course, according to the books, is either to move that the defendant be committed for breach of the injunction, or to move that he be committed unless he show cause at a future day to the contrary. If the first course is adopted the motion must be made on personal service of a notice of motion on defendant.*

The learned judge referred to 2 Daniel's Ch. Pr. 1264; *Pearce* v. *Crutchfield*, 14 Ves. 206; *In re Morris*, 22 L. J. Q. B. 417; *Swinfen* v. *Swinfen*, 1 C. B. N. S. 364; *Thomas* v. *Rawlings*, 28 L. J. Ex. 347; 33 L. T. Rep. 186.

The following order was thereupon made and issued.

JOHN MELLING, *Plaintiff*, v. JOSEPH ELLIS, *Defendant*. } Upon reading the writ of injunction issued in this cause, the affidavit of service thereof, and the affidavits on which said writ was issued, and upon reading the affidavit of plaintiff and others filed yesterday in this cause, I do order that the defendant stand and be committed for contempt in violating the terms of the said injunction, and that a writ of attachment do issue for the arrest of his body for said contempt, unless he the said defendant, his attorney or agent, do upon the second day after the day of personal service of this order, shew cause to the contrary.

THOMAS JOHN COTTLE AND JOHN BARWICK v. ISAAC MORRIS.

Ejectment—Service of Writ on Defendant's Wife—Allowance.

Where the writ of ejectment was served on the wife of defendant (she being at the time in possession of the *locus*) and stating that her husband was in the United States, on an application for an order to allow the service under the particular circumstances of the case an order was made allowing the service as of the date of the order.

(5th December, 1860.)

This was an action of ejectment. The writ of ejectment was served on the wife of the defendant. She was at the time of the service in possession of the *locus in quo*, and stated that her husband had gone to reside in the United States of America.

It appeared that defendant was at the time of the service of the writ of ejectment a resident in the City of Philadelphia, in the United States of America, and was there engaged as a hand in an iron foundry.

Jackson for plaintiff, obtained a summons on the defendant, his attorney or agent, to shew cause why the service of the writ of ejectment and notice of claim attached thereto effected on the wife of the defendant, should not be deemed good and sufficient service, and why the service should not be deemed as good and sufficient, for all subsequent proceedings as if personal service had been effected on the defendant.

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* Subsequently plaintiff adopted this course in preference to the order nisi, and having caused defendant to be personally served with notice, Mr. Justice Burns, upon the production of the notice and affidavit of service, ordered the attachment to issue.

Lawder, for defendant, showed cause, and filed among other things an affidavit of John Senkler, Jr., describing himself as "partner of the attorney in this cause for the above-named defendant," showing the residence of defendant to be in Philadelphia, and stating that he had not been able to communicate with defendant. The affidavit also stated that deponent had seen in possession of defendant's wife, two deeds relating to the *locus in quo*, and purporting to convey to defendant that part of the *locus* for which the defendant desired to defend.

BURNS, J.—Granted an order allowing the service as of the day of the date of the order.

BURTON ET AL V. KELLY.

Judgment debt—Married Women's Protection Act, 22 Vic., 2nd Sess. cap. 34, (Con. Stat. U. C. cap 73)—*garnishing rent due to wife for debt of husband.*

The mere registry of a judgment against a husband's lands, before the passing of the 22 Vic., cap. 34 (Married Women's Protection Act) does not of itself give a right to the judgment creditor to garnish a debt due for rent of the wife's land since the passing of that act.

(Chambers, 27th December, 1860.)

On 3rd December, 1851, the judgment creditors recovered a judgment against the judgment debtor for £153 10s. 11d. damages and costs, and afterwards caused a certificate of the judgment to be registered against the lands of the judgment debtor.

On 30th November last, upon an affidavit in the usual form made by one of the judgment creditors as to the recovery of the judgment, that the judgment still remained unsatisfied to the amount of £123 7s. 5d., and that Anne Loring of the City of Toronto was indebted to the judgment debtor in the sum of $215 84 for ground rent due on a day passed in respect of certain premises in the City of Hamilton, an order was made in the usual form attaching all debts due or accruing due from the garnishee to the judgment debtor to answer the judgment of the judgment creditors.

At the same time a summons was issued in the usual form calling upon the garnishee to shew cause why she should not pay the judgment creditors the debt alleged to be due from her to the judgment debtor.

On shewing cause both the garnishee and Lorinda Kelly, the wife of the judgment debtor claimed that she the wife of the judgment debtor was entitled in her own right and free from any contract, claim or right of her husband to the moneys sought to be garnished.

It appeared that by a deed in fee simple dated 23rd May, 1860, the Canada Life Assurance Company conveyed to Lorinda Kelly, solely and absolutely, certain lands in the City of Hamilton—that at the time of the conveyance to her there was a subsisting lease of the land to one Valentine H. Tisdale, which was by Tisdale assigned to the garnishee by way of mortgage—that part of the rent sought to be attached accrued due since the conveyance—and that the whole of it was claimed by Lorinda Kelly, as the owner of the reversion in fee.

Jackson for the judgment creditors.

H. B. Morphy for the judgment debtor.

English for the garnishee.

The summons was argued chiefly under the 22 Vic., 2nd Sess., cap. 34, intitled "An act to secure to married women certain separate right of property" (Con. Stat. U. C. cap. 73, page 791.)

RICHARDS, J.—It does not appear that the amount due by the garnishee for rent or any part of it accrued before 4th May, 1859, when the statute in reference to the protection of the property of married women was passed.

The thirteenth section of that act provides that the estate of the husband in the real property of his wife shall not during her life be subject to his debts.

Then follows a proviso which protects the right that any creditor had obtained in respect of the husband's estate in the land of his wife under any judgment or execution obtained before 4th May, 1859.

If the plaintiffs by registering their judgment obtained a charge on the lands of defendant's wife which is now binding they may enforce it. The mere registry of the judgment does not of itself in my opinion, give a right to garnish a debt due for rent of the wife's land after the passing of the act.

The summons and order, so far as relates to the garnishee Anne Loring, must be discharged with costs.

Summons and order discharged with costs.

CHANCERY.

(Reported by THOMAS HODGINS, Esq., Barrister-at-Law.)

THE TOWN OF PORT HOPE V. THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

Consolidated Municipal Loan Fund Acts—Loan to United Counties—Loan to Town within United Counties—Liability of Town.

The United Counties of Northumberland and Durham made application for and obtained, under the Municipal Loan Fund Act, 16 Vic. cap. 22, a loan of the sum of £115,000, for the purpose of constructing certain roads of the united counties, in which roads the town of Port Hope was not directly interested. Afterwards the town of Port Hope itself raised a large sum of money, under the same fund, for the purpose of aiding in the construction of certain railways, and for the improvement of the Port Hope Harbour.

Held, that the town, in addition to its direct liability on the last mentioned loan, continues liable for its proportion of the debentures issued by the united counties.

The Council of the United Counties of Northumberland and Durham, under the authority of the Upper Canada Municipal Loan Fund Act, 16 Vic. cap. 22, raised the sum of £115,000, for the purpose of constructing certain roads in the counties.

The town of Port Hope was not directly interested in these roads, and no part of them was in that town.

The town of Port Hope itself raised the sums of £50,000, £30,000, £50,000 and £85,000 to aid in the construction of certain Railways: the last sum being also for the improvement of the Port Hope harbour.

In pursuance of the act of 1859, "An Act further to amend the Consolidated Municipal Loan Fund Acts," the town caused the rate of five cents in the dollar, in that act mentioned, as the assessed yearly value of all the assessable property in Port Hope, to be levied for the year 1859, and paid over the moneys arising therefrom to the Receiver General, on account of the moneys raised on their own behalf; and they claimed not to be liable for any further assessment in respect of the moneys raised by the united counties.

The united counties, on the other hand, claimed that the town is liable for its proportion of the debentures issued by the united counties: and proceeded to enforce their claim by warrant directed to the sheriff, under the provisions of the Consolidated Assessment Act of Upper Canada.

The plaintiffs thereupon applied to this court for an injunction.

McGregor for plaintiffs: *Hodgins* for defendants.

The judgment of the court was delivered by

SPRAGGE, V.C.—It is not questioned but that the by-law of the united counties for raising the sum of £115,000 was a legal one, and I suppose it cannot be doubted that under the act first referred to, 16 Vic. cap. 22, Port Hope was liable for its proportion of that debt. One clause expressly provides for such a case: "If the by-law has been passed by a county council, the principal and interest of the loan shall be payable by all the townships, towns and villages in the county;" and it then goes on to provide how the county treasurer is to apportion the amount to be paid by each. Section 53 provides that the treasurer of each muicipality shall, upon the passing of a by-law, ascertain in the mode therein pointed out, the amount required to be assessed; and proceeds, "and shall certify the amount in a notice to the clerk of the municipality, or if such municipality be a county, then to the clerk of each township, or incorporated town or village therein the amount payable by the same.

Now it is quite clear, though the statute speaks of only one assessment, that there must necessarily be two in all cases where the township, town or village had itself raised money under the act as well as the county.

Then came the act 22 Vic. cap. 15, which provided for a different mode of assessment. Section 88 in the Consolidated Statutes of Canada provides, "That a sum equal to the amount of five cents in the dollar on the assessed yearly value," or a like per centage on the interest, "at six per cent. per annum on the assessed value of all the assessable property in any municipality

which has raised money by debentures issued under the acts mentioned in the preamble to the last preceding section, shall be paid by such municipality to the Receiver General, on or before the first day of December, in the year one thousand eight hundred and fifty-nine, and every year thereafter, unless and until the total amount in principal and interest payable by such municipality to the Receiver General under the said acts, by reason of such loan, have been paid and satisfied, or a smaller sum shall be sufficient to satisfy the same in any year, in which case such smaller sum only shall be paid."

Section 94 provides: "Instead of the special rate mentioned in the fifty-third, fifty-fourth, fifty-fifth, fifty-sixth and fifty-seventh sections of this act, there shall in the present year one thousand eight hundred and fifty-nine be levied upon all the assessable property in every municipality which has raised money by debentures issued under the acts aforesaid, a rate of five cents in the dollar upon the assessed yearly value, and a like per centage on the interest, at the rate of six per cent. per annum of the assessed value of such property, and a like rate in each year thereafter, until the total sums payable as principal or interest to the Receiver General by reason of such debentures shall be paid off, or until a reduced rate shall be substituted by order in council, as hereinafter mentioned."

It is argued for the plaintiff that this substituted rate, substituted for the assessment under 16 Vic., is only authorized to be levied once — one equal rate upon all the assessable property in the municipality. I think this position wholly untenable: it is at variance with the expressed intention of the act, which is "to afford relief to the municipalities which had raised money by debentures issued under the said acts," (16 Vic. cap. 22 being one of them) "and at the same time to secure the ultimate redemption of such debentures by the municipalities *respectively* liable."

When the municipality is a county, section 11 shows that such sub-division, township, town or village is to contribute: the county being the aggregate of them all. The position contended for by the plaintiff would throw the redemption of the debentures not upon the municipality but upon a part of it. Suppose the case of half of the townships having borrowed for their own purposes, and the other half not, the debt of the county—contracted, it must be presumed, for the common benefit of all—would have to be paid by those townships only which had not borrowed: but suppose all the townships had borrowed, (and the position must apply to such a case if good at all) how could the county debt be paid?

It would be an entire change of principle from that upon which the former act proceeded, and there is nothing in the act to indicate a such change. It would be more than a change of principle, it would be rather a negation of principle, for it would shift a debt from one party to another: for every redemption in one quarter would be a burthen added to another — it would be no more just than it would be to exact that half of the members of a joint-stock company should pay the whole debt of the company; exempting, to make a parallel case, those who owed debts, on their private account to the creditors of the company.

There is besides nothing in the act necessarily calling for such an interpretation. Section 88 makes a sum to be ascertained in a particular way, payable to the Receiver General by every municipality which has raised money under 16 Vic., c. 22,—that applies to the town of Port Hope and to these united counties: each has raised money separately; each has to pay its own debt. Section 94 creates the difficulty, if any difficulty exists. It provides for the levy of a certain rate upon all the assessable property in every municipality which has raised money by debentures under, inter-alia, the same act, 16 Vic., cap. 22. Well, Port Hope is a municipality which has so raised money; these united counties are a municipality which has also raised money. The assessable property in Port Hope, it is not denied, is liable to be so assessed, in respect of the moneys raised by itself; but why is it not assessable as part of the municipality of Northumberland and Durham, while its property is assessable property as part of that municipality? The property in that town is made by the law property in two municipalities—there is nothing in the act which says that it shall be assessed in respect of one rather than the other, or that it shall not be assessed in respect of both. The act rather points to an assessment in respect of both, because the rate authorised by it is in terms "instead of the special rate mentioned in 16 Vic., c. 22" and that special rate was clearly in respect of county as well as town debts. The point appears to me to be too clear to admit of serious doubt.

The injunction must be refused.

QUARTER SESSIONS—COUNTY OF WENTWORTH.

JAMES KENT v. MATHEW OLDS ET AL.

Held, that the person appealing from a summary conviction by a magistrate must comply with all the conditions imposed upon him by the statute under which he appeals.

Where in the recognizance the appellant, instead of being bound to appear and try the appeal, &c., as required by the Act, was bound to appear at the Sessions to answer to any charge that might be made against him, the appeal was dismissed.

An application to take the appellant's recognizance in Court was refused on the ground, that, although the recognizance need not be entered into within four days it must be entered into and filed before the sittings of the Court of Quarter Sessions to which the appeal is made.

(Hamilton, December, 1860.)

This was an appeal from a summary conviction. At the trial, after notice of appeal proved, objection was taken by *Sadlier* to the form of the recognizance filed. By it the appellant was bound to appear at the Sessions to answer to any charge that might be made against him instead of being bound to appear and try the appeal, and abide by the judgment of the court and pay such costs as might be awarded, and Mr. Sadlier argued that the appellant has no standing in this Court unless he either remains in custody or enters into a recognizance such as the statute requires.

Robertson contra, argued that the appellant having appeared is subject to the order of the court, and is virtually in custody, and that the objection could not then be taken.

LOGIE, Co. J., and Chairman of Sessions.—The person appealing from a summary conviction by a magistrate must comply with all the conditions imposed upon him by the statute. He must not only give notice within the proper time, but he must also either remain in custody or enter into a proper recognizance. He has no standing in Court until he has done all that he is required to do. The appeal must be dismissed.

Note.—An application to take the appellant's recognizance in Court was refused, on the ground, that, although the recognizance need not be entered into within four days, it must be entered into and filed before the sitting of the Court.

GENERAL CORRESPONDENCE.

Vendor and Vendee—Mortgage—Judgments.

TO THE EDITORS OF THE LAW JOURNAL.

Orangeville, 16th Nov., 1860.

GENTLEMEN,—A case has just occurred here, which being rather unusual, I beg to submit to your opinion.

A. has several judgments recorded against him. B. sells and conveys by deed to A. a property, and at once takes a mortgage from him on the property and forthwith registers it.

Question? Who holds the first lien on the said property, B. by mortgage, or the prior judgment creditor of A.? Your answer will much oblige,

Your obedient servant and subscriber,

J. R. B.

[The question put by our correspondent is not free from doubt. On the authority of decided cases, however, our opinion is that the judgment creditor of A. would have the first lien. On this point, so far as the courts of common law are concerned, we quote the head note of *Rutlan* v. *Levisconte*,

16 U. C. Q. B., 495, which well represents the judgment of the court in that case:—"Where lands are conveyed to a purchaser, against whom judgments are then registered, and execution against lands in the sheriff's hand, and a mortgage is taken back on the same day for a balance of purchase money, the judgments and executions attach before the mortgage,"

It is true that Mr. Justice Burns is reported to have said, (p. 499), "There is really very little use, as it appears to me, in our being asked to consider the question in this court (Queen's Bench) which can be of no practical use to the parties, for without doubt the plaintiff would have a good remedy in equity to charge the estate by way of lien for the remainder of the unpaid purchase money, to the exclusion of the judgment creditors." The case of *Baldwin* v. *Durgnan*, 6 Grant, 595, in equity appears to us to conflict with the remarks of Mr. Justice Burns, and on the same point reference may be made to *Grace* v. *Whitebread*, 7 Grant, 591.

In Lower Canada there is a conveyance which in the same instant operates both as a deed to a vendee and mortgage back to vendor for balance of purchase money. The adoption of some such conveyance in Upper Canada, or a conveyance to uses, seems to us at present, the only safe mode of conveying land to a person against whom judgments are registered, so as to preserve a lien for unpaid purchase money as against the judgments.—EDS. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. SCALES v. BAKER. *March* 2.

Marriage settlement—Husband and wife—Separate use.

By a marriage settlement made previous to the marriage of A. and B. in 1840 a sum of £2000 was settled on B. for her sole and separate use. Shortly after their marriage they invested the £2000 in shares in a joint stock bank in their joint names. In 1856, A. sold the shares on the express understanding that he would reinvest the proceeds in some other good security in the joint names of himself and B. A. invested the proceeds however in the purchase of real property conveyed to himself in fee. A. died in 1850.

Held, on a bill filed by B. that she was entitled to be considered as an incumbrancer on the property and had a lien on it to the amount of the purchase money which belonged to her for her separate use.

V. C. K. FULLERTON v. MARTIN. *March* 8.

Settlement directed by will—Advancement and maintenance—Contingent interest—Intermediate income—Corpus.

A testator directs £6,000 to be set apart by his trustees and invested and settled upon each or either of two of his daughters marrying after his decease; as to the income to such daughter for life, for her separate use without power of anticipation; and as to the *corpus* after her decease to her children equally upon their attaining twenty-one; and in default of children attaining a vested interest such legacy to fall into the residue, which is given to certain persons for life with remainders over. One daughter marries after her father's death, and dies leaving a husband and one infant child.

Held, that it was doubtful whether a further settlement by deed was intended; that the daughter did not take an absolute interest; that the limitation to the children was contingent; and that the court would not direct the insertion of clauses other than those pointed out by the testator; he having not merely directed a settlement but pointed out what it should contain.

Held, also, that the tenant for life of the residue was entitled to the intermediate income as income.

V. C. K. DAY v. DAY. *Feb.* 28.

Bequest of Railway shares—Calls—Liability of specific legatee of shares to pay calls.

A testator leaves "to his son H. any shares in Railway's mines and other undertakings that might belong to him at his decease." *Held*, that this bequest imposed upon the legatee the onus of paying all calls accuring due subsequently to testator's death.

V. C. S. PERRY v. HOLL. *Feb.* 24.

Power of attorney—Power to Mortgage—Payment to agent.

A. gave to B. a power of attorney to recover his rents and official salary, &c., and to act generally in his affairs as fully as he himself could.

Held, that the power taken together with certain correspondence, authorised a mortgage of policies. B. an agent under a general power of an attorney had in his possession certain moneys of C. and also two policies belonging to A. his principal. B. representing that he acted by direction of A. borrowed a portion of the moneys and assigned one of the policies as security; but he never paid any portion of the money to A.

Held, that as between A. and C. there was a good payment to A.

V. C. W. HUGHES v. LEWIS. *Feb.* 29.

Practice—Motion to dismiss—Costs.

On the 18th of February, the defendant served the plaintiff with notice of motion for the 29th to dismiss for want of prosecution. On the 27th after defendants brief had been delivered to counsel replication was filed and on the 28th at 4 p.m., 20s. costs were tendered to defendant but not accepted. *Held*, that defendant was entitled to costs of the motion.

COMMON LAW.

Q. B. REGINA v. JOHNSON. *Feb.* 8.

Practice—Indictment for obstructing highway—New trial.

Where a defendant is acquitted on an indictment for obstructing a highway the court will not grant a new trial on the ground that the verdict is against the evidence.

C. P. FITZJOHN v. MACKINDER. *Feb.* 25.

Malicious prosecution—Remote cause.

If a party to a civil action commit perjury and thereby cause the judge to believe that the opposite party is committing perjury in consequence of which the judge commits such opposite party and binds over the party so committing perjury to prosecute and such last mentioned party accordingly goes before the grand jury and procures a bill to be found against the party committed and adheres to the charge at the trial when the party committed is acquitted, the prosecutor having no reasonable or probable cause for the charge but preferring it with a knowledge of its falsehood and endeavouring to maintain it by further and perjured evidence.

Held, that it is not the party who commits perjury but the judge who committed under the act who sets the criminal law in motion and by whom the prosecution is instituted; that although the perjured party does lead the committing judge into the belief that the other party who speaks the truth is swearing falsely, and thus does cause the prosecution to be instituted, yet that is only a remote cause and not sufficiently proximate to make the perjured party civilly responsible in an action for a malicious prosecution.

EX. C. ANDERSON v. RADCLIFFE ET AL. *Feb.* 8.

Champerty—Attorney and client—Security for costs incurred distinguished from a purchase of the subject matter of the suit.

After verdict and before judgment a plaintiff in ejectment assigned the subject matter of the suit to his attorney as a security for money advanced by the attorney for carrying on the suit and other purposes and for the amount due to him for his professional services. *Held*, (affirming the judgment of the Queen's Bench) that the assignment was not void as against public policy or by reason of any of the statutes against champerty and maintenance.

Q. B. CURRIE v. ANDERSON. *Feb.* 7,

Statute of frauds—Acceptance within sec. 17.

Certain goods were purchased of the plaintiffs by the defendant and were by the defendant's order delivered on a certain ship together with other goods of the defendant which had been forwarded by the defendant to the plaintiffs. The bill of lading was made out according to the defendant's directions and delivered to him. After more than a year had elapsed the defendant returned the bill of lading to the plaintiffs and informed them that the goods were lost, requesting them at the same time to see after them, and stating his opinion that the master was liable.

Held, in an action to recover the price of the goods that there was here sufficient evidence to warrant the jury in finding that there had been an actual receipt and acceptance within section 17 of the statute of frauds.

Q. B. BEACHEY v. BROWN. *Feb.* 15.

Contract—Promise of marriage—Plaintiff's engagement to another person.

The existing engagement of the plaintiff to another person of which the defendant was ignorant at the time of an agreement by the plaintiff and defendant to marry is no defence to an action on the agreement.

Q. B. REG. v. KNIGHT ET AL. *Feb.* 26.

Highway—Obstruction—Power of Gas Companies to lay down pipes.

The members of a gas company having parliamentary powers to open streets for the purpose of public lighting, but having no similar powers for the purpose of conveying gas to private houses, are liable to be convicted for a nuisance in obstructing the highway, if they open the streets in order to lay down service pipes from the mains already laid down by them for public lighting to the houses of the adjacent inhabitants.

An inhabitant who directs such service pipes to be laid down to his house is also similarily liable.

Q. B. IN RE MARSACK v. WEBBER. *Feb.* 25.

Arbitration—Costs—Event of award.

Where two parties agree to refer several disputes arising out of one matter to arbitration and that "the costs of the reference and award are to abide the event of the award," and the arbitrator decides some of the matters in dispute in favor of one party and some in favor of the other, there is no "event" of the award within the meaning of the agreement, and neither party is entitled to his costs.

EX. WYATT v. WHITE. *Feb.* 25.

Malicious prosecution—Reasonable and probable cause—Search warrant—Direction to arrest person in whose custody goods are—Effect of.

A direction in a search warrant to arrest the person in whose custody the goods alleged to be stolen are, consequent upon the warrant to search and the person procurring the warrant to be issued, is not responsible for an imprisonment under it if there was reasonable and probable cause for believing that the goods were stolen.

EX. BENNETT v. BAYES ET AL. *Feb.* 25.

Landlord and tenant—Distress for rent—Responsibility of agent of landlord for wrongful distress—Distress after tender.

The agents of a landlord for collecting his rent signed as such agents and delivered to a broker a warrant to distrain for rent in arrear. The tenant made a good tender of rent to one of the agents before the execution of the warrant which was refused and the goods distrained

Held, that the agents were responsible in an action for such wrongful distress.

Quære, whether an agent for landlord who directs a broker to distrain for a landlord is responsible if the distress becomes unlawful by the act of the broker.

Q. B. CHILDERS v. WOOLER ET AL. *Feb.* 25.

Sheriff—Execution against goods of wrong person.

The attorney of an execution creditor in an action against W. F. caused a writ of *fi. fa.* to be issued against W. F. and endorsed on the writ. The defendant is a "blank" and resides at Redcar. The writ was delivered to the sheriff who executed it against W. F. who resided at Redcar and son of the real defendant W. F. who resided at Coatham near Redcar. The attorney and the sheriff both acted *bona fide*. *Held*, (*dissentiente* WIGHTMAN, J.,) that the endorsement on the writ was the mere statement by the attorney of the execution creditor for the purpose of affording information to the sheriff and left him to his own discretion as to how he should act and that it was not a requirement to the sheriff which made him the agent of the attorney for the purpose of seizing the goods of W. F. the son.

Q. B. *Jan.* 26.

ROUTLEDGE, APPELLANT v. HISLOP, RESPONDENT.

Master and servant.

A servant in husbandry sued her master in the County Court, claiming damages on the ground that she having been hired for a year had been dismissed within the year without reasonable or probable cause, in which suit the decision was in favor of the master. She then applied to the justices of the Peace for an order upon her master to pay her her wages; claiming her wages for the whole year, on the ground that she had been dismissed without just cause.

Held, that the justices had no power to enquire into the merits of the case and adjudicate thereon, as the same question substantially had been already adjudicated on by a court of competent jurisdiction.

Q. B. RENWICK v. TIGHE. *April* 19.

Bill of exchange—Presentment—Notice of dishonor.

The plaintiff, holder of a bill of exchange, having asked the acceptor on the last of the days of grace if he was going to pay the bill was told by him that the defendant the drawer would pay it, and that he had not a shilling. The plaintiff did not formally present the bill to the acceptor but sent the same day by post a notice to the defendant that the bill was not paid, which notice was addressed to the defendant at "Edward Street, Hampstead Road;" the defendant had a lodging at 28 Edward Street, but the notice never reached him. The bill was dated from "London" only.

Held, that there was no impediment to the action either for want of a sufficient presentment for payment or a sufficient notice of dishonor.

C. P. BECK v. DENBIGH ET AL. *April* 17.

Trespass—Trover—Distress.

If a landlord put in a distress and declare that he distrains and does really intend to distrain certain goods on the premises which are not by law distrainable—for this *alone* neither trespass nor trover will lie—the intention not constituting any cause of action. The ruling of the judge that inasmuch as the sale took place subsequently to the issuing of the writ no evidence of the sale could be given, held to be correct.

Q. B. HOLDEN ET AL V. BALLASTYNE ET AL. *April* 18.

Practice—Misjoinder of defendants—Discretion of the judge as to amending the record—Common Law Procedure Act.

By the C. L. P. Act it shall and may be lawful for the Court or a judge in case of the joinder of too many defendants in any action on contract at any time before the trial of such cause to order that the name or names of one or more of such defendants be struck out if it shall appear to such Court or judge that injustice will not be done by such amendmont.

Held, that the court *in banc.* will not review the discretion of the judge where he has refused to amend, *contra*, where he may have amended improperly.

REVIEWS.

THE NORTH-BRITISH REVIEW for November is before us, and is an excellent number.

The discussion which is now taking place upon Theological subjects, occupies the first pages with a genial yet conservative article under the heading of "Modern Thought, its progress and consummation" which is well worth a perusal.

The events which have lately transpired in Syria, render interesting, an account of the Druises, the tribe which during the past year has so fiercely revived the animosity of the Mahommedan to the Christian.

Critical and generous notices of the writings and literary position of Leigh Hunt, Lord Macaulay and the American Humorists give a graceful attraction, while a carefully prepared paper upon the "Province of Logic and recent British Logicians" enters fully into an abstruse subject, with a lucidity of style necessary for the general reader, and an ability to be admired by the student whatever his metaphysical views.

There is also an article upon the South American Republics, whose progress seem to have been impeded throughout their entire history, by internal contests not unlike the one now threatening the more powerful republic of North America.

Other papers upon Revivals, &c., conclude the quarterly.

THE ECLECTIC MAGAZINE for January is received.

This magazine it will be recollected is made up of selections from the best current foreign literature, together with embellishments.

The embellishments of the present number relate to historic events of France and England in *the divorce of the Empress Josephine and King Henry the VIII., and Anne Boleyn.*

Several selections from Italy, Sicily, and Syria, are at present opportune considering the great interest now felt in these places.

The Reviews contribute other entertaining articles among which is a noticeable a paper from the *British Quarterly* with the heading of "Hours with the Mystics." It reviews the different phases presented by Sabbatism, Gnosticism and Mysticism from the earliest times.

We take this opportunity of thanking the enterprising publishers for two premium plates beautiful in design and well executed called respectively "Sunday Morning and "Returned from Market."

PATENTS OF CANADA, FROM 1824 TO 1849. Toronto: Printed by Lovell & Gibson, Yonge Street, 1860.

The business of the Patent Office in Canada having (according to the Preface) within the last few years greatly increased, the government have deemed it advisable to follow the example of other countries and to publish from time to time the specifications and drawings of all Patents issued in the Province.

The volume before us (700 pages) contains the specifications of Patents issued in both Provinces before and after the union, from the year 1824 to January 1844, and of the specifications and drawings from the latter period till 1849.

It has not been thought advisable to incur the expense of engraving drawings of those inventions the patent right of which expired in January, 1858; for (as well remarked in the Preface) the publication of the names and specifications of such is sufficient notice of their having existed, and that they have by the expiration of fourteen years, now become public property.

We understand that a second volume of the publication will be issued on or before 1st May next.

We cannot too highly recommend this well directed effort of the Canadian Government. The patent interest is now becoming in Canada, as in older countries, one of great importance. Few there are who understand or pretend to understand the intricacies of the law regulating the granting of Patents for inventions; but to solicitors concerned in the issuing of patents, and to all inventors intending to apply for patents, a knowledge of patents previously granted is most essential.

We regret to say that applications for Letters Patent are too often prepared by men who know nothing of the law relating to such applications. The result *is* incomprehensible specifications—and *will be* endless and vexatious law suits.

It is the fashion with every man who feels himself able to spell the Queen's English, and to reduce it to passable syntax to prepare agreements, deeds, mortgages, and other such writings. That fashion is now being extended to the preparation of the more difficult writings necessary to the obtaining and validity of Letters Patent for invention. The consequences will fall upon those who are sufficiently "penny wise and pound foolish" to employ mere scriveners.

Lawyers however have no good grounds to complain of "these fashions." The most tedious chancery suits, and the most protracted law suits are those that arise upon the the construction of bungled conveyancing. We know one instance where a man to save $3 employed a schoolmaster to prepare a mortgage, and afterwards had the pleasure of paying $200 to have it reformed in Chancery so as to express what was really intended by the parties, and what a lawyer of any experience could not have failed to express.

BLACKWOOD'S MAGAZINE is received.

It contains the conclusion of an argument upon the benefits of Iron-clad ships of War, a paper upon Social Science, and some entertaining matter of a light character.

APPOINTMENTS TO OFFICE, &C.

NOTARIES PUBLIC.

WILLIAM MORTIMER CLARK, of Toronto, Esquire, Attorney-at-Law.—(Gazetted December 8, 1860.)

WILLIAM DICKINSON MACKINTOSH, of Sarnia, Esquire, Attorney-at-Law.—(Gazetted December 8, 1860.)

THOMAS WATTS, of Ottawa, Esquire.—Gazetted December 8, 1860.)

WILLIAM STEVENS SENKLER, of Brockville, Esquire, Solicitor-in-Chancery.—(Gazetted December 22, 1860.)

ASSOCIATE CORONERS.

JOHN MUNRO, Esquire, M.D., for County of Wellington.—(Gazetted December 8, 1860.)

ROBERT CHARLES MANNERS, Esquire, for County of Middlesex.—(Gazetted December 22, 1860.)

THOMAS R. K. SCOTT, Esquire, for County of Lambton.—(Gazetted December 22, 1860.)

TO CORRESPONDENTS.

"B."—Under "Division Courts," page 14.

"J. J. R."—Under "General Correspondence," page 21.

DIARY FOR FEBRUARY.

3. SUNDAY ..... *Sexagesima.*
4. Monday ..... Hilary Term commences.
5. Tuesday ..... Chancery Exam. Term, Toronto, commences. Last day for notice for Sandwich and Whitby.
8. Friday ..... Paper Day, Q. B.
9. Saturday ..... Paper Day, C. P.
10. SUNDAY ..... *Quinquagesima.*
11. Monday ..... Paper Day, Q. B.
12. Tuesday ..... Shrove Tuesday. Paper Day, C. P. Last day for notice Chan. Exam. Chatham and Cobourg.
13. Wednesday ... Ash Wednesday. Paper Day Q. B. Last day for serving writ for County Court.
14. Thursday ..... Paper Day, C. P.
16. Saturday ..... Hilary Term ends.
17. SUNDAY ..... *1st Sunday in Lent.*
19. Tuesday ..... Chancery Ex. Term, Sandwich and Whitby, commences. Last day for notice London and Belleville.
23. Saturday ..... Last day to declare County Court.
24. SUNDAY ..... *2nd Sunday in Lent.*
26. Tuesday ..... Chancery Ex. Term, Chatham and Cobourg, commences.
28. Thursday ..... Sittings of Court of Error and Appeal commence.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

FEBRUARY, 1861.

NOTICE.

Subscribers desirous of availing themselves of the discount of one dollar on the Subscription money to the Law Journal, are reminded that in order to secure the discount payment must be made on or before 1st March proximo. The terms are $4 per annum for one year's subscription, if paid on or before 1st March—otherwise $5, without abatement.

ADMINISTRATION BONDS.

Liability of Sureties.

It is seldom if ever that intending sureties, before executing bonds, examine their contents with a view to determine the nature or extent of the responsibility which they are about to incur. This remark is perhaps more true of administration bonds than of bonds of any other kind.

The signing of an administration bond is deemed "a mere matter of form," and the giving of it is in general looked upon simply as an act of kindness to a friend. Little is ever afterwards thought of the liability incurred until in all probability the commencement of a suit. Then the "mere matter of form" assumes the proportions of "a dread reality," and every effort is made to frustrate its legitimate effect.

We purpose to make some observations on the nature and effect of an administration bond, and incidentally on the liability of those who become parties to it.

The administration bond owes its origin to two English statutes, the one (21 Hen. VIII. cap. 5, s. 3) which directed the Ordinary, the person then authorised to grant administration, "taking surety of him or them to whom shall be made such commission;" and the other (22 & 23 Car. II. cap. 10, s. 1) which further provided that "all Ordinaries, as well as the Judges of the Prerogative Courts of Canterbury and York for the time being, as all other Ordinaries and Ecclesiastical Judges, and every of them having power to commit administration of the goods of persons dying intestate after 1st June, 1671, of the respective person or persons to whom any administration is to be committed, take sufficient bonds, with two or more able sureties, respect being had to the value of the estate, in the name of the Ordinary."*

"The condition of the bond, which to this day is little altered, was required to be in the following form:

The condition of this obligation is such, that if the within bounden A. B., administrator of all and singular the goods, chattels and credits of the said deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hand or possession or knowledge of him the said A. B., or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of —— Court, at or before the —— day of —— next ensuing. And the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased, at the time of his death, which at any time after shall come to the hands or possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer, according to law. And further, do make or cause to be made a true and just account of his said administration, at or before the —— day of ——. And all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administrator's account, the same being first examined or allowed by the Judge or Judges for the time being of the said Court, shall deliver and pay unto such person or persons, respectively, as the said Judge or Judges by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint. And if it shall appear that any last will or testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Court, making

* These acts were made perpetual by the stat. 1 Jas. II., cap. 17.

request to have it allowed and approved accordingly, if the said A. B. within bounden, being thereunto requested, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said Court; then this obligation to be void and of none effect, or else to remain in full force and virtue."

Upon dissecting this condition it will be found that the duties of the administrator, and for which the sureties become responsible, are the following:

First—To make a true and perfect inventory of all and singular the goods, chattels and credits of the deceased.

Second—To exhibit the inventory in Court at or before a day limited for the purpose.

Third—To well and truly administer according to law.

Fourth—To make a just and true account of his administration, at or before a day limited for the purpose.

Fifth—To make distribution of the goods, chattels and credits, that shall be found remaining upon the account, the same being first examined or allowed by the Judge or Judges for the time being of the Court.

Sixth—To render and deliver the letters of administration upon the discovery and approbation of a will of the deceased, in the manner described.

A Probate and Surrogate Court were, in 1793, established in Upper Canada (33 Geo. III. cap. 8). The former was a court as to jurisdiction extending to the whole Province, and the latter were local courts co-extensive with the districts in which situate. If the intestate died possessed of goods, chattels and credits, in more than one district, letters of administration were issued from the Probate Court; but if in one district only, then from the Surrogate Court of that district. The Judge of Probate, and every Surrogate in his district, upon granting letters of admistration of the goods of persons dying intestate, were required (as by the act 22 & 23 Car. II.) "to take sufficient bonds of the respective person or persons to whom any administration is to be committed, with two or more able sureties, respect being had to the value of the estate, in the name of the Governor, Lieutenant Governor, or person administering the government of the province." (sec. 12.) The condition of the bond was given, and was almost word for word the same as that above set forth as prescribed by the English statute 22 & 23 Car. II.

In 1858, the Probate Court of Upper Canada was abolished, and the jurisdiction at the time of its abolition exercised or exercisable by it was transferred to the several Surrogate Courts of Upper Canada, of which one was established in each county. (22 Vic. cap. 93.) By section 45 of this act, it was provided that every person to whom any grant or administration should be committed should give bond to the Judge of the Surrogate Court from which the grant was made to enure for the benefit of the Judge of the Court for the time being, with one or more surety or sureties, as might be required by the Judge of the Court, conditioned for the due collecting, getting in and administering the personal estate of the deceased; which bond was required to be in such form as might be prescribed by the rules and orders under the act, and in cases not provided for by the rules and orders the bond was required to be in such form as the Judge of the Surrogate Court should by special order direct. By section 46, the bond was required to be in a penalty of double the amount under which the estate and effects of the deceased were sworn, unless the Judge in any case should think fit to direct the same to be reduced, in which case it was declared lawful for the Judge so to do; and it was also provided that the Judge might direct that more bonds than one should be given, so as to limit the liability of any surety, to such amount as the Judge might think reasonable. By section 44 of the same act, it was provided that so much of the English acts of 21 Hen. VIII., cap. 5, 22 & 23 Car. II., cap. 10, and 1 James II., cap. 17, "as requires any surety, bond, or other security to be taken from any person, to whom administration shall be committed, shall henceforth cease to extend to or be in force in Upper Canada."

On 29th November, 1858, the Rules and Orders having been made were promulgated, and by Rule 27 it was provided that the bond to be given upon any grant of administration, should be according to the forms 16 and 17 thereto subjoined, or in a form as near thereto as the circumstances of the case admit. The condition of the bond is substantially the same as that already noticed. In some particulars, however, not unimportant, there is a difference which we shall proceed to describe.

The duties of the administrator (as in the foregoing condition under the English Statute of Car. II.) are made six in number, viz.:

First.—To make an inventory of "*all the personal estate and effects, rights, and credits*" (not "goods, chattels, and credits," as in the old form of condition) of the deceased.

Second.—To exhibit the inventory so made "*when lawfully called on in that behalf*" (not on a day fixed for the purpose, as in the old form of condition).

Third.—To administer the personal estate, &c., according to law, "*that is to say, do pay the debts which the said deceased did owe at his decease.*"

Fourth.—To make a just and true account of his administration "*whenever required by law so to do*" (not on a day fixed for the purpose, as in the old form of condition).

Fifth.—To make distribution to such person or persons "*as shall be entitled thereto under the provisions of any act*

of Parliament now in force or that may hereafter be in force in Upper Canada."

Sixth.—To render and deliver the letters of administration upon the terms and under the circumstances mentioned in the old form of condition.

Let us now consider what would be a breach of an administration bond in Upper Canada, so as to cause a forfeiture of it. The following may be, it is apprehended, assigned as breaches—that the administrator has not made an inventory—has not exhibited it—has not well and truly administered according to law—has not made a just and true account of his administration—has not made distribution—or has not under the circumstances stated as to the discovery of a will, made a render of the letters of administration.

Under the old form of condition, most if not all of these breaches might be incurred without any previous citation (*Archbishop of Canterbury* v. *Willes*, 1 Salk. 365). The reason was that as the administrator was, by the express language of the condition, required to exhibit an inventory and to account at certain days, he was bound to do so at his peril; but now that he is only to make an inventory "when lawfully called on in that behalf," and the same to exhibit "whenever required by law so to do," and to account "whenever required by law so to do," it is believed a citation will be, in the cases specified, requsite.

A still greater change will arise as to the construction and effect of the condition that the administrator "shall well and truly administer according to law, &c." It was, under the old form of condition, held to be no breach that the administrator had not paid the debts of the intestate. Thus it was held that a creditor of the intestate was not entitled to sue upon the bond and assign as a breach, the non-payment of a debt due to him. The words of the condition, that the administrator was to well and truly administer, &c., were construed as to bringing in the account, and not as to paying the debts of the intestate (*Archbishop of Canterbury* v. *Willes*, 1 Salk. 315, *Browne* v. *Archbishop of Canterbury*, 1 Lutv. 882 b). It was said that such was the law even though a devastavit or waste were suggested (*Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 711). Now, however, by the condition of the bond it is especially provided that the administrator shall "well and truly administer according to law, that is to say, *do pay the debts which the said deceased did owe at his decease.*" If any effect is to be given to these words, the old authorities are no longer law because the branch of the condition to which they apply has been most materially altered. The old cases most unjustly limited the operation of the words "well and truly administer according to law," so that an administrator might waste the personal estate of deceased, and yet creditors be without a remedy as against his sureties. The meaning of the words "well and truly administer according to law," is not left in doubt to be decided by judicial interpretation, but on the face of the obligation made to signify that the administrator shall "pay the debts which the deceased did owe at his decease." We are not aware that any case has yet arisen in which the alteration has received judicial consideration, but take this occasion to direct attention to it. It appears, so far as we understand it, greatly to widen the responsibility of sureties to administration bonds.

So under the old form of condition it was held that the neglect or refusal of the administrator to distribute the surplus or residue of the effects of the deceased among the next of kin, was not a breach of that branch which required the administrator to deliver and pay over the residue, unless there had been a previous decree or sentence of the Ecclesiastical Judge, because by the terms of the condition such decree should precede the distribution (*Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 690); but under the form of bond now in use, no such decree appears to be required before distribution, and therefore the distribution would seem not to be made dependent upon it.

When the administrator applies to his own use the effects of the intestate so that those effects are entirely lost to the estate of the intestate, this has always been held such a breach of the bond by which the administrator undertakes "well and truly to administer according to law," as will entitle those interested to have the bond put in suit (*Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 690).

In the United Stntes it has been held that a devastavit or waste cannot be tried in an action against the administrator and sureties, brought on the administration bond (*Steward* v. *The Treasurer of Campagn County*, 4 Ohio Rep. 98; *Coney* v. *Williams et al*, 9 Mass. Rep. 114); but in another state the contrary was held (*The People* v. *Dunlop*, 13 Johns, 437).

As the law stands in Upper Canada, upon a plea of *plene administravit* by the administrator, it is in the power of a plaintiff to reply lands, and if confessed, have the same sold on a judgment against the administrator. In other words, lands are here made assets in the hands of an administrator for the satisfaction of debts. In no case of which we have any knowledge, has the liability of the sureties of an administrator in respect of the waste of lands by an administrator, been determined. By the terms of the bond the sureties are liable for the due administration "of the personal estate and *effects*, rights, and credits of the deceased." Whether or not the word "effects," can be construed to extend to lands is not yet determined. It has been held in the United States, that the sureties in an administration bond are liable

only for the administration of the goods, chattels, and credits of the deceased, which were at the time of his death (*Reed v. Commonwealth*, 11 S. & R. 441); and so they were not held liable for the act of the administrator in confessing a judgment on which the real estate of the deceased was sold, and applied to the payment of debts which were posterior in order to those which would have been paid had the property been brought into a course of administration (*Ib*).

The statute now regulating the granting of letters of administration, is Consolidated Statute of Upper Canada, cap. 16. It is a re-enactment of the former act 22 Vic., cap. 93, and the remarks that we made upon the last mentioned act, will equally apply to the existing law.

THE PITTSBURGH LEGAL JOURNAL.

We notice that the proprietors of the *Pittsburgh Legal Journal* have made arrangements with the State Reporter, Mr. R. E. Wright, under which there will be published officially in that Journal, abstracts of all cases that are intended to be reported in the forth-coming volumes of the Pennsylvania State Reports.

UPPER CANADA REPORTS.

The attention of the Profession is directed to an advertisement of Maclear & Co., in this number of the *Law Journal*, offering a complete set of the Upper Canada Reports for sale. The chance is a rare one, and we are informed that the selling price is much less than cost.

LAW SOCIETY, UPPER CANADA.

HILARY TERM, 1860.

ARTICLED CLERKS' EXAMINATION.

SMITH'S MERCANTILE LAW.

1. What is an indorsement in full, or in blank respectively, of a bill or note; and what bills or notes can be transferred by mere delivery?

2. State the requisites of a valid tender?

3. What is a nominal, and what a dormant partner, and upon what principles respectively does their liability to third persons depend?

4. In what cases will a master be held liable for goods bought on his credit by a servant?

BLACKSTONE'S COMMENTARIES, VOL. 1.

1. What is the common law of England?

2. What is the meaning of the maxim, The King can do no wrong?

3. What is the distinction between absolute and relative rights?

STORY'S EQUITY JURISPRUDENCE.

1. In what cases has a vendor of real estate a lien for the purchase money?

2. Under what circumstances will a court of equity decree specific performance of a parol contract for the sale of land?

3. When will a court of equity relieve against penalties and forfeitures?

4. What is the nature of the relief given by a court of equity on a bill filed to establish a will?

WILLIAMS ON REAL PROPERTY.

1. Give a definition of a vested remainder? Mention an example.

2. What is requisite to the validity of a deed of bargain and sale?

3. Give an instance of tenancy by sufferance.

4. What is the difference between an indenture and a deed poll?

5. Can a valid lease of lands be made by parol, in any and what cases?

STATUTES AND PLEADING OF THE COURTS.

1. In what cases can replevin be brought in this province?

2. What is the effect of suing the several parties to a bill or note in separate actions?

3. If the defendant in an action of ejectment does not appear at the trial, what is necessary to entitle the plaintiff to a verdict?

4. What is the rule, under the Common Law Procedure Act' for pleading and traversing the performance of conditions precedent?

5. How must an infant sue in equity?

6. What is the proper proceeding to enforce obedience to the decrees or orders of the Court of Chancery?

7. What is the next proceeding in a cause in Chancery, after a demurrer to the Bill has been overruled?

EXAMINATION FOR CALL.

SMITH'S MERCANTILE LAW.

1. To what limitations is an undisclosed principal's right to sue in his own name subject?

2. What is an actual and what a constructive total loss; in what cases is the insured entitled to abandon, and what is the effect of abandonment?

3. State the rules with regard to appropriation of payment?

4. How may a right of lien once acquired be lost?

BYLES ON BILLS.

1. Will an indorser be entitled to notice of dishonour, where it can be shewn that he knew the bill would be dishonoured; and what information must a notice of dishonour contain?

2. Is there any and what distinction between the liability of the drawee of a bill of exchange and a banker on whom a cheque is drawn?

3. If a bill obtained by fraud be indorsed by A. to B., B. having notice of the fraud, but A. being an innocent holder, can B. recover on the note? Give your reasons.

TAYLOR ON EVIDENCE.

1. Has the party on whom the *onus probandi* lies in all cases the right to begin?—if not, state any exceptions.

2. State any exceptions to the rule that hearsay evidence is inadmissible.

3. What is the limitation as to the right of calling evidence to contradict a witness who denies that he has made a particular statement at another time?

4. Is a declaration by a person not a party to the record accompanying an act in any cases admissible in evidence? Give your reasons.

STORY'S EQUITY JURISPRUDENCE.

1. What is a bill of discovery? Mention some of the cases in which such a bill will lie.

2. What is a constructive trust? Give some examples.

3. Can a suit for specific performance be maintained by a purchaser of land against the vendor where the contract is signed by the vendor only?

4. Can an infant purchaser of lands maintain a bill for specific performance of his agreement to purchase? Give a reason for your answer.

5. Is an executor liable in equity for a debt due by him to his testator's estate?

6. When will the widow of a testator be bound to elect between her dower, and a legacy given her by the will?

7. In what manner can a mortgagee of personalty enforce his security?

WILLIAMS ON REAL PROPERTY.

1. What are the distinguishing features of a joint tenancy?

2. What are "springing uses," and "shifting uses" respectively? Give examples of each class, and shew in what way they do not conform to the common law.

3. What powers may and what may not be released or extinguished by the donee?

4. Is a conveyance of an estate of freehold, to commence at a future day, valid at common law?

5. What is essential to the due execution of a dower!

6. In what manner can an estate tail in possession be barred? What is the proper mode of conveyance for a tenant in tail to adopt to convert his estate tail in possession into an estate in fee in himself?

ADDISON ON CONTRACTS.

1. What is the rule with regard to proof of consideration for simple contracts, contracts under seal, and negotiable instruments respectively?

2. Does a promise by A. to pay the debt of B., who has been taken under a *Ca. Sa.* in consideration that B.'s creditor will discharge him from the *Ca. Sa.*, require to be in writing? Give your reasons.

3. What is the effect of the consideration for a contract being partly legal and partly illegal?

4. In what cases will a request be *implied* where the consideration for a promise is *executed?*

PRACTICE AND STATUTES.

1. When will a devise of lands by a tenant in fee simple, without words of inheritance carry the fee?

2. How must a will of lands be attested?

3. Under a conveyance to two or more persons, without words indicating whether they are to take as joint tenants, or tenants in common, how will they take? Are there any and what classes of persons to whom the rule does not apply?

4. How do relatives of the half-blood take by descent?

5. An answer to a bill having been filed, and no subsequent proceedings having been taken by the plaintiff within the time limited for that purpose, what courses of proceeding are open to the defendant?

6. What is meant by the expression that a suit is abated? In what manner is an abatement rendered?

7. To a suit by a *cestui que trust* to carry into execution the trusts of a deed of assignment for the benefit of creditors, who are the necessary parties?

8. What is the effect upon a future suit between the same parties, in respect of the same matter, of a plaintiff taking an order to dismiss his own bill after the cause is set down for hearing?

9. In an action of trespass, where the plaintiff recovers less than forty shillings, how many certificates are necessary to entitle him to full costs, and what must such certificates contain?

10 Is a plea of accord without satisfaction, or satisfaction without accord, or either of them, a good plea?

11. Mention some causes of action in which money cannot be paid into courts.

12. Where the time for making an award is enlarged by Judge's order, and no time specified in such order, for how long a time is the enlargement?

EXAMINATION FOR CALL WITH HONORS.

JUSTINIAN'S INSTITUTES.

1. Give a definition of the legal term "obligation," as used in the civil law.

2. How were obligations arising from contracts divided, in the civil law, with reference to the manner of their creation?

3. Give an instance of a contract created "*verbis.*"

4. Give definitions of the contracts of "*mutuum*" and "*commodatum,*" and explain the distinction between them.

5. What was essential to make the contract of sale complete in in the civil law?

6. Give a definition of "*novatio,*" and explain the mode in which an obligation was dissolved by it.

COOTE ON MORTGAGES.

1. If leaseholds are mortgaged, and before the mortgage is paid off the term expires, and the mortgagee then takes a new lease in his own name, what are his rights in respect of such new lease?

2. If a surety for a mortgagor purchases the mortgage for a less sum than the mortgage debt, what are his rights against the mortgagor?

3. What is the proper remedy of an equitable mortgagee who desires to apply the rents and profits of the estate, in reduction of his debt?

4. Is a mortgagee who assigns the mortgage in any case liable to the mortgagor for rents and profits received after the assignment by his assignees? Give reasons for your answer.

5. Will a mortgage given by a client to his solicitor for costs due and to become due be to any and what extent a valid security?

6. Can the mortgagee compel the mortgagor to account for rents and profits received by the latter while in possession?

DART'S VENDORS AND PURCHASERS.

1. Is a conveyance upon a sale by an infant void or voidable only?

2. If an infant vendor commit a fraud upon the purchaser by falsely representing himself as of age, will a court of equity give the purchaser any and what relief, if the vendor attempts to recover the land in ejectment?

3. What are the requisites to a confirmation by a *cestui que trust* of a voidable purchase of the trust estate by his trustee?

4. What false statement by the vendor will avoid the contract?

5. What are the essential requisites to the validity of an agreement for the sale of lands?

6. What is constructive notice? Give a definition.

7. How must a vendor, relying on a waiver by the purchaser of his right to an investigation of the title, charge such waiver in his bill for specific performance?

8. What covenants for title has a purchaser a right to, from a vendor who has acquired the estate sold by inheritance?

JARMAN ON WILLS.

1. In what cases is parol evidence admissible to shew the intention of a testator? Give instances.

2. Give some instances of estates arising by implication under a will.

3. In what cases will cross remainders be implied in a will? Give examples. Is there any difference between the construction of wills and deeds as to the implication of cross remainders?

4. Explain the doctrine of "election" as applicable to wills. Give an example.

5. When will lands held in trust pass under a general devise of all the testator's lands?

6. Under devise to A. and his children, A. having no children at the date of the testator's death, what estate will A. take? What estate would such a devise have conferred if A. had had children at the testator's death?

WATKINS ON CONVEYANCING.

1. Can an estate for years be in any mode and how so limited to A. for life with remainder over to B. and the heirs of his body that the first taker cannot defeat the remainder? If an estate to C. and his heirs were limited after the limitation to B. and the heirs of his body, what estate would C. take?

2. If there is a conveyance by deed of bargain and sale to A. and his heirs, to such uses as A. shall appoint, and in default of appointment to the use of A. and his heirs, and A. executes an appointment to B. and his heirs, does B. take any and what estate at law? Give reasons for your answers.

3. What estate will pass under a conveyance by bargain and sale to A. and his heirs by tenant in tail in remainder, without the consent of the protector of the settlement?

4. What are the distinctions (five in number) between an executory devise and a contingent remainder?

5. What estates may be successively limited by way of executory devise? Within what period must an executory devise be limited to take effect in possession, so as to avoid the rule of law against perpetuities?

6. When does a tenancy by entireties arise? Give an example.

7. What liability does the mortgagee of leasehold incur in respect of the covenant on the part of the mortgagor contained in the lease? Does this liability arise from privity of estate or privity of contract?

STORY'S CONFLICT OF LAWS.

1. If a debt contracted in England be there barred by the Statute of Limitations, can the creditor recover it in this country? Give your reasons.

2. If one enter into a contract in a foreign country to pay money, or do any other act in this, which contract is void by the law of the foreign country but valid here, by which law is its validity to be determined by our courts?

3. Can an action be maintained here on a contract void under the Statute of Frauds, but made and to be performed in a foreign country, by the law of which it is valid? Give reasons for your answer.

4. By what law is the succession to the moveable estate of an intestate to be regulated, where the intestate's domicil is in one country, and the moveable property in another? Give reasons for the answer.

5. If a testator domiciled in Scotland, but seized of real estate in this country, make a will in Scotland disposing of his lands here, upon what law would the construction of the will depend? Give reasons for the answer.

STORY ON PARTNERSHIP.

1. To what extent can the sheriff seize partnership property upon a judgment against an individual partner for his separate debt? And what is the position of a purchaser from the sheriff in such a case?

2. Is the rule that a release by one partner of a debt due to the firm an exception to the doctrine that one partner has no authority to bind his co-partners by deed? If not, upon what principle does the effect of such release depend?

3. Is there any, and if so, what cases in which a retiring partner, after notice, will be held liable for the new debts of the new firm?

4. What is the effect of the death of one partner, and what is the position as regards the partnership property of his personal representatives?

5. What is the presumption, in the absence of precise stipulation, as the proportion in which each partner is to share in the profits; and does the amount which each has contributed effect this presumption?

RUSSELL ON CRIMES.

1. Does the crime of larceny necessarily involve a trespass? Does it differ in this respect from embezzlement, and obtaining money by false pretences, and if so, how?

2. What is the *Common Law* offence of arson?

3. Can a woman be accessory after the fact to a felony committed by her husband, and does this rule apply to treason? Give your reasons.

4. What is the definition of burglary, and what is considered night for this purpose?

5. Are there any crimes for which a woman will be answerable if committed under the control of her husband? If so, mention them.

THE ART OF PLEADING.

(From the Solicitors Journal.)

At the last meeting of the Glasgow Legal and Speculative Society, in the Faculty Hall, the President having introduced the Lord-Advocate, his lordship, after some preliminary observations said—The subject that I have chosen is the art of pleading as distinguished from the other branches of legal education; and as I understand that all the members of this society are intended for the practice of the profession of law, it probably may not be amiss to direct a few observations to that very important, and, as an artistic branch of the profession, rather neglected study. For, while the study of the law itself embraces and engrosses the attention of the student, I think there is too little attention paid to the rules by which the art of pleading should be conducted, and yet that, in order to success in the profession as the law now stands, is essential—not merely written pleading, as it used to be, but oral pleading, which, I am happy to say, is the principal vehicle by which the cases are now discussed; and therefore, as the importance of the legal tribunal increases—and it has greatly increased—it is the more necessary to understand the philosophical and practical rules upon which cases should be argued as well as decided. The objects and principles of pleading, in the vulgar sense, are much misunderstood. We often see and hear it represented as if the business of the lawyer were to make the worse appear the better reason—as if, at all events, that was part of his profession—that the main object of a pleader was to gloss over the truth, or to be able to do so, and to be able to present that which is not true in unreal and false colours. Now I deny altogether, not merely the general truth of this, but I deny that there is anything in the practice of the legal profession which in the slightest degree warrants or vindicates the assertion. It is quite the reverse. In order to excellence or effect in pleading precise and strict accuracy is absolutely essential, and no man can be a great pleader without it. The truth is, the mistake arises from ignorance of what the art of pleading is—from imagining that there is something precise and definite in legal right. It is not so, and it never can be so, because the law is in one sense unjust. It is an average justice that a legal system must aim at, and the art of pleading is the art of bringing the circumstances to which the pleading is applied within the favourable category of the law. In the great

majority of cases that is a question of dialectics, not a question of fact, fairly admitting of a difference of opinion and of discussion on both sides. Plainly then, in the just exercise of the art, the elements of truth and falsehood, in their absolute sense, do not arise. That is the better reason which the judge confirms, the worst is that which he rejects: and, therefore, in a strict logical sense the result of making the worse appear the better reason cannot by possibility arise. In the noble profession of the law, about the highest intellectual exercise in which a man can be engaged, there is nothing whatever that approaches to the maintenance of falsehood instead of truth in the dialectics that are necessary for the due argument of the general legal question. On the contrary, if a man has a bad case, the argument which must maintain it is an argument that cannot be maintained. You may think so; but he is a suitor in the court, and he is entitled to have his case stated, and he is entitled to have his argument as favourably put for him as the facts will admit; and it is in vain to say, therefore, that the man who only discharges a great public duty by so stating it is liable to the slightest imputation of endeavouring to make the worse appear the better. Now then, the first question is the preparation for the position of a pleader. Of course, knowledge of law lies at the foundation of it; and if I may take the liberty of saying so to you, who have shown your zeal and desire to profit by the study of the law by joining the association which I am now addressing, and if I may judge by the case-book which has been put into my hand, exercising yourselves in the meetings of this society with great intelligence and great appreciation of legal difficulties and legal distinctions—I need not say to you that knowledge of the law is important, but I may take the liberty of saying to you that every hour you spend in the study of the law now will save you many hours in after life. But there is another department on which I will say a word. I see that your society is legal and speculative, and embraces not merely discussions on legal topics, but also on speculative or general topics. It is impossible to overrate the importance of that combination. When a man begins active practice there are two snares into which he is apt to fall. One is of imagining that he is now going to be a practical lawyer, anything but law is unworthy of his consideration—that he is to forget all his previous studies, and devote himself to being a real business man—and that if he indulges in the lighter avocations in which, perhaps, he once took pleasure, he is likely to lose his reputation as well as his time. Now, there is no greater mistake than that, because the early studies in which a man of intellectual tendencies engages have the most important influence on his future professional life. It enlarges the mind—it gives variety and versatility to the tone—it enables a person to indulge with safety in larger and more general views of illustration; but in addition to that, it gives the power of composition, it gives a knowledge of the language, without which no man can be a good pleader. It is important, therefore, to study general literature, with a view to the active exercise of the profession, in order that you may know what to discard in the way of expression as well as what to keep. The power of precise expression is only to be learned by knowledge of the language, and that is only to be gained by studying its best models; and the power of precise expression is one of the greatest weapons which a pleader can use. But there are two remarks to be made here. In the first place, it is necessary to learn with accuracy the scientific vocabulary and nomenclature of your art. Now this is very apt to be a stumbling-block to the young practitioner. I know myself I cannot express the disgust with which, fresh from moral philosophy and the speculative society, I first began to study law. The terms were hateful to me; I could not reconcile them to any model of composition with which I was accustomed, and they appeared to me to be both barbarous and absurd. But that was a very crude and foolish imagination, because the use of technical terms is essential to any science whatever; and so from the use of popular terms in the science of law indicating elegance, it indicates nothing but ignorance, because an adept in any science is at once discerned by the accurate and skilful use of its nomenclature—a nomenclature invented simply because it imports something different from ordinary language. The proper meaning and use of technical words is one of the most important parts of the law student, for it enables him to express with precision neither more nor less than the technical term imports. These technical terms do not admit of equivalent, because for the most part they have a scientific meaning, and, if you once begin to introduce popular instead of technical terms, you fail to express with the accuracy essential to good pleading the precise idea which you intend to convey. After some remarks on the advantage of all studies in this profession, especially that of literature, his lordship pointed out the necessity of a very careful preparation of the causes they might be engaged in for judicial decision. The system of pleading in the sheriff courts, he said, is, I believe, as simple, as good, and as nearly a model for the statement of facts, as any system that at this moment exists. It was an experiment which we tried in the Bill of 1853, to see whether without an elaborate statement of facts, in ordinary and simple cases, an issue could not be joined much more expeditiously and less expensively than formerly was the case; and I understand that the short answer given in after the serving of the summons—the general defence—has, on the whole, worked well. I know that certain remarks have been made on the bench in the Court of Session, upon cases of that kind coming up, where the record was rather barren of fact; but I might own for myself that, in the cases in which I have heard the remarks made, I am far indeed from concurring in them. I believe it is far better, if the facts are simple, to let them be stated generally and go to proof, than to have long papers, expensively prepared, at great sacrifice of time, for the purpose of stating facts in detail, which might be perfectly well stated generally at once, upon the first hearing of the case; but of course there are many cases where this cannot be done. There are a great many cases of most important mercantile questions that arise to which it is impossible to apply that general rule; and accordingly, the mode of stating facts on the record is a matter which the practitioner ought to study, and that also is a thing to be done according to rule, because in no part of this proceeding is a man merely to trust to the hazard of the moment. The whole process from beginning to end ought to be an artistic process; and as to the mode of stating facts, according to our system of pleading, the general rule for the practitioner should be that he should state nothing but facts, and that all quotations, and all extracts, correspondence, deeds and settlements, should be simply referred to, and never be quoted at all. Having therefore, the materials, the question is, on what general rules, oral or written, pleading should be conducted? Now this is, perhaps, more an art than a science, having more relation to mechanical adaption than to theoretical abstraction. You should never lose sight of this, that the real end we have in view is to convince a man, or two or three men. The materials are facts and legal principles, and the art is logic—the systematic and skilful combination of the facts and the legal principles. Of course, in the practice of this art a great deal depends upon intellectual qualities, without a certain measure of which success is difficult; but still there are some general rules which it is useful to observe, and these general rules that I am now going to speak to are not the rules of the schools as you will find in Cotillon, but are certain practical rules, which by my intercourse with older lawyers, or in my experience, seem to me to be well worthy of observation. In the first place, the statement of facts, as the foundation of the logical structure, demands careful attention. It should be without prolixity, full and exhaustive. There is nothing which young pleaders, full of the coming argument, are more apt to treat with carelessness; and yet an argument without facts is a house built on sand, which al-

though constructed with all the ingenuity in the world, will tumble town beneath some little circumstance overlooked or forgotten. The first reputation which a pleader should set himself to acquire is a reputation for stating his facts with unscrupulous accuracy. I need say nothing of intentional misstatements, because no member of an honourable body would be guilty of that. But there is great temptation, especially at the commencement of a professional career, to colour facts in the mode of statement so as to admit those which are adverse, and unduly exaggerate those which are favourable; but no man who indulges in this habit in the slightest degree ever can become a great pleader. It has two great disadvantages —in the first place, it is necessarily inconsistent with high art, because exactly in proportion to the exaggeration or distortion of the fact, is the argument false and powerless. It is like the tricks of painting, which, while they produce effects startling to the vulgar, the educated eye detects and disdains. Nothing has a greater tendency to corrupt and deteriorate the logical perception than the habit of looking for aid in false premises to assist a difficult or desperate process of reasoning. A second and necessary effect is distrust in the mind of the judge. A logical fallacy may be difficult to discern, but imperfect statement of fact is short-sighted as well as injurious, and a very few instances will produce in your accustomed tribunal a distrust far more easy to create than to dispel. I am the more anxious to impress this upon you, that it is a snare difficult at starting to avoid, and there is no cause which operates so powerfully in producing slovenly and imperfect pleading. But you are not to suppose that much legitimate art may not be expended simply on the statement of facts. It is one great department of skilful pleading. In the hands of a master the statement of fact suggests so much that when it is finished the battle is half over. The circumstances have all fallen into their proper order with so much coherence—they hold such a clear and logical relation to each other—that the desired result starts up before you before any words have even framed it. I have known pleaders who possessed this faculty in great perfection, and who, while apparently stating in the most natural order, and in the simplest language, an unvarnished series of circumstances, had so arranged them, with reference to logical order, that the argument was begun, conducted, and riveted before the tale of facts was ended. This, which is one of the highest acquirements of the art, is not only not to be confounded with inaccurate statement, but is quite inconsistent with it. It consists in so adjusting the order and manner of the narrative, as that it shall bear its proper relation to the legal principles which you are anxious to deduce from or apply to them, and the habit of endeavouring to excel in this branch of pleading is the surest safeguard against being betrayed into the error I have endeavoured to warn you against. There is also another great advantage in oral pleading especially in performing the part of the duty with deliberation and care. It gives ease and confidence to the reasoning which is to follow. The pleader, as he feels that step by step he is building his edifice on a sure foundation, takes courage, and when his coping stone is farily placed, he plants his foot firmly on it, and commences his reasoning, with the certainty that he has all his materials before him. It is plain also, that in order to bring this statement to the desired result, it must be framed with a full knowledge and appreciation of the legal principles to be applied—in other words, no man need attempt it who is not thoroughly master of his case. He must have weighed and pondered over it, and scrupulously estimated the precise effect which the facts have on the law to be maintained; and whether the case be important or unimportant, the practitioner should never hold his duty discharged until he has constructed his argument with as much coherence and solidity as it admits of. Every case should be regarded as an exercise in his profession, to be performed as perfectly as possible, and the pleasure which the artistic labour confers will reward him amply, however insignificant the stake may be. The facts, however, stated, the next question is, on what rules should reasoning be conducted? I assume, of course, at present that the pleader has mastered the law applicable to his case. The question is how he is to apply it. Now, one great rule I shall suggest, as it was to me by the greatest pleader of his time—the late Lord Rutherford, who said to me—"Never think what you can say about the legal argument; consider how you are to gain your case." There is no error which a young pleader is so apt to run into as exhausting his ingenuity in maintaining legal sophisms or subtle refinements which he has charmed himself into admiring. There is no trick of fancy so strong as that which makes a lawyer enamoured of an argument he has himself invented; especially if his practice is not great and his mind has had time dwell on the process, it is wonderful how clear and conclusive a fallacy will become to his own mind, when any other mind will at once detect it. But even if the subtlety have some legal truth to recommend it, he must remember that he has to adress himself to a judge who has had other things to do then to split intellectual hairs for the last fortnight—and that the attempt, in the course of a single address, to educate the judge to his own pitch of refinement, must necessarily be hopeless. There is no cure for this state of mind so effectual, no means so potent of dispelling the day-dreams of an inventor of fallacies, as the prosaic question, will it gain the case? It may display acuteness, indicate great power of analysis; be really a creditable specimen of metaphysical analysis; but all is useless if it will not gain the case. The true process is, when the facts and the legal principles are mastered, to sit down quietly to consider how the battle is to be gained and the citadel stormed. This also is a task which presupposes and insures thorough knowledge of the case. The temptation is often great to be satisfied with saying something smart and plausible upon it; but when the line of argument is fairly canvassed and considered, and the points in which victory is probably determined, throw away all the rest. If they won't gain the case they are worse than worthless, whatever their merits in points of ingenuity; for nothing so much injuries the effect of a sound and strong argument as to find it alongside a weak one. In the next place go straight to your adversary's arguments. It was told to me of the great John Clark, who was in his time probably the acutest and most powerful man at the bar, that he despised greatly some of his contemporaries, who went round about and round about their adversary, and never fairly met him, but endeavoured to draw away the attention of the Court from his argument. Again never misstate your adversary's argument, but rather the reverse; and here I may quote without offence, the practice of a great living pleader, now on the bench—I mean the present Lord Justice-Clerk—who, in legal dialectics, was probably as accomplished a man as the bar of Scotland ever produced. He never misstated his adversary's argument—he even stated it more strongly than his adversary had done, just in order that his triumph might be greater, when, after having strengthened the argument in that way, he was enable to crumble it into atoms. There is, however, a suggestion which I also learned from some of the luminaries of former days, who studied this art of pleading, probably with greater accuracy than we do, because, as their oral pleadings were not so frequent, they were able to give them more care and consideration. But I remember my father stating to me as a rule that he had often practised with success when hard pressed by the difficulties, and intricacies, and power of the opposite argument—and I think I may say of him that he was, perhaps, the fairest pleader of his time—"It is," he said, "a perfectly legitimate proceeding, if you find that your adversary's plan of reasoning looks so coherent and compact that you cannot break it, and that the judges or the audience are impressed with it, to begin at the other end of the chain. If the opposing argument proceeds by induction, do you proceed by analysis; if it commences with the statement of fact, you may begin with the

statement of the law; and in that way you get the mind of the judges fresh to attend to your argument, and you have not to labour to show where the weak link is in a chain so artificially and scientifically constructed as that of your adversary." After some observations on the style, his lordship expressed his disapprobation of the manner in which witnesses were very frequently examined; the questions put to them should be really questions, and the witnesses should be left to tell their own story in their own way. He likewise stated his disapproval of the custom which some had of brow-beating witnesses in cross-examination. His lordship concluded by observing that he had thrown out some hints, and given them a few disjointed materials, their reflection on which might not altogether be misapplied. If he had done anything whatever to encourage the young student in that profession in which he (the Lord Advocate) had spent his life, and to which he was ardently attached—it is one of the noblest exercises of the intellect, and one of the most useful avocations in which a citizen of a free country could engage—he would be amply repaid for having availed himself of the kind opportunity which they had afforded him of meeting them.

COURTS OF APPEAL—CONFLICTS OF DECISIONS.

From the Solicitors Journal.

The most important branch of the judicature of a country would seem to be its courts of appeal. They exercise the function of finally deciding all questions arising as to the substance or construction of the law—a function which in countries of unwritten laws borders closely on the legislative; and the decisions of these tribunals constitue the standard of the law to which all inferior courts must conform. It might be expected, therefore, that the appellate courts would be the chief care in the constitution of a judicial establishment; that their maintenance and efficiency would be a constant object of attention and supervision, and that their decisions would be received with greater respect, and studied with more diligence by the lawyer than those of any other courts. In this country, however, the courts of appeal appear in a very different position. Their constitution in their present form can be traced only to chance and casual expediency. Public attention is seldom called to their action or efficiency; and any question made concerning the amendment of the Supreme Court of Appeal commonly turns upon considerations of a political rather than a juridical character, and foreign to its immediate purpose as a branch of the judicature of the country. Even the judgments of these courts, though final and conclusive as to the questions of law which come before them, are not found of equal practical utility with those of the inferior courts; and the library of a lawyer in ordinary is not deemed incomplete although it does not contain the volumes of the Reports of the House of Lords.

The time seems now to have arrived when our courts of appeal should be subjected to the same process of criticism and amendment which has been exercised so freely and with such beneficial effect over other branches of our judicature, in comparison with which the branch in question at present remains in a very inferior degree of efficiency. The operation of our courts of appeal as at present constituted is far from satisfactory. The multiplicity and complexity of these courts presents an unnecessary obstacle, and causes useless delay in obtaining a final decision; and these evils are augmented by the irregularity, slowness, and uncertainty, of each stage in the process. The final judgment, when obtained, is found to depend in a great measure on the casual mode of constructing the courts, and on other accidental causes, rather than on the real weight of judicial authority. The value of the final judgment as a delaration of law is thus depreciated, so that it even becomes a question whether it would not be expedient for the House of Lords to exercise the liberty of reviewing its own decisions, in order to avoid the alternative of persisting in some erroneous doctrine in which it may have become implicated, through the peculiar views entertained by two or three of its learned members. From a discussion which recently appeared in the columns of this journal, it seems that some difference of opinion actually exists even amongst the lords themselves as to the existence of this power. It is certainly a remarkable instance of the unsettled state of the principles of our courts of appeal, that any question should exist as to a power so contradictory in its nature to the fundamental notion of a court of final appeal, and to all ideas of certainty in the law.

We have collected the few following cases as examples, for the purpose of showing the peculiar action of our courts of appeal, and the remarkable results occasionally produced by them, where there is much conflict of judicial opinion. These cases, it may be said, are exceptional. But they are not so in fact. They have been selected from the most recent publications of reports in which many other cases may be found containing the same peculiarities in a less prominent degree; and the very same elements of uncertainty and inconsistency pervade all cases of appeal, although they do not produce the same strikingly anomalous results in the majority of instances.

In the case of *Hickman* v. *Cox* (8 W. R. 754) the question was, whether creditors signing a deed of arrangement, by which the debtor assigned his business to trustees upon trust to carry it on for the benefit of the creditors, became liable as partners for debts contracted by the trustees in carrying on the business. In 1856 the Court of Common Pleas, consisting of Jervis, C. J., Williams, J., and Willes, J., decided this question in the affirmative. In 1857 the case came before the Court of Exchequer Chamber, and the judges were equally divided. Coleridge, J., Erle, J., and Crompton, J., held the affirmative; Martin, B., Bramwell, B., and Watson, B., the negative. In 1860 the case came before the House of Lords; Blackburn, J., Crompton, J., Williams, J., Pollock, C.B., held the affirmative opinion; Channell B., Wightman, J., the negative. The law lords, comprising the Lord Chancellor, Lords Brougham, Cranworth, Wensleydale, and Chelmsford, decided unanimously in the negative. The opinions of the judges and of the law lords on this question are accordingly thus balanced:—

Aff.	*Neg.*
Jervis, C. J.	Martin, B.
Williams, J.	Bramwell, B.
Willes, J.	Watson, B.
Coleridge, J.	Channell, B.
Erle, J.	Wightman, J.
Crompton, J.	The Lord Chancellor.
Blackburn, J.	Lord Brougham.
Pollock, C. B.	Lord Wensleydale.
	Lord Cranworth.
	Lord Chelmsford.

The judges of the superior courts thus stand in a majority of nine to five against the final judgment of the House of Lords. The law lords, assembled in an unusual number, turned the scale by a majority of two.

The recent case of *Jeffries* v. *Alexander* also presents a remarkable conflict of judicial opinions. The question in dispute was, whether an indenture, containing a covenant with trustees that the executors of the covenantor should within twelve months after his death invest £60,000 in Government funds in the names of the trustess upon trusts for charitable purposes, —where the assets of the covenantor after his death consisted of charges upon real estate,—was within the statute of Mortmain. The Master of the Rolls thought that it was, and ordered an action at law. On appeal, the Lords Justices, assisted by Wightman and Erle, JJ., declared the indenture valid, and that the sum was payable. Before the House of Lords, on the first hearing, the law lords were equally divided. On the second hearing, six common law judges attended to assist the

House, and were equally divided: Wilde, B., Byles, J., and Pollock, C.B., being of the negative opinion; and Blackburn, J., Willes. J., and Williams, J., of the affirmative. Finally, the Lord Chancellor, Lord St. Leonards, and Lord Kingsdown, decided the question in the affirmative against the judgments of Lord Cranworth and Lord Wensleydale. The judges who had delivered opinions in this case then stood as follows:—

Aff.	*Neg.*
LORD CHANCELLOR.	LORD CRANWORTH.
LORD ST. LEONARDS.	LORD WENSLEYDALE,
LORD KINGSDOWN.	WILDE, B.
BLACKBURN, J.	BYLES, J.
WILLES, J.	POLLOCK, C.B.
WILLIAMS, J.	KNIGHT BRUCE, L.J.
THE MASTER OF THE ROLLS.	TURNER, L.J.
	WIGHTMAN, J.
	ERLE, J.

And the case was ulimately decided against the opinions of the majority.

The case of *Boosey* v. *Jeffries*, (20 L. J. Ex. 354; 24 L. J. Ex. 81,) raised the important question whether a foreign author while resident abroad can acquire a copyright in England. Rolfe, B., ruled at Nisi Prius in the negative, to which ruling a bill of exceptions was tendered; and in 1851, the Court of Exchequer Chamber, composed of Lord Campbell, C. J., Patteson, J., Maule J., Wightman, J., Cresswell, J., Erle, J., and Williams J., decided unanimously against the ruling and in the affirmative of the question. On appeal to the House of Lords in 1854, the judges called in to assist were divided in opinion; Crompton, J., Williams, J., Erle, J., Wightman, J., Maule, J., Coleridge, J., held the affirmative; while Alderson, B., Parke, B., Pollock, C. B., Jervis, C. J., held the negative. The law lords, comprising the Lord Chancellor, who had originally ruled the question at Nisi Prius as Baron Rolfe, Lord Brougham, and Lord St. Leonards, finally decided the question in the negative.

Judicial authority in this case then stood as follows:—

Aff.	*Neg.*
LORD CAMPBELL, C. J.	ALDERSON, B.
PATTESON, J.	PARKE, B.
MAULE, J.	POLLOCK, C.B.
WIGHTMAN, J.	JERVIS, C.J.
CRESSWELL, J.	LORD CRANWORTH.
ERLE, J.	LORD BROUGHAM.
WILLIAMS, J.	LORD ST. LEONARDS.
CROMPTON, J.	
COLERIDGE, J.	

The case was thus decided against a majority of two. Three law lords overruled an unanimous decision of the Court of Exchequer Chamber, constituted of seven judges, one of whom was also a peer and might have supported his own decision in the House of Lords.

The case of *Cooper* v. *Slade* (7 W. R. 63), was an action for penalties under the Corrupt Practices Prevention Act, 1854, and turned on the question whether the payment of the travelling expenses of an elector was prohibited by the statute; Parke, B., at Nisi Prius ruled that it was. In 1856, on a bill of exceptions, the Court of Exchequer Chamber decided that it was not; Alderson, B., Cresswell, J., Martin, B., Crowder, B., and Bramwell, B., being of that opinion, while Williams, J., maintained the contrary. In 1858, the House of Lords, consisting of the Lord Chancellor Cranworth, and Lord Wensleydale, reversed this judgment; Channell, J., Watson, B., Willes, J., Crompton, J., Williams, J., Wightman, J., Coleridge, J., advising for the reversal, and Bramwell, B., advising against it. The question in dispute in this case, though not of legal, was of great practical and political importance; and yet only two law lords were found in attendance to decide finally upon it. These two lords, one of whom had originally delivered the ruling on which they sat in judgment, reversed the judgment of the Court of Exchequer Chamber, composed of six judges, of whom one only was dissentient.

The above examples are sufficient to call attention at once to some of the more obvious incongruities in the operation of our courts af appeal. They are also highly suggestive of further reflections on the construction and action of those courts, which we have not space to enter upon at present, but which may furnish appropriate matter for observation on a future occasion.

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

CHAPTER I.

Of the Small Debt Court System, from its origin to the establishment of Division Courts—A. D. 1792 *to* 1841.

In treating of the Upper Canada Division Courts, a brief reference to the institution and progress of the small debt court system in this part of the Province seems a fitting introduction.

In the year 1791 the Province of Quebec, which then included Upper Canada, was divided into two provinces, and by the Imperial Act 31 Geo. III., cap. 31, a distinct legislature was given to each. The western or upper division was called the Province of Upper Canada; the eastern or lower, the Province of Lower Canada.

Upper Canada was subsequently divided into Counties, for the purposes of representation, and commenced to legislate as a separate province under the constitution created by the Imperial Act.

The first Parliament of Upper Canada was constituted and assembled in the year 1792, and the first act of the Provincial Legislature was to adopt the laws of England as the rule of decision in all matters of controversy relative to property and civil rights; * but "the forms of proceedings in civil actions and the jurisdiction of the courts already established," were not interfered with (32 Geo. III., cap. 1). This was followed by an act requiring all issues of fact joined in any action in any of His Majesty's Courts of Justice within the Province, to be tried by a jury summoned and taken conformable to the laws of England (32 Geo. III., cap. 2); and, by another act, causes exceeding

* The laws and customs of Canada established in the year 1774 for the Province of Quebec, not many years before then a French Colony with the laws and customs of the parent country, remained in force when Upper Canada was erected into a separate province. Unsuited to the inhabitants of Upper Canada, the great majority of whom were "British born subjects educated in countries where the English laws were established, and unaccustomed to the laws of Canada," they were at once abolished by the Parliament of Upper Canada, and the English system established in their place; at the same time, existing rights were saved and properly guarded in express terms by the enactment. The English "poor laws," and the laws respecting bankrupts, were not introduced, being specially excepted (32 Geo. III., cap. 1, sec. 6).

forty shillings in value were no longer to be disposed of summarily without a jury (32 Geo. III., cap. 4).

"To contribute to the conveniency of the inhabitants of the Province an easy and speedy method of recovering small debts," was deemed necessary, and an act with this declared object passed in the same session of the legislature (32 Geo. III., cap. 6). It provided for the establishment of courts, two or more justices of the peace acting in each, with power to hear and determine matters of debt to forty shillings, and to "decree as to them should seem just in law and equity." Each of these tribunals exercised jurisdiction for a certain locality or division. The several divisions being "ascertained and limited by the Justices' assembled in General Quarter Sessions.

The *place* of holding a court was fixed by the justices acting for the particular division; the *times* for holding the several courts were on certain days prescribed by the statute itself.

The tribunals thus created under the name of "*Courts of Request*," although defective in power and without any settled procedure, were probably adequate to the wants of the inhabitants of Upper Canada, at that time few in number; and any question that could arise in the exercise of the limited jurisdiction given must have been, from the circumstances of the country, of the simplest and most ordinary character. We may at least conclude that they were found useful and were acceptable to the people, for after a trial of nearly a quarter of a century their jurisdiction was more than doubled.

"It was the wise constitution of the Common Law of England to bring justice to every man's door," and in England a multitude of inferior courts were from time to time established to bring justice home to the people. From their great diversity, however, in constitution, jurisdiction and procedure, they failed to accomplish the object of their creation, and were swept away, to be replaced by the general system of County Courts now existing.*

However defective in other respects, our local courts were from the first uniform in constitution and jurisdiction, and, without any radical change in the general plan of organization have been gradually matured into the present system of local judicatories throughout Upper Canada. As it was in 1792 so it is in 1861, tribunals are established over the country upon the same plan, the jurisdiction alike in all, each court has its local limits, which are fixed by the justices acting in Quarter Sessions.

Although the original design has been kept in view and the general features of the system retained, yet, as will be seen, the character of these courts has been greatly changed, —in constitution, jurisdiction, and procedure. They are no longer "small debt" courts, but embrace a very large share of the law business of the country.*

Proceeding to notice the legislation affecting the Courts of Request established in 1792, we find no change worthy of particular notice till the year 1816.

In the year 1797 certainly there was a provision empowering the justices of Assize and nisi prius to act as visitors of the District Courts (then presided over by laymen) and of Courts of Requests in their Circuits (37 Geo. III. cap. 6, sec. 7). But it is difficult, at least at the present day, to say what practical advantage could be attained by this enactment. The same act prohibited any charge for mileage, but this strange provision was repealed the next session (38 Geo. III).

On the statute book of 1816 is a legislative declaration, that "it will contribute to the conveniency of the inhabitants of this Province to extend the jurisdiction of the Courts of Request." It is in the preamble to the Act 56 Geo. III., cap. 5, by which the jurisdiction was increased to five pounds in matters of debt. This act also better defined the authority of justices of the peace as judges of these courts; and laid down a simple procedure. There were certain restrictions however, for an acknowledgment of the debt in writing, or other proof than that of the oath of the plaintiff, was made necessary to ground a judgment, unless the demand did not exceed forty shillings. A defendant could not be summoned out of the court division in which he was a resident, and no writ of execution could issue on a judgment under the enlarged jurisdiction until forty days after the judgment had passed. And it is observable that at this early date it was deemed proper to exclude from the jurisdiction of the courts "debts contracted at a tavern for spirituous liquors, or for any gambling debt whatever."

A difficulty seems to have been felt respecting the power of the Courts of Request to deal with cross demands, and it would seem that a defendant having a debt against a plain-

* In Mr. Harrison's work on the C. L. P. Act, the subject is thus referred to: "As early as 1517 a court for the recovery of small debts, known as a Court of Conscience or Court of Requests, was by act of the Common Council established in London. In 1605 the same court was fully confirmed by act of the legislature (3 Jac. I. cap. 16). This court having been found very beneficial in London, courts of a similar nature were established by numerous acts of the legislature in different parts of the kingdom. The accumulation of inferior courts throughout England exhibited the popular desire for the local administration of justice. By reason of the diversity of these courts and the defects in their constitution, and in order that "one rule and manner of proceeding for the recovery of small debts and demands should prevail throughout England," all small courts were abolished and a system of County Courts fully established (9 & 10 Vic. cap. 95)

* For the 18 months ending 30th September, 1859, there were 215,883 cases entered in all the Division Courts in Upper Canada, for claims varying from $1 to $100. The probable average at least $24 to each case, and the total amount for which suits entered in that period would exceed five millions of dollars.

In the Courts of Request, 39,203 cases were entered in the year 1838, for sums under $40 in each case.

tiff was driven to his action for the same if he sought to recover any balance against him.

By 11 Geo. IV., cap. 5 (A.D. 1830), the law of set-off was extended to the Courts of Request, and they were allowed to deal with such cases and to give judgment for the defendant for any balance found to be due to him from the plaintiff; but if the nature or amount of the defendant's demand, or set off, was such as not to come within the general jurisdiction, it could not be entertained, and the defendant was without remedy in the Court of Request.

This is the last enactment respecting the local courts during the first forty years of their existence in Upper Canada, for until the year 1833 no other change was made. They stood from 1792 to 1833 upon their original footing. The court boundaries traced out by the Court of Quarter Sessions, the courts presided over by justices of the peace. It was then that the first marked change was made in the constitution of the Courts of Request, under the statute 3 Wm. IV., cap. 1.

By this act a re-arrangement of the court divisions was directed in each district, and the divisions when declared in Quarter Sessions were to be numbered and described, and a list thereof transmitted to the Governor's office.

The judicial power was transferred from justices of the peace to commissioners appointed by and holding office during the pleasure of the Crown, and to qualify for office each commissioner was required to take an oath "faithfully, impartially, and honestly, according to the best of his judgment, to hear and determine," &c., the matters brought before him as a commissioner.

A clerk and bailiff were to be appointed to each court by the commissioners thereof. An oath of office was prescribed for the clerk, and both clerk and bailiff were required each to give security for the due performance of his official duties.

The commissioner, clerk and bailiff were all paid by fees upon the proceedings, according to a table of fees contained in the statute.

The jurisdiction of the courts was extended "to matters of debt and contract," where the demand did not exceed *ten pounds*, and the defendant resided in the division; and enlarged powers necessary for carrying this jurisdiction into effect were conferred upon the commissioners. The privilege of Barristers and Attornies to object to the jurisdiction was taken away, and they were in effect debarred from bringing actions in the Superior Courts upon a subject matter cognizable in a Court of Requests. Witnesses living out of the division might be summoned from any part of the district. Writs of execution could be executed in any part of the County. The commissioners were empowered to fine and imprison for contempts in the face of the courts, and the practice was remodelled and traced out more in detail. In fact, procedure in these courts was then put much on the footing that it afterwards stood in the first Division Court Act.

As in the previous Act so in the statute, claims for gambling debts and for spirituous liquors drunk at a tavern were excluded from the jurisdiction, as were also "causes involving the rights or title to real estate."

The jurisdiction of our Courts of Requests was at no time exclusive, yet their existence pointed to the propriety of withdrawing from the superior courts cases of a trifling nature, and the Act sufficiently enforced this by providing that the costs of actions brought in the Superior Courts, which might be tried in the court of requests, should be limited to Court of Requests costs, unless it was shown to the court or a judge, that from the nature of the plaintiffs evidence, or the situation of his witnesses, he could not have proved his case in the Inferior Court, or unless the action was commenced by bailable process against the defendant.*

The act was made to extend to all districts thereafter to be created; and the justices of the peace were required at their first quarter sessions, if a new district, to set off the same into court divisions. It had not long been in force when it was found necessary to make some alterations and amendments in it, and in 1837 a statute was passed

* In those days, and indeed until the year 1835, a person could be arrested for a debt as low as two pounds, under process from District Courts—under process from the Court of Queen's Bench if the claim exceeded five pounds. And to facilitate arrests Commissioners of the Court of Queen's Bench were supplied with, and authorised by statute to issue writs. These writs were, in all cases, obtainable on the affidavit of the plaintiff, or his agent of the debt, that deponent "was *apprehensive* that the defendant would leave the Province without satisfying the same;" and that process was not sued out from vexatious or malicious motives. This power of arrest was fearfully abused, and a vast amount of perjury and injustice committed under cloak of law.

Though commissioners were not then numerous—probably not more than an average of fifteen in each district, and were for the most part professional men—yet still the facilities for obtaining a writ on the instant at a trifling cost, greatly increased the evil. What would it be in the present day under such a law, when commissioners are as thick as blackberries through the country—men of every grade in life, and most of them out of the profession?

An incalculable amount of loss, hardship and misery was wrought to thousands of persons throughout Upper Canada under that abominable law. The country was infested by a plague of "clock-pedlers" in particular, and farmers were induced to purchase their wares "on one or two years' credit" on promissory note, commonly with a stipulation to take payment of the note in farm stuff. These notes were "traded" from one to another of the vermin, and scarcely were they, due when a "*capias* was sworn out," and fortunate was the defendant who escaped with loss in costs, and expenses equal to double the amount of the claim against him, for under the above exception the plaintiff was entitled to superior court costs. Well-to-do farmers—men owning cleared farms, and who had not the slightest idea of leaving the country, were arrested for a debt of a few pounds; and many emigrants, just settled in the bush, were taken from their homes at seeding time or harvest, dragged to gaol, and often lost their all for a paltry "clock debt." In fact few escaped loss or annoyance, however good their means and standing who fell into the hands of these ruthless wretches. Hundreds of writs in one county alone have been "sworn out" in a week, in very many cases by men who had no personal knowledge of the defendants. To this day the old settlers remember these doings with a bitter feeling, and speak of the wide spread injury they occasioned.

for the purpose. (7 Wm. IV., cap. 12.) This statute was brief, and dealt with four subjects.

First—As to the organization of the courts.

It would appear that doubts arose, and reasonably enough, whether the magistrates acting in quarter sessions having once exercised the power conferred by the act of 1833 to "ascertain and declare" the court divisions in their several districts, could afterwards vary or change these divisions. To settle this doubt, it was enacted that it should be lawful for the magistrates to vary the divisions of the courts of requests *from time to time* as to them might seem necessary.

Second—The naked power of summoning witnesses, given by the act of 1833, could hardly have been of much value without the authority to punish for non-attendance. This also was remedied by one of the clauses, enabling the commissioners to impose a fine of forty shillings upon any person disobeying a subpœna from the court.

Third—As to jurisdiction, it was provided that a debtor might be summoned from any division within the particular district to the division where the debt was contracted; and a mode was prescribed of transmitting process for service in an out division, making proof thereof, and obtaining return—much the same as that now in force in the division courts; and lastly, personal service of summons on a defendant was dispensed with in cases not exceeding five pounds, where it was made to appear that the defendant "absented himself for the purpose of avoiding the service."

Under the act of 1833, as amended by that of 1837, the power of appointing court divisions was exercised by the magistrates in quarter sessions, and every district in Upper Canada separated into divisions. A court of request was organized in each division, provided with proper officers—commissioners, clerks and bailiffs.

(*To be continued.*)

U. C. REPORTS.

QUEEN'S BENCH.

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*)

SHAW AND NEAL AND THE CORPORATION OF THE TOWNSHIP OF MANVERS.

School section—Alteration—Notice—By-laws.

On the 19th of December, 1857, a township council passed a by-law creating a new school section, called No. 9, out of sections 13 and 8, and defining what should thereafter constitute section 13. Notice was given of the intention to pass this by-law, but it was not done at the request of the freeholders and householders expressed at a public meeting; on the contrary, the change made appeared to be opposed to the wishes of a majority of the inhabitants. On the 8th of May, 1858, a by-law repealing it was passed, of which no notice had been given to the parties interested, thus restoring the sections to their former position, and on the 10th of September,, 1859, another by-law was passed assessing the section 13 as it originally stood, for the expenses of building a school house, &c.

Held, that the by-law of May, 1858, must be quashed, for the previous by-law was legal, and a by-law repealing it. which would in effect make an alteration of school sections, could not be passed without notice to those interested; and that the by-law levying a rate on section 13 as it stood before 1857 must necessarily be quashed also, for that would include part of what was section 9.

Hodgins obtained a rule *nisi* to quash two by-laws under the following circumstances:

On the 19th of December, 1817, the township council of Manvers passed a by-law altering some of the school sections of the township. The first clause created a new school section to be carved out of sections numbers 13 and 8, and the new section was called section number 9, and it was defined by boundaries.

The second clause defined the portion of the township which should thereafter compose section number 13.

When this by-law was passed the relator, Shaw, was a member of the township council. It seemed that the change was opposed by various inhabitants of the then section, but Shaw proposed the by-law in council, and one other of the councillors voted with him, one voted against it, the reeve did not vote, and the fifth councillor was not present. Notice was given of the intention to propose this by-law. The by-law came into operation on the 25th of December, 1857.

On the 8th of May, 1858, the township council repealed this by-law, the effect of which, if legally done, was to restore matters to the former footing.

At the annual school election of trustees in 1858, it seemed the majority of the electors considered that the by-law of 1857 did not legally constitute the section number 13, and as Shaw's term of office as trustee expired by effluxion of time, the majority elected a person of the name of Sanderson in his place. The local superintendent attended that meeting. When the election was held for 1859 the other relator Neal, joined with Scott, another of the trustees in calling the meeting to elect a new trustee in the place of Neil, whose term of office expired, and on that occasion one McQuaid was elected in Neal's place. The parties, that is, the majority, were then treating the school section as upon the footing upon which it had stood previous to the by-law of 1857.

It appeared that a school-house had been built since the repeal of the by-law altering the section, and on the 10th of September, 1859, the township council passed a by-law assessing the section in $565, to pay the expenses of building the school house, and for paying the teacher's salary.

The present application was made on the part of the relators, Shaw and Neal, to quash these two by-laws of the 8th of May, 1858, and the 10th of September, 1859, in order that the by-law of the 19th of December, 1857, altering the sections, might remain in force. The grounds upon which the application was made were as follows:

With regard to the first of the by-laws—1. That the by-law was passed without notice to the trustees of school sections 8 and 13, and other parties affected thereby, and without the request of a majority of the freeholders and householders of the school sections to be affected by it.

2. That the by-law does not set out or recite any such notice or request as the condition precedent for the passing thereof by said council.

3. That no notice of the passing of the by-law was given by the said council to the trustees of the school sections affected thereby, nor to the local superintendent of common schools, either immediately after the passing thereof or on or before the 25th of December, 1858.

Then, with regard to the second of the by-laws complained of, the objections were:

1. That the school section on which the rate was levied was not legally formed.

2. That the by-law was passed without notice to the trustees, and freeholders and householders of the school section concerned.

3. That the by-law was passed without the previous request of the majority of freeholders and householders of said school section, as expressed at a lawful annual or special meeting thereof duly called by the trustees for considering the levying of the rate mentioned in the by-law and the application thereof.

4. That the by-law was passed without the previous request of the lawful trustees of said school section, duly made to the council on behalf of a majority of the freeholders and householders expressed at a public meeting for the purpose of authorising said rate and application therefor.

5. That the by-law does not set out or recite that it was passed at the request of the trustees of the section, duly made to such

council on behalf of a majority of the freeholders and householders therein, expressed at a public meeting called by the said trustees for the purpose of authorising said rate.

6. That the by-law was not applied for by the lawful trustees of said section, at or before the meeting of the council held in August, 1859.

7. That the by-law levies a rate on behalf of an illegal contract for building the school house mentioned therein, said contract having been previously made with a member of the corporation of trustees, and also levies a rate for law costs, for which the trustee corporation is not responsible.

The application was supported by the affidavits of the relators and others. The relators swore that they as trustees, which they claimed to be as legally representing the altered school section, received no notice whatever of the consideration or passing of the by-law of the 8th of May, 1858, and that they were informed, and believed, that none of the parties affected by or interested in the effect of that repealing by-law were informed of the intention or the proceedings of the council in passing it, nor did the council enquire or satisfy itself whether any notice had been given to the parties concerned, but that the council did it of their own accord. They further said, that the clerk of the council did not notify the trustees of it, or the local superintendent, and it was only lately the inhabitants of the section knew that such a by-law was passed.

The by-law of the 10th of September, 1859 was requested to be passed by Sanderson and McQuaid, trustees of school section number 13, which they contended they represented. With respect to this by-law the relators swore that those persons who asked the council to pass the by-law had no authority to do so, because they were wrongfully elected, and had not the true seal of the corporation, which the relators contended remained in their hands. They said they were not aware of any meeting having been called to consider the levying of a rate, and they believed none was called; that treating the relators as the lawful corporation of trustees, the council had full notice that they had not requested a rate to be levied, and they denied that they had requested the council to pass the latter by-law. The relators then further stated, that Sanderson was the party who held the contract for the building of the school house mentioned in the by-law, and for which the rate was levied, and further, that they were informed and believed that the costs of a division court suit, paid by one Scott, were included in the rate.

The relators were supported by the affidavits of three other persons, inhabitants of the section, with regard to what they had stated.

M. R. Vankoughnet shewed cause.

The application was opposed upon affidavit of Scott, who was the reeve for the year, 1859, and who stated that he was a councillor for both the years 1858 and 1859, and was one of the school trustees in 1857, at the time the then council made the alteration. He said that there never was any public meeting of the freeholders and householders for the purpose of petitioning the council to make an alteration in the sections. A notice was given, however, that the council would be asked to make the alteration, and in consequence of that he appeared at the meeting of the 19th of December, 1857, to oppose the alteration, and he produced the petition of twenty-six of the inhabitants opposing the alteration. Neal, one of the trustees, a relator now, appeared and produced a petition of thirteen of the inhabitants in favour of the alteration. At that time the other relator, Shaw, was both a trustee and councillor, and he supported the alteration. Scott further stated that it was found the alteration worked injuriously, and broke up the school, and upon taking legal advice he was informed that the by-law altering the sections was itself illegal, and unless it were repealed steps might be taken to quash it. This was communicated to the council, and the members of the council then had an interview with Shaw, and Shaw was informed that if he would give security against the costs the council would allow the by-law of the 19th December, 1857, to be tested, but this Shaw refused to do, whereupon, to avoid trouble and expense to the township, the council, as Scott stated, on the 8th of May, 1858, repealed the by-law of December, 1857.

The affidavit of Scott was supported by affidavits of six other persons, inhabitants of the section 13, all denying that any meeting was ever called or held for the purpose of considering the expediency of any alteration. All these persons said that they were opposed to it, and that the majority of inhabitants were opposed to it: that the effect of the alteration was to destroy the section, and that it would be impossible to maintain a school in it.

BURNS, J., delivered the judgment of the court.

With respect to the ground upon which the defendants attack the by-law of 1857, as a reason why it might be repealed by the township council—namely, that no public meeting was held of the freeholders and householders of the inhabitants, or any request made to the council expressed at any meeting for the purpose, to make an alteration in the sections, this court has already decided in *Ness* and *The Municipality of Sallfleet*, and *Ley* and *The Municipality of Clarke*, (18 U. C. R. 408 & 433,) that it is not necessary to confer power upon the council to alter school sections that it should first be asked to do so by that mode of request. All that is necessary, in case of an alteration being asked for, is that all parties affected by the alteration shall have been duly notified of the intended step or alteration. Notice was given, and both sides, those favourable to the alteration and those opposed to it, were present and were heard, but the council notwithstanding passed the by-law making the alteration. Why then it should be supposed in May, 1858, that the by-law was illegal, it is difficult to conceive, unless it be that the parties thought the council had no power to pass it against the wish of the majority of the inhabitants of the school section? According to the affidavits and petitions *pro* and *con*, there seems to be little doubt the by-law was passed contrary to the wishes of a majority of the inhabitants. Nevertheless it was a legal by-law, and it could only be got rid of again upon legal grounds.

This latter point is involved in the attack made by the relators upon the by-law of the 8th of May, 1858, and the question is whether that by-law has been legally passed without notice. It is not pretended that the ratepayers or inhabitants generally of the section 13, or the new section created by the by-law of 1857, were notified or had any notice of an intention to pass such a measure. It seems that Shaw, one of the relators, was aware on the 7th of May that such a measure was before the council, for he was then asked to give the council a guarantee against costs, and they would allow the by-law to stand which was then still in force; but this he refused to do. It appears there was a division among the inhabitants immediately after the passing of the by-law of 1857, and each division elected its own set of trustees, or rather another trustee to fill up a vacancy. There seems to be little doubt, that in the contest going on between the two parties, the one favorable to no change being made in the section was the most numerous.

The question, however, is not which was the most numerous party electing the trustee in 1858, or which of them had most friends in the council in May, 1858, but the question, is whether the council had any power to repeal the previous by-law without the paries interested in it being notified of the alteration the repeal would effect?

The repealing of the previous by-law undoubtedly was another alteration in the section, and that could not go into operation until the 25th of December, 1858. The 4th sub-section of section 18 of the school act of 1850, enacts that no application for an alteration shall be entertained unless it shall clearly appear that all parties affected by such alteration have been duly notified of the intended application. The giving of notice is a condition precedent to the council entertaining the application, and this provision must apply as well to the repeal of a law, which would itself constitute an alteration, as of a notice in the first case of making a change.

For this reason the by-law of the 8th of May, 1858, must be quashed.

Then comes the next by-law, levying the rate. If the by-law upon that which is founded be quashed, it is impossible this can stand. The by-law of the 8th of May, 1858, being removed out of the way, then that of December, 1857, remains in force, and by that a new section, number 9, was created out of sections 13 and 8. The by-law for levying the rate, however is for section 13 as it formerly stood, and under that those who would be in the new section 9 are called on to pay, which cannot be right so long as number 9 remains.

Without entering into the points raised against the last by-law which have been taken, it is sufficient to say that in removing the by-law of the 8th of May, 1858, the other must go with it.

The rule should therefore be made absolute with costs.

Rule absolute.

McCarthy v. The Corporation of the Village of Oshawa.

Village corporations—Duty to maintain crossings.

The plaintiff, living in an incorporated village, laid a plank from his door across the ditch to the street, by which he was in the habit of crossing, although the ditch was deep there, and he might, by going down the sidewalk a short distance, have crossed where it was shallow. In crossing by this plank at night he fell off and broke his leg; and he thereupon sued the corporation, alleging that it was their duty to have maintained a proper crossing from his house to the street.

Held, that there was no such duty incumbent on the defendants, and that the action could not be maintained.

The declaration stated that the plaintiff owned a lot in the village of Oshawa, at the head of a street called Mechanic street: that between his land and the street there was a ditch for draining the street: that it was the duty of the defendants to keep that ditch in proper repair, and to make and maintain a sufficient bridge or crossing over the ditch from the street to the plaintiff's land and dwelling house: that they neglected to do so: that the crossing there was insufficient, and the plaintiff, in crossing from the street to his dwelling house, fell into the ditch, and broke his leg.

Defendants pleaded,—1. Not guilty. 2. The same plea by statute. 3. That they were not possessed of the street, as the declaration alleged. 4. That the plaintiff was injured by his own carelessness, default and neglect. 5. That the plaintiff's cause of action did not arise within three months of the action brought. 6. That the street was not a highway as alleged.

At the trial, at Whitby, before Hagarty, J., an amendment was allowed to be made in the declaration, averring that it was the defendants' duty to make and maintain a bridge or crossing over the ditch to the plaintiff's land and house, and that they did not do so. Before the amendment, the statement was that the defendants did not keep the ditch in repair, and the injury was ascribed to their default in not doing that. The defendant objected to the amendment.

The evidence shewed that the ditch spoken of was an ordinary ditch on the edge of the street, intended as usual to be open, like the other side ditches in the village. The soil being loose, the ditch had become wider and deeper; and was at the time of the accident, about six feet wide at the top and about three feet deep.

The plaintiff could, by going a short distance along the sidewalk, have avoided the part where this deep ditch was, but in order to cross more directly from the street to his house, he had himself laid a single plank over the ditch, by which he was in the habit of crossing. This plank was narrow at one end, and so was unsteady, and coming home one night he fell off the plank and broke his thigh. He had never applied to the defendants to make a crossing from the street to his premises, and it was proved that the inhabitants in the village provided such crossings for themselves, none being provided by the corporation, except at the intersections of streets.

It was objected by the defendants' counsel that the defendants were entitled to notice of action: that the action should have been brought within three months; and that it was the plaintiff's own negligence to place there an insufficient plank.

Leave was reserved to move to enter a nonsuit or a verdict for the defendants on these objections.

Bell, (of Toronto,) obtained a rule *nisi* accordingly. He cited *Mackinnon* v. *Penson*, 18 Eng. Rep. 509; 22 Vic., ch. 99, secs. 322, 323; 13 & 14 Vic., ch. 15, sec. 1.

Cameron, Q. C., shewed cause, and cited *Mayor &c., of Lime Regis* v. *Henley*, 2 Cl. & Fin. 354; *Whitehouse* v. *Birmingham Canal Co.*, 27 J. J. Ex. 25; *Gibbs* v. *Trustees of the Liverpool Docks*, Ib. 321; *Ruck* v. *Williams*, 3 H. & N. 308; Grant on Corp. 501-2.

Robinson, C. J., delivered the judgment of the court.

The statute 13 & 14 Vic., ch. 15, sec. 1, which was cited in this case does not apply to incorporated villages, but only to cities and towns, and anything, therefore, that might turn upon provisions in that statute cannot affect the question before us. But the Municipal Act, 22 Vic., ch. 99, secs. 322, 323, extends the provisions of that statute to incorporated villages. If the street from which the plank was laid to the plaintiff's premises by himself was a public street, which we assume, then by the clauses of the Municipal Corporations Act just referred to, it was the duty of the corporation of the village to keep it in repair, and a right of action is given to any individual who may sustain damage from the neglect to do so. But then, any action on that ground must be brought within three months of the damage being suffered, as the statute requires, which this action was not; and we do not see proof that the street was out of repair.

Then, as to the other ground of action introduced by the amendment—namely, the neglect of the defendants of an alleged duty to provide a bridge or crossing from the street to the plaintiff's land and house—no authority has been shewn for asserting that to be a duty incumbent on the corporation, and we do not think it is.

The public crossings or bridges over the side ditch at the intersection of streets is all that we see the corporations of cities, towns, and villages do in fact provide: it is all, so far as we have observed, that the inhabitants of towns expect them to provide, and we do not think that the duty could reasonably be extended further. If the plaintiff in this case had walked a few yards further along the street, he would have had the advantage of the public crossing over the ditch into the other street which intersected it, and thence could have got conveniently upon his own land.

The plaintiff, like others, seems to have desired the convenience of crossing from the street directly opposite to his own door, and he seems also to have taken upon himself to provide a crossing, but only by a single plank, which in the night time he should have considered it is not always safe to trust to, for the plank may easily have been shifted in its position so as not to rest firmly, or a false step may easily produce an accident.

We should be making a decision which would take all municipalities, both in town and country, by surprise, if we held that the defendants were chargeable with the accident which the plaintiff in this case unfortunately met with. The verdict must, we think, be set aside, and a verdict entered for the defendants on the leave reserved at the trial.

Rule absolute.

MICHAELMAS TERM, 1860.

The School Trustees of the City of Toronto v. The Municipal Corporation of the City of Toronto.

Con. Stat. U. C. cap. 64, sec. 79, sub-sec. 11—Estimate of School Trustees—Duty of City Council.

Where the Board of School Trustees of a city prepare and lay before the Municipal Council of the city an estimate of sums deemed requisite by the School Trustees it is the duty of the City Council to provide such sums in the manner desired by the Board of School Trustees.

If the City Council refuse so to do a mandamus may be issued to compel them to do so at the instance of the School Trustees.

Cameron, Q.C., obtained a rule in this term on the Municipal Council of the Corporation of Toronto to shew cause why a peremptory mandamus should not issue, commanding them to assess and levy $30,000 ordered by the Board of School Trustees of the city to meet the expenditure of the Common Schools of the city for 1860, according to the estimate furnished by the Board to the Municipal Corporation, by levying such a rate upon the rateable property in the said city as shall be sufficient to raise the said sum of $30,000.

This rule was obtained upon an affidavit made by one of the School Trustees that the annual value of the whole ratable property in the city for the current year (1860), as finally settled by the Court of Revision, is $1 643,888. That the School Trustees adopted the sum of $30,000 as the expenditure required for the Common Schools for 1860. That an estimate was accordingly furnished by the Trustees to the Corporation of the city, and that the City Council passed a by-law to assess and levy 1 cent and 6 mills in the dollar on the above-named value for such Common School expenditure, and no more; but that such rate is not sufficient to raise $30,000—that it will require a rate of two cents in the dollar to do so.

The City Council did pass a by-law which would have imposed a larger rate for school purposes, the particulars of which by-

law was not shown to the court; but afterwards, on the 24th October, 1860, repealed that by-law, which had fixed the rate for the year, and which appropriated the proceeds on it to various purposes, including school purposes, and they passed another by-law as a substitute for the first, and in this latter by-law they provided that of the proceeds of a rate of 15 cents in the dollar, imposed for all purposes mentioned in the by-law, the proportion of 1 cent and six mills shall be applied to "defray part of the expenses of Common School Education."

No affidavits were filed in answer to the rule.

It was sworn that the City Council having been called upon by the School Trustees to impose the necessary rate of two cents in the dollar upon the whole value of ratable property, declined to do so.

A. Wilson, Q.C., in showing cause against the issuing of a peremptory mandamus contended that the School Trustees have no right to insist that the city shall impose a rate for school purposes, because they may have the means in their hands of defraying the expense, or part of it, without such rate, or they may choose to raise the sum by a loan.

He objected also that, as the School Act enabled the School Trustees to raise the money themselves by rate, they are not in want of the extraordinary remedy by mandamus, and on legal principles have therefore no right to it.

Cameron, Q.C., cited Consolidated Statutes, U.C., cap. 64, sec. 79, sub-sec. 21, p. 747, *Brockville School Trustees* v. *The Town Council of Brockville*, 4 U. C. Q. B 302, *School Trustees of Port Hope* v. *The Town Council of Port Hope*, 4 U. C. C. P. 418; *School Trustees of Galt* v. *The Municipality of Galt*, 13 U. C. Q. B. 511.

A. Wilson, contra, cited *The King* v. *The Severn and Wye Railroad Co.*, 2 B. & Al. 646; *The King* v. *The Bristol Dock Company*, 6 B. & C. 181.

ROBINSON, C. J.—In the case cited of the *The Brockville School Trustees* v. *The Town Council of Brockville*, 4 U. C., Q. B. 302, this Court had granted a mandamus nisi to which a return was made, and that return brought up a particular question, whether they had or had not proceeded irregularly in an important step which they had taken in substituting one general School for four local schools, and incurring without reference to the ratepayers a large expense in erecting the new school. The Town Council rested their opposition to raising the money by rate on the ground that that measure of the trustees was illegal.

This was an important question, which both parties desired should be determined by the Court, and it was raised in that formal manner on the return to the mandamus. The Court were bound to give judgment on the sufficiency of the return made by the Town Council, and finding it to be insufficient they decided accordingly, and the writ was ordered.

The ground taken here, that the School Trustees had power by law to raise the rate themselves, and therefore could not call upon the Court to command the Council, does not seem to have been taken, and it is not likely that it would be, because the objection went to the right to raise the rate either by their own means or the other, on account of the alleged illegality of the expenditure in putting up the new school house.

That case, therefore, cannot be relied on, as an authority for maintaining that the trustees can, as a matter of right, insist in all cases, on the Municipality raising the money by rate.

Then, looking at the other case of the *School Trustees of Port Hope* v. *The Town Council of Port Hope*, 4 U. C. C. P. 418, and *School Trustees of Galt* v. *The Municipality of Galt*, 13 U. C. Q. B. 511, and looking at the existing School Act, cap. 64, (Consolidated Statutes, Upper Canada,) I think it results from the whole that the Court may, if *it* shall seem to them to be manifestly proper in any case on the facts before them, order the Municipality of a city to raise a rate, notwithstanding the School Trustees might, under the the Act, impose and collect the necessary rate themselves.

I take this case to come expressly under the 79th sec. of cap. 64. Here the School Trustees have laid before the Council their estimate of the sum required for the year for school purposes, whereupon the statute says, p. 747, sub-sec. 11 (*f.*), "And the Council of the city, town or village, *shall* provide such sums *in the manner* desired by the said Board of School Trustees."

I am not sure what may be meant by the words "*in the manner desired.*" It can hardly mean that they are to determine for the Council whether the money shall be paid out of city funds that may be had, or borrowed on debentures, or raised by rate, and if by rate, the manner of levying it. It means rather, I suppose, that the City Council are to take care and provide at such periods and in such sums as it may be called for.

The sub-section 12 of this clause is all that I find in the existing School Act which gives power to the Board of School Trustees in a city to levy school rates, and that seems to be a mere discretionary power that may be exercised in aid of the power of the city to collect school moneys, and when the trustees levy money under that provision, it would not be on ratepayers generally, but on the parents or guardians of the children attending any school under their charge. These at least are not co-extensive powers.

It is very reasonable for the City Council to say that the trustees cannot dictate to them, neither should the Court order, by what means they are to provide money, whether by rate or loan, and the case from Port Hope, 13 U. C. Q. B. 511, that objection was said by the Court to have much force.

But in all that is before us in this case we see—

1st. That the City Council have received the usual estimate for the year, and have objected to it.

2nd. That they proceeded to provide by by-law for raising the whole sum by rate.

3rd. That they afterwards in effect cancelled what they had done, so far that they have provided a less rate, which will only produce a part of the sum, and will leave the rest unprovided for.

4th. That having every opportunity of showing their reason for doing this, they have given no reason, but leave to their full force the grounds of complaint which the Trustees have laid before us. If they substituted a rate of one cent and six mills for a rate of two cents, because that would produce the sum required, or because they have paid, or are ready to pay, or mean to provide the residue by law, or from their current general purpose funds, or for any other good reason, we may take it for granted they would have laid the reason before us by affidavits.

Not having done so, we are bound, I think, to proceed upon the assumption that they have no good reason to offer.

The interests of the Common Schools are too important in a large city to admit of a sudden suspension of their proceedings, from any dispute of this kind between the two authorities, if it can possibly be avoided. It would produce the utmost inconvenience.

I think we must make the rule absolute, for the obligation upon the City Council under the statute is express in its terms, and no good reason has been shown why, since it has been executed in part, it has not been executed to the full extent.

The cases cited from 2 B. & Al. 646, and 6 B. & C. 281, are satisfactory authorities for the purpose for which they are cited, but do not apply under the circumstances of this case to restrain us from doing what we can to prevent what, for all that appears, might come to be a great public evil. If the City Corporation shall hereafter show that they have rendered it unnecessary to levy a rate as required by providing the money without delay, either wholly or in part, from other sources, they may be assured that no fault will be found with such a course.

It is but just towards the city to suppose that if they were prepared to meet the estimate without levying a rate, they would not have left them to this time unpaid, or at least such amounts on account as were from time to time required.

Rule absolute.

CHAMBERS.

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*

HAMILTON AND DAVIS v. HOLCOMB, MCPHERSON, AND CRANE.

Several Defendants—Ca. Sa.—Arrest of one—Satisfaction of Judgment.

Held, that the arrest of one of several defendants under a *ca. sa.*, and his subsequent discharge with the consent of plaintiff operates as a satisfaction of the judgment by all the defendants; and this, although plaintiff at the time of the discharge expressly stipulated that his other remedies on the judgment were not to be impaired by the discharge. (January 7, 1861.)

This was a summons to set aside a writ of *fi. fa.*, issued 5th

July, 1860, against the goods of the defendants, and all proceedings thereon, and for entering satisfaction on the judgment roll under the following circumstances.

The plaintiffs obtained judgment against the defendants, in January, 1858, upon a bill of exchange, drawn by Messrs. Holcomb & Henderson, upon and accepted by the defendants, McPherson & Crane.

McPherson & Crane made an assignment for the benefit of creditors, on the 2nd Jan., 1858. In June, 1858, the defendants sued out a *ca. sa.* upon the judgment, against all the defendants, and thereupon the defendant, McPherson, was arrested and charged in execution; and on the 3rd July, 1858, the plaintiff's solicitor authorised the sheriff to discharge him by a memorandum in writing, as follows: "Mr. Sheriff you will please discharge the defendant, John McPherson, from custody, under the *ca. sa.* in this cause, upon payment of your fees."

The defendant was discharged, and the plaintiffs signed the deed of assignment, made by McPherson & Crane, on or about the 20th July. The plaintiffs, on 5th July, 1860, sued out a *fi. fa.* against the goods of the defendants, and under it the sheriff seized goods in the possession of the defendant Holcomb.

It was sworn on the part of the plaintiffs, that the understanding when McPherson was discharged, was that the plaintiffs were not to be affected by the discharge, but were to be at liberty to enforce the judgment by any other remedy.

Galt, Q. C., for the summons submitted, 1. That satisfaction of a judgment by one of several defendants is, as against the judgment creditor, satisfaction by all. 2. That the arrest of one defendant in the cause under a *ca. sa.*, and his subsequent discharge from custody by the order of the plaintiff's attorney, operates as a satisfaction of the judgment by the defendant arrested. He referred to *Vigers* v. *Aldrich*, 4 Burr., 2482; *Jaques* v. *Whithy*, 1 T. R., 557; *Clarke* v. *Clement, et al.*, 6 T. R., 525; *Catlem* v. *Arnott*, 3 C. B., N. S.. 796.

Harrison, R. A., contra, contended, 1. That the arrest under a *ca. sa.* was not *per se* a satisfaction of the debt. 2. That this followed by the discharge from custody by the order of the plaintiff's attorney, was not sufficient to work satisfaction. 3. That the consent of plaintiff to the discharge, must be shown to have been express and absolute. 4. That when plaintiff consented to the discharge in this cause, it was upon the express reservation of his other remedies of the judgment. 5. That the arrest and subsequent discharge of a single defendant, would not operate as an absolute satisfaction of the debt, but only to bar the plaintiff's remedy by *ca. sa.* as against the particular defendant. 6. That, if a satisfaction, the liability of defendants as drawers of a bill of exchange, is under our statutes several, as if separate actions had been brought, and so satisfaction by arrest and discharge of one would be no bar to proceedings against the others. He referred to Con. Stat., U. C. cap. 22, s. 274, p. 244; *Ib.* cap. 42, s. 23, *et seq.* p. 446; *Denton* v. *Godfrey, et al.*, 11 Jur., 800; *Harris* v. *East India Co.*, 11 Moore, P. C., 39; *Thompson* v. *Parish*, 5 C. B., B. S., 685.

Burns, J.—Mr. Harrison relies on *Denton v. Godfrey*, 11 Jur. 800; *Haines* v. *East India Co.*, 11 Moore, P. C., 39; and *Thompson* v. *Parish*, 5 C. B. N. S., 685, to establish the general principal that a *ca. sa.* executed against the defendant is not a satisfaction of the judgment, and that plaintiff may obtain satisfaction from another defendant, though he has discharged McPherson. He argues also, that the defendant Holcomb is not a joint contractor with McPherson and Crane, and therefore the taking of the person of McPherson is no satisfaction.

For the purpose of determining the question raised in this cause, it does not appear to me we are to go behind the judgment and examine upon what it is founded. Admit it to be that Halcomb was only liable as drawer of the bill, and the other two as acceptors, and that if there had been separate actions, the discharge of the defendants from an arrest in one, would have been no discharge in the other, yet when the bill has passed into judgment in one action against all, there is no longer a several liability in different characters, all are equally liable upon the judgment, and it must be considered as one judgment. The bill is merged in the judgment, and the execution must follow the judgment both as respects the different kinds of execution, and as respects all the defendants, unless there be some legal excuse or reason for it.—Hob. 59; *Raynes* v. *Jones et al.*, 9 M. &. W., 104.

Where the plaintiff obtained a verdict in trespass, against two defendants, both of whom were arrested on a joint *capias ad satisfaciendum*, and one was discharged on giving a promissory note to the plaintiff, the Court of Common Pleas held that this operated to discharge the other. See *Ballane* v. *Price & Payne*, 2 Moore, 285.

The true nature of the question in this case is, whether the judgment is to be considered satisfied or not by what the plaintiff has done, for if the judgment has been satisfied as respects McPherson, there can be no question that once being satisfied there is an end of it for any purpose whatever.

I agree with the proposition that the mere taking of the person upon a *capias ad satisfaciendum* is not satisfaction *per se* of the judgment. But here the plaintiffs themselves discharged McPherson, and the question is whether that act did not entitle him to have the judgment treated as satisfied.

It appears to me that the cases of *Vigers* v. *Aldrich*, 4 Burr., 2484; *Jaques* v. *Whithy*, 1 T. R., 557, and *Turner* v *Hague* 7 T. R., 420, fully support the proposition that the judgment must be considered, as respects McPherson, to be satisfied.

If it is to be considered as satisfied with regard to one defendant, is it not so as to all? The case of *Clarke* v. *Clement*, 6 T. R., 525, and the case already mentioned of *Ballam* v. *Price*, prove clearly to my satisfaction that it is so.

In *Clark* v. *Clement*, the plaintiff first took one of two defendants upon a joint *ca. sa.*, and discharged him. The other defendant then moved to have satisfaction entered, but the court instead of ordering that, made an order protecting the defendant from arrest. The plaintiff then sued out a *ca. sa.* against the defendant alone, who had been arrested, and then that defendant applied to the court to set that writ aside for irregularity, for being against the defendant alone, and to have satisfaction entered upon the roll. The court decided that the plaintiff was wrong upon both points, and made absolute the rule for entering satisfaction.

If the defendant obtains his discharge by operation of law, or in some manner to which the plaintiff is not consenting, then the fact of having been taken in execution is not satisfaction. But if the plaintiff discharge the defendant, then the taking and the discharge complete the satisfaction, and a judgment once satisfied by one defendant must, as respects the plaintiff, be considered so *quoad* all the defendants.

I refer to *Catlin* v. *Kernot* 3 C. B. N. S. 796; *Blackburn* v. *Stupart*, 2 East, 243; *Lambert* v. *Parnell*, 10 Jur. 31; *Wood* v. *Bramhead*, 21 Law J. Ex., 216.

The summons must be made absolute, but without costs.

Summons absolute without costs.

English et al. v. Henderson.

In an action on the common counts by a Toronto agent of a country attorney against his principal, for alleged agency services, leave was given to defendant on the usual affidavit, to plead—1. Never indebted. 2. Payment. 3. Set off. 4. Non-delivery of bill signed by plaintiff one month before action.

(Chambers, Dec., 30, 1860.)

This was an action brought by plaintiffs against defendant, on the common counts for alleged professional services rendered by the plaintiffs attorneys of the court, as Toronto agents for the defendant, another attorney of the court resident and practising in Belleville.

Jackson, upon the usual affidavit, that he had just ground to traverse the several matters proposed to be traversed, and that the several matters sought to be pleaded by way of confession and avoidance were respectively true in substance, and in fact, obtained a summons to plead the following matters.

1. Never indebted. 2. Payment. 3. Set off. 4. Non-delivery of bills signed by plaintiff one month before action.

He cited *Smith* v. *Dimes*, 4 Ex. 32.

English showed cause.

McLean, J., made absolute the summons to plead all the matters proposed to be pleaded.

COURT OF ERROR AND APPEAL.

(*Reported by* THOMAS HODGINS, Esq., *Barrister-at-Law.*)

CARRALL (Sheriff), Appellant, vs. POTTER, Respondent.

Executions—Attachments—Absconding Debtor's Act—Priority.

Held, (affirming the judgment of the C. P.) that a second execution coming into a Sheriff's hands after several attachments, under the Absconding Debtors' Act—the debtor's goods having been sold under the first execution—has priority over the attachments. (23rd January, 1861.)

Appeal from the Common Pleas. This was an action against a Sheriff for a false return, involving the question of priority between an execution and attachments. The facts of the case *Potter* v. *Carrall*, are reported in 6 U. C. L. J., 42, and 9 U. C. C. P., 442, see also the case of *Carrall* v. *Potter*, (19 U. C. Q. B., 346).

Freeman, Q. C., and *Baird* for the appeal, *Wood* and *R. A. Harrison* contra.

ROBINSON, C. J., (after stating the facts of the case). It seems to me that the attachments being in the Sheriff's hands before the execution of the respondent are entitled to priority, according to the wording of the statute. From early times it has been held that where a second execution against a person comes into the hands of a Sheriff, where the person is already in his custody, he does not go through the form of a second arrest. In attachments against the person, the words used in the writ are: "Keep and detain the body," and in the form of writ given in the Absconding Debtors' Act the words used are, "attach, seize and safely keep all the real and personal property," &c. It does not appear that this right to seize was merely to compel the appearance of the absconding debtor. The appeal should be sustained.

DRAPER, C. J., C. P.—It does not seem to me that the debtor's goods are seized by the attachment. When taken by the Sheriff one of three things happens:—1. Special bail is put in by the defendant, and then all his property so attached is restored to him; or—2. The plaintiff obtains judgment and issues execution; or—3. If the plaintiff fails, the Sheriff is to restore the property to the defendant. Now, the object of the attachment is to compel the defendant to put in special bail, or retain the goods until the plaintiff's right is determined. The objects of writs of *fieri facias* and of writs of attachment are totally different. The Sheriff has no authority to sell except under executions:—he could not sell under the attachments unless in the cases pointed out in the statute. Either then he sold under the respondent's writ, or under the writs of the attaching creditors, and now retains the money for these executions. The seizure by a writ of execution is a complete and exhaustive act,—not so a seizure by a writ of attachment. On technical grounds the respondent is entitled to priority, and the appeal should be dismissed.

MCLEAN, J., concurred with ROBINSON, C. J., that the appeal should be sustained.

ESTEN, V. C., concurred with DRAPER, C. J. The respondent's writ attached on the goods immediately on its being placed in the Sheriff's hands, and should have priorty over the attachments. The appeal should be dismissed.

BURNS, J.—The attachment coming into the Sheriff's hands while the goods were in his custody under a prior execution could not attach, because an execution is a totally different writ, and the goods enure to the class of creditors who have the proper writs in the Sheriff's hands. Appeal should be dismissed.

SPRAGGE, V. C.—The cases in the books do not clearly show what act should be done by the Sheriff to bind the goods. The writ of attachment without some act does not bind the goods in *custodia legis*. In this case, the Sheriff had actually seized the goods under a prior execution, and he held them to answer any legal charge which might come in against them; and a writ of attachment being such legal charge, it must be held that such attachments coming in before the respondent's execution are entitled to priority. The appeal should be sustained.

RIHARDS, J., and HAGARTY, J., affirmed their judgments in the court below, and concurred that the appeal should be dismissed.

Per cur.—Appeal dismissed with costs.

HALL, Appellant, v. CALDWELL, Respondent.

Mortgage—Redemption—Dormant Equities—Statute of Limitations—Infancy.

The respondent (plaintiff below) filed his bill to redeem a mortgage made by his father in 1835. payable on the 4th February, 1837. The mortgagor remained in possession until his death in May, 1838, and his heir (then an infant) continued to reside on the property until some time in 1839, (about a year after the death of the mortgagor) when the mortgagee obtained possession. In 1842 the mortgagee sold to one of the appellants. The respondent's bill was filed on the 18th October, 1859.

Held, (affirming the judgment of the Court of Chancery,) 1. That the respondent was entitled to redeem. 2. That the Dormant Equities Act does not apply to cases of mortgage. 3. That disabilities apply to the redemption of mortgages the same as to actions to recover land or rent, and that the statute of limitations was no bar to the relief sought by the respondent.

Appeal from the Court of Chancery. The facts of the case and the judgment of the Court below, are reported 6 U. C. L. J., 141.

A. Crooks for the appellant.

R. A. Harrison and *Thomas Hodgins* for the respondent.

ROBINSON, C. J.—The first part of the preamble to the Dormant Equities Act, 18 Vic. ch. 124, seems to be retained in the Con. Stat. U. C. ch. 12, ss. 57, 60, and is therefore still in force. But it appears to me from the wording of the statute that the Dormant Equities Act does not apply to mortgages where the right to redeem is expressed in the deed, and on this point I concur with the judgment delivered in the court below. Then as to the statute of limitations, as being a bar to the right to redeem. The statute did not begin to run during the lifetime of the mortgagor, he was in possession, and if the mortgagee wished to eject him, he could stay proceedings by paying the money into Court. Assuming that every statement in the bill must be taken against the pleader, and that the phrase "about a year after May, 1838," should mean May, 1839, and the bill not being filed until October, 1859, does the disability of infancy relieve the respondent from the operation of the statute? We think it does, and that he is entitled to claim the benefit of the disabilities clause of that statute. The object of the mortgage clause was to settle the law as to the right of the mortgagor to redeem and not to limit him in any other way, and therefore not to deprive him of the advantage of disabilities which he enjoyed before. There is nothing in this case which brings it within the provisions of the 11th section of the Chancery Act of 1837. The appeal therefore should be dismissed.

ESTEN, V. C.—I had doubts at first as to whether the judgment in the case should not be reversed. But on mature consideration I am satisfied that I was right in the judgment given in the Court below. The Dormant Equities Act cannot apply to this case, for mortgages are not within it. In regard to the 11th section of the Chancery Act of 1837 (Con. Stat. U. C. pp. 57, 875), that section I think cannot apply. In cases arising under it, the plaintiff must state a case to warrant the exercise of the discretion of the Court, and the defendent should not meet it by a demurrer. Then as to the statement in the Bill as to the time when the mortgagee took possession, "about a year after," May, 1838, the case of *Baker* v. *Wetton*, (14 Sim. 426, s. c. 9, Jur. 98,) lays it down that the Court will not on such statement as "shortly after," &c., intended on demurrer that the bill shows any thing from which it can be inferred with certainty at what period the time commenced to run, and as long as that judgment stands we must be governed by it. The clause in the statute of limitations providing for disabilities, must be held to apply to redemption of mortgages, as well as to actions for the recovery of land. Although Sir Edward Sugden in his work on *Real Property Statutes*, remarks, "There is, it should be observed, no saving for disabilities of the mortgagor or his heirs," (p. 114.) Mr. Fisher (in *Law of Mortgages*, p. 95), in referring to this statement, expresses a strong opinion against it, and doubts whether it was ever intended that the Courts of Equity in construing the Act would feel bound to deprive the mortgagor and his heirs of the benefit of disabilities. I think the Legislature did not intend to deprive the mortgagor and his heirs of that benefit, and I must therefore hold this respondent entitled to it, and that he has a right to redeem.

Per. Cur.—Appeal dismissed with costs.

BANK OF TORONTO V. ECCLES.

Assignment for Creditors—Evidence—Registration—Release.

This was an appeal from the C. P. This case was as to the validity of an assignment for the benefit of creditors, and the questions raised on the appeal were (1) as to the admission of evidence of consideration allunde the deed.
Held admissible—(2) as to registration. *Held* that it did not disturb the conveyance (3) as to release. *Held* that it did not vitiate the assignment, as fraud was not to be presumed against the assignor.

Esten and Spragge, V. C., *Dissentientibus.*

Per. Cur.—Appeal dismissed with costs.

MUNICIPALITY OF KING V. HUGHES.

Appeal from the Q. B. The judgment of the Court was delivered by Draper, C. J., C. P. Appeal dismissed with costs.

COMMERCIAL BANK V. AVERILL.

Appeal dismissed with costs.

GREAT WESTERN RAILWAY CO. V. BRAID.
" " " V. MCALEESE.
" " " V. FAWCETT.
" " " V. COOK.

Appeals dismissed with costs.

MCARTHUR V. VANDEBURGH.

In this case Robinson, C. J., delivered judgment, affirming the judgment of the Court below. The other members of the Court concurred with so much of the judgment as affirmed the conclusiveness of the line run by the surveyor, Roche. Appeal dismissed with costs.

PORT BRUCE HARBOR CO. V. WEBB.

Appeal dismissed with costs.

JOSEPH V. HEATON.

Stands until next sitting.

CHANCERY.

Reported by A. GRANT, Esq., *Barrister-at-Law.*

HENRY V. BURNESS.

Assessment Act—Sale of Lands for Taxes—Combination to Prevent Competition—Effect on Sale—Relief—Costs.

A combination among bidders at an auction sale of lands for taxes under and pursuant to the Assessment Act, is not only contrary to public policy, but contrary to the spirit and intent of the Assessment Act.
A party who purchases a lot of land at a sale where such combination exists, though not a party to the combination, will not be protected in his purchase.
The Sheriff is, as it were, a statutory trustee, and it is his duty as such, by every possible means, to discountenance a combination against competition among bidders.
A person whose land was sold for taxes at a sale where such a combination was proved to have existed, notwithstanding the lapse of a year allowed by the statute to redeem, was relieved from the sale on the same terms as if he had tendered payment within the year—each party paying his own costs of suit.

This bill was filed by the owner of land sold for taxes, under the assessment laws of this Province, in the month of October, 1858.

The sale was impeached on the ground of the improper conduct of the sale by the Sheriff, and of there being a combination among the audience, or a large number of them, to prevent competition at the sale.

The sum due for taxes and for the expenses was ten dollars and forty cents, and to satisfy this 200 acres of land, being Lot 12 in the 2nd Concession of the Township of Moore, was sold, and was purchased by the defendant. Its value was proved to be about $2,000.

The nature of the combination charged, and to some extent established by the evidence, was, that the parties to it should not bid against one another. The object of the parties was to get whole lots knocked down to them for the taxes in arrear; and there appeared to have been a sort of rotation agreed upon, or at least understood among them, according to which parties were to get entire lots without opposition.

It was not brought home to the defendant that he was a party to such combination, and several bidders at the sale were called by the defendant to prove that they were not parties to any combination, and some expressed the belief that there was no such combination whatever; but the fact of such combination is proved by one of the parties to it, Mr. Yeomans, who says: "I got a whole lot for the taxes. There was an agreement between some purchasers, about a dozen I think, of whom I was one—that we should not bid against one another. We were to allow one another to get whole lots. If any one bid out of his turn it was said, let him have the lot, it is his turn," speaking of the person bid against. "The arrangement applied to both days." What occurred at the sale is perhaps best described in the witnesses' own words. Michael Sullivan says:—"I bid for one lot and got it on the first day.

"There was some competition, and there was a general understanding among those present that they should not bid against one another, but each take a lot in his turn. This understanding continued to the end of the sale. If after a person got a lot he bid for another, it was complained of, and it was openly remarked that he had no right to bid again out of his turn." "At the sale if any persisted in bidding others would bid against him, so as to bring it down to two or three acres; few did persist after being told they were bidding out of their turn; there was an opportunity for others to bid if they liked; some bid on lots in order to perfect their title; I was not present at any arrangement that parties should not bid against one another, but I saw that there was such an understanding; the audience was rather riotous sometimes, and the Sheriff threatened to postpone the sale." Francis Creighton says:—"I tried to get a lot the first day, but could not; on the second day the bidders seemed to get lots apiece, but when I tried they bid against me, and I did not go below fifty acres, but when I bid that they would bid lower; other bidders were bid against in the same way. It appeared to me that the townspeople and speculators were combined together."

This was confirmed by the auctioneer himself, who says:—"On the first day a great many lots were cut down to small pieces, which were not taken; I thought that it was to prevent others from getting the lots. On the second day more whole lots were sold than on the first. I thought bidders allowed others to get a lot under the idea that they would be allowed themselves to get one without opposition. There was nothing corrupt or fraudulent about the sale that I know of. Mr. Thornton acted as Sheriff's clerk at the sale; he bought some lots. When they were put up he said he would take that lot, and there was no one who would bid against him."

The evidence for the defence did not materially change the character of the proceedings at the sale. The witnesses spoke of more competition than the witnesses for the plaintiff; and their evidence tends to exonerate the Sheriff from complicity in any arrangement among purchasers to prevent competition, but even Mr. Talfourd, whose evidence is entitled to implicit confidence, says:—"There was an attempt among bidders certainly to get lots in turn, not opposing one another, but the Sheriff I am satisfied had nothing to do with it. I bid for the sake of investment, rather than for the purpose of purchasing land. There was a good deal of noise part of the time." Other witnesses agreed generally in the evidence of Mr. Talfourd. One of them, McAvoy, says:—"There was a great deal of clamour and noise at the sale."

The Sheriff was also called for the defence. He said he was not aware of any agreement among the audience as to their bidding, but he adds—"I did not, however, like the way in which the audience conducted the sale. The practice of persons saying 'I will take this land,' and others saying, 'let them have it,' was probably repeated a thousand times; such practices occur at all sales for taxes, I believe." He added that a number of young men of the place were scattered through the audience; that the greater part of the land sold the first day was thrown up—that

purchased by persons in the neighborhood principally; that purchased by persons at a distance was returned.

Other witnesses spoke of a combination to prevent what they call speculators from a distance from purchasing; others of purchase by such speculators through the young men of the town.

It also appeared from the evidence that whole lots were purchased by persons who professed their object to be to perfect their title; that lands not likely to be redeemed were preferred; that the sale was conducted amid much noise and confusion; and that a considerable portion of the audience interfered in the conduct of the sale, not only by a private combination or understanding among themselves, but by openly interfering with bidders to prevent their competition.

Mowat, Q. C., for plaintiff. *J. H. Cameron*, Q. C., and *G. D. Boulton*, for defendant.

SPRAGGE, J. C., delivered the judgment of the Court.

To consider briefly the object of that portion of the audience that acted in combination, the means they took to accomplish it, and its effect upon the sale.

The object is palpable and was not disguised. It was to secure to themselves entire parcels of land for the taxes in arrear. The means taken to accomplish that object were by an arrangement not to compete with one another, and by silencing competition in others. So far as in them lay, they endeavored to confine the the biddings (with certain exceptions, of which a purchase alleged to perfect a little was one,) to a certain set. Those outside of this set were bid against and the quantities of land run down to such a trifle as to be useless to the purchaser, and these generally not taken if the purchase happened to fall to one of themselves. I do not mean that the evidence shews that this exclusion of others was universal. Mr. Talfourd and some others were not interfered with, but still this portion of the audience exercised such an influence upon the sale—it is not too much to say, such a control over it—as practically to exclude whom they would from purchasing. The effect of this upon the sale is evident enough, and we may look not only at the audience to see what did occur, but at what must occur necessarily as a consequence of what was done. But the evidence shows much more: some bidders deterred from the apparent hopelessness of being allowed to purchase; others induced to refrain from competition in order that, if they did not oppose others, they would be allowed to purchase a lot themselves.

Mr. Mowat contended, and with much force, that such conduct is against the policy of the law, as the law regards auction sales as a just and open method of selling property for the best price; and also against the policy of the assessment laws of the Province, which appear to have been framed with an anxious desire that when land is necessarily sold for taxes, as small a quantity as possible should be sold, and that such part should be sold as would injure the owner as little as possible; and he also insisted upon the extreme inadequacy of price as a ground for setting aside the sale.

Upon the latter point I hardly think that the grounds upon which the contracts upon inadequacy of price are founded apply to such a sale as this. The fraud evidenced by the inadequacy of price is that upon which the Court proceeds; but in a sale which the law makes the duty of a public officer to collect revenue for public purposes, if the sale be duly and properly conducted, fraud on his part as an inference from inadequacy of price would seem to be excluded.

But I think that there is a great weight in the other objection. On the one hand bidders at auction sales are protected by the rules against the employment of puffers, and on the other hand if a purchaser obtains his purchase by means which prevent a fair competition, he cannot hold it. A decision on the latter point is that of *Fuller* v. *Abraham*, B. & B. 116, where upon the sale of a barge, a person who afterwards became the purchaser, stated to the audience that he had a claim against the owner of the barge, by whom he had been ill-used. He made a bid and was not opposed; the auctioneer refused to knock it down to him, when he got a friend to make a small advance upon his bid, and he himself made a small advance upon that. The auctioneer still refused to knock the barge down to him, and the Court sustained him in his refusal. The sum bid was about a fourth of the prime cost of the barge.

The books are, indeed, full of authorities to show that a party who obtains an advantage by unfair dealing cannot be allowed to hold it, and that whether the advantage be in the shape of a purchase or not, and if a purchase whether it be by auction or not, still it is obvious that a sale by auction cannot be that test of fair dealing which it is intended and taken to be, unless it is scrupulously kept free from undue influence from any quarter. And in regard to sales of land for the payment of taxes, it may be said to be the avowed policy of the statutes that the least land possible should be sold; and as a consequence that any contrivance that may be practised to procure the whole, or a large portion than necessary of the land to be sold, is in contravention of that policy, and it is admitted that not only is the sale at which it is practised affected by it, but future sales, and at other places as well as at the same; for bidders will be deterred from ever going to such sales when they find that their attempts to purchase may be defeated by combinations or other contrivances.

With regard to combinations, they may certainly be innocent, and instances are given where they may be so. One is where the thing sold is of such a nature as to be only within the reach of several combined. Another instance is where each of two parties requires a portion of a piece of land offered for sale, and agrees that one shall bid for the benefit of both of them. But the combination which existed in this case was of a totally different character. It was to obtain land not offered for sale voluntarily by the owner; and where he might exercise some control; but through the process of the law,—without competition. And why is competition excluded? Clearly under the apprehension that other bidders would pay the taxes for less land; in other words, that others are prepared to bid more for the land than they are; and in order that they may get it at as great an under value as possible,—at a tenth, a hundredth, or, as in this case, at a two hundredth part of its value. I can have no hesitation in saying, that such combination must, in the eye of the law, be looked upon as unconscientious. In the words of Mr. Justice Story,—"They operate virtually as a fraud upon the sale." (Story, E. J., s. 293.)

The language of that eminent jurist, Chancellor Kent, in just reprobation of a combination to prevent competition at a sale of lands in execution, is opposite to this case:—"Such an agreement is against the policy of the law, dangerous to the rights of property, and fraudulent in its design." 4 Johns C. C. 254. And he quotes with approbation the language of the Court in *Jones* v. *Carroll*, 3 Johns, C. C. 29:—"The law has regulated sales on execution with a zealous care, and provided a course of proceeding likely to promote a fair competition. A combination to prevent such competition is contrary to morality and sound policy. It operates as a fraud upon the debtor and his remaining creditors by depriving the former of the opportunity of obtaining a full equivalent for the property; which is devoted to the payment of his debts, and opens a door for oppressive speculation." I desire to add the words of another American Judge as expressing clearly and justly the policy of the law in regard to auction sales by officers of the law, 25 Maine Rep. 143:—"It must be admitted that fairness in whatever is connected with auction sales should be encouraged. Vast amounts of property are and must continue to be disposed of at such sales. It is a mode of proceeding necessarily resorted to in the execution of decrees and determinations of courts of justice. The object in all cases is to make the most of property that fairly can be made of it. It is the policy of the law, therefore, to secure such sales from every species of undue influence. To allow bidders to buy of each other, which is but a species of bribing, and so to combine to prevent a fair competition as that a sale may be rendered iniquitously fruitless, cannot be admissible."

I need not say in referring to decisions of American Courts, I do not quote them as authority binding upon our Courts; but the opinions of such men as Judge Story and Chancellor Kent are entitled to great respect; and I have quoted their language as, in my judgment, in accordance with the spirit of English law upon the same subject. There was one feature of the sale in question which I do not find to have existed in the cases referred to. Not only was there a combination among a portion of the audience not to bid against one another, whereby competition was bought off, and that, as it would appear, not among themselves only, but on

the part of others; but the combination extended to driving others from the field of competition by so binding against them as to make a profitable purchase hopeless. This, if successfully carried out, would give to certain parties the entire control of the sale; they would purchase as they pleased, and in effect for such prices as they pleased, and others would purchase only at their sufferance. It is manifest that such a sale would be at variance with the spirit and object of a sale by auction, and of our assessment laws, so far as they relate to the selling of land for taxes. It is, in truth, a mere going through the form of an auction sale, but in violation of its spirit. The very essence of an auction sale is fair and free competition; when competition is bought off or silenced, it were a misapplication of terms to call a purchase, under such circumstances, a purchase at auction. It is a principle of this Court to have regard to the substance and reality of things; not to the shape which they are made to assume. I should shut my eyes to the real character of the sale in question if I held it sustainable, as in substance and good faith, as in name, a sale by auction. Mr. Cameron did not contend (I think rightly) that the defendant was entitled to be protected in his purchase, because it was not proved that he was a party to the combination to prevent biddings. I do not think that the sale could be set aside as against a party to the combination, and sustained as to the defendant.

It is true that in *Cranstown* v. *Johnston*, 8 Ves. 170, a case in which Lord Alvanley took so strong a view against the defendant as to say,—"I never saw a case in which relief sought was more clear; and I must forget the name of the Court in which I sit, if I refuse to grant it;" still made this remark,—"It is said what if the sale had been to a third person? I am glad I have not to determine that—a third person might have a great deal more to say than this defendant can." The purchase there was by an execution creditor, who had brought about the sale by means which the Court held to be oppressive, but Lord Alvanley certainly thought that difficulty might exist in the way of relief against an innocent purchaser. But in the subsequent case of *Haguenin* v. *Basely*, 14 Ves. 273. Lord Eldon felt no such difficulty. He said,—"I should regret that any doubt should be entertained whether it is not competent to a Court of Equity to take away from third persons the benefit which they derived from the fraud, imposition, or undue influence of others." He referred to *Bridgman* v. *Green*, 2 Ves. p. 27, heard first before Lord Hardwicke, and then before the Lords Commissioners and cites the language of Lord Chief Justice Wilmot, which concludes thus:—"Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it." In both of these cases the property was affected in the hands of volunteers; here the defendant though not standing in that position, is affected with notice. Indeed, he scarcely stands in so favourable a position as a purchaser for value with notice, because assuming that he took no part in the combination or in actively influencing the sale, he took the benefit, with his eyes open of the improper practices of others to prejudice the sale. It cannot be urged that it may be that he would have obtained this whole lot, even if the sale had been fairly and properly conducted, and that it would be hard to fix him with the consequences of the misconduct of others. It is possible, certainly, that he might have obtained the whole lot without such misconduct, but he obtained it for a little over $10, while it was worth $2,000, and obtaining it was a natural fruit of the absence of competition—a permissive purchase by the parties to the combination. The bare possibility for it is a point incapable of ascertainment, that the defendant might have made the purchase, even at a fair sale, would be a very weak reason for allowing him to hold it when made at such a sale.

There is considerable conflict of evidence as to the conduct of the Sheriff at the sale. Some of it points to his being an accomplice with those who combined to prevent competition. If this were made out, his conduct, taking his position into account, would be very gross, much worse than any of his audience. —His duty was to discountenance, by every possible means, any combination among the audience. If in any way he lent himself to such combination, it would, undoubtedly, be a very great dereliction of duty, a very gross perversion of his office. But I think this is not made out. He himself, upon being examined, emphatically denied it; and those about him, who had an opportunity of observing his conduct, discredit it. I think that, in repressing the impertinence of some of the audience, he used language which has been misunderstood. But, in acquitting the Sheriff of complicity with others with improper practices at the sale, I cannot hold him wholely blameless in his conduct of the sale—at least, according to my judgment of what he ought to have done under the circumstances. He is the officer appointed by the law to conduct the sale—in other words, a statutory trustee, his duty being to sell land to pay the taxes, and to sell as little as it was necessary to sell for that purpose, thus owing a duty, as such trustee, to the owner of the land as well as to the public. In executing his trust, so far as it affected the owner of the land, he found himself thwarted by a considerable portion of the audience; he was able to execute his trust to the public by realizing the taxes from a sale of the land, but unable to execute his trust to the owner of the land by selling as little as was necessary. I think he erred in continuing the sale amid the clamour, confusion, and combination which prevailed, and which rendered justice to the land-owner impossible. I believe, looking at all the evidence, that he made as little sacrifice of the property offered for sale as he could, while permitting the sale to proceed under the circumstances; but when he saw that the essential element of an auction sale, competition, was virtually put down, so that his duty to the land-owner could no longer be discharged, I think he was wrong in continuing the sale.

It may be said that at an adjourned sale he might be met with a repetition of the same conduct on the part of the audience, and that his duty to levy the taxes would thus be left unfulfilled. He might be so met, or he might not; but the chance, or even the probability of it, is not a good reason for continuing the sale as he did. He would have no right to assume that the improper course of conduct would be repeated; I do not mean to say that the course proper for the Sheriff to take may not be attended with difficulty, but the law has a right to look for the exercise of sound judgment and discretion, as well as firmness in the execution of such duties. Mr. Cameron put it that the Sheriff cannot be taken to know that the value of a whole lot necessarily so greatly exceeds the arrears of taxes that a sale of the whole is improper. This implies that the Sheriff is not bound to acquaint himself with what he is selling; that he may properly remain ignorant of the improvements, the quality of the soil, and of every particular beyond the number of the lot and the assumed quantity. I by no means concede that he can properly be ignorant of these particulars; he has peculiar facilities for becoming acquainted with them, and if he had not, still it is his duty to sell for the best price, as I take it so to be. He cannot discharge that duty if so utterly ignorant of what he is selling as not to know whether it is worth ten dollars or two thousand. Besides, the statute, in making it the duty of the Sheriff to sell not only as little as possible, but that part which is *least* injurious to the landowner, seems to contemplate his making himself acquainted with the land he is selling.

In the case before me, combination, for the two purposes I have stated, has been proved; but I do not mean to say that actual combination is necessary to invalidate such a sale. The prevention of competition by any undue means, I apprehend, would be sufficient, because against public policy and a fraud on the sale. The simple issue raised upon these pleadings is, whether the defendant's purchase made under the circumstances that it was, can be sustained. It is not objected that the plaintiff has not come promptly; and as no ground is suggested for refusing relief if the sale was an improper one, I feel no difficulty in holding that the defendant's purchase cannot be sustained.

As to the terms upon which the plaintiff should be relieved; I think, as to the money payment, it should be the same as if he had tendered payment within the year. As to costs, I think each party should bear his own. The defendant cannot hold his purchase, but I think he did not obtain it through any undue practices on his part. The plaintiff, of course, ought not to pay costs. I have had some doubt whether he ought not to have them against the defendant; but, upon the whole, I think it is more just that each party should pay his own.

ASSESSMENT CASES.

IN THE THIRD DIVISION COURT OF THE COUNTY OF ELGIN.

IN THE MATTER OF THE APPEAL OF HEPBURN AND JOHNSTON FROM THE DECISION OF THE COURT OF REVISION OF THE MUNICIPALITY OF THE VILLAGE OF ST. THOMAS.

Lease of Road—how assessable—where assessable.

The gravel road in the County of Elgin forming part of the London and Port Stanley Road, was granted by the Crown to the municipal corporation of the County of Elgin, and by that corporation leased for a term of years to the appellants, who were not residents of the village of St. Thomas.

Held, 1. That the interest of the appellants in the road being a chattel interest, could only be assessed as personal property. 2. That as the appellants did not reside in the village of St. Thomas, they could not be assessed by the Municipal Council of that Village in respect to their interest in the road.

(June 4th, 1860.)

The gravel road in the County of Elgin, forming part of the London and Port Stanley Road, formerly a Provincial work, was granted by the Crown to the municipal corporation of the County of Elgin under the statute authorising the transfer of public provincial roads vested in Her Majesty under the control of the commissioners of public works, 13 & 14 Vic., cap. 15; continued by secs. 4 & 5, cap. 85 Con. Stat. of Can., p. 937.

The municipal council leased this road to the appellants for a term of years.

The municipality of the village of St. Thomas—through which village about a mile of this road passes—assessed that portion of it as real property, to Messrs. Hepburn and Johnston the lessees, with a view to make them pay taxes for it as such.

They appealed to the Court of Revision against this assessment as illegal, and failing to get redress there, they appealed to the judge of the county court of Elgin.

It was admitted that there was no toll-gate, or other place of business of the appellants connected with the road situated within the municipality of St. Thomas, and that both appellants reside in the township of Yarmouth, and not within the village of St. Thomas.

Becher, Q. C., for the appellants, objected to the assessment: 1. That the gravel road is a "*public road and way*," and as such is specially exempted by the 6 sub. sec., Con. Stat. U. C., cap. 55., page 651. 2. That the road, though leased, is "*property belonging to a county*" as exempted in the 7 sub-section. That the leasing of the road is in effect but a leasing of the tolls, which the county receives by way of rent, the property in the road remaining in them, and the tenant being *de jure* their collector. 4. That if it be argued that the road is a highway (see Con. Stat. U. C., p. 612) in the face of the above, then it is vested in the crown, and the council, or Messrs. Hepburn and Johnston have a mere easement in it, and it is exempted in the 1st sub-section; and besides as to them it is not real property. But the first reason given is sufficient without going further; the road is *de facto* and *de jure* a public road, (see the use of that term page 613 Con. Stat. U. C., and in other acts) its transfer to the council does not alter this, nor does its letting by the council

The only legal way that taxation can reach this road is by assessment of the income derived from it by its lessees, and the learned judge to whom the appeal is made will, I doubt not, strike out the assessment as regards real property altogether.

In reply to this the Reeve of St. Thomas put in the following paper, prepared by his counsel, Mr. Hamilton.

In regard to the opinion of Mr. Becher as to the illegality of the assessment declared on the portion of the London and Port Stanley Road passing through St. Thomas:

1. The municipality of St. Thomas say, that the said portion of the said London and Port Stanley gravelled road is not "a public road and way," within the meaning of the 6th sub-sec. of sec. 9, Con. Stat. U. C., cap. 55, page 651, forasmuch as the same is held by Messrs. Hepburn and Johnston by virtue of an indenture equivalent to a deed, and which said indenture binds the county council of Elgin to make the said parties a clear deed so soon as they have power to do so, if required; and further, that the said road is held by the said Hepburn and Johnston for their own benefit, they receiving payment from the public for the use thereof.

2. In consequence of the said indenture from the said county council to the said Hepburn and Johnston, which the Court of Revision consider equal to a deed, the said portion of the said road is the private property of the said Hepburn and Johnston to all intents and purposes, the said indenture not being a lease of the *tolls* as argued by Mr. Becher, and the property in the said road being thereby to all intents and purposes vested in the said Hepburn and Johnston, it cannot be exempted from taxation under the sections quoted.

3. In answer to the third objection: the Crown has transferred all interest in said road, as a road, to the County Council of Middlesex, the County of Middlesex to the County of Elgin, the County of Elgin to Mr. Hepburn, Mr. Johnston deriving his interest from Mr. Hepburn; Messrs. Hepburn and Johnston deriving all gain and profit from travel on the said road, and not being mere collectors of tolls, ought not to be exempt from taxation on the said property, as it is clearly of the nature of real property. Further, the road was disposed of by tender. (See memorandum in possession of clerk of County Council of Elgin.) That notices for the said tenders were published in the *St. Thomas' Dispatch*, and were for tenders for *purchase*, and not for lease of the said London and Port Stanley gravelled road, and bear date 4th Dec., 1856, and 22nd January, 1857.

HUGHES, Co. J.—I am satisfied, as my impression was at the first day of the hearing in this court, that the appellants' interest in the property assessed is taxable, but I had not then made up my mind in what way it was so, nor that it was assessable in the municipality of St. Thomas.

After hearing the parties, and reading the arguments that have been, by consent, mutually placed in writing before me, and considering and comparing the facts and arguments with the law regulating assessments, I find that the property of the appellants in the road in question, is only a chattel interest, being a term of years, and as such assessable only as personal property.

The interest of the appellants cannot be regarded as real estate, inasmuch as the title, or fee simple in the road, is vested in the municipal corporation of the county; and the appellants hold only a chattel interest under that corporation, which might be made subject to seizure and sale under an execution against goods and chattels.

Supposing the county council had no interest in it, it is extremly doubtful to my mind whether the 6th sub-section does not exempt it from taxation, because it is a public road and way within the meaning of the 22nd Vic. chap. 64, sec. 313.

The property of the county is also expressly exempted by the 7th sub-section whether occupied for the purpose thereof or unoccupied; here it is occupied by their tenants, or by persons to whom they have granted an easement in it, and as such road it cannot be legally assessed.

The question then comes, would I order the roll to be amended by changing the assessment from real to personal property, and order it to be assessed at the income it yields to the appellants, or otherwise? I am satisfied I should not, because I cannot order the roll to be amended in a manner different from what the assessors ought to have originally made it. By the 19th section, I find that the assessors are required to prepare an assessment roll, in which they are to set down "the names and surnames in full, if the same can be ascertained, of all taxable persons resident in the municipality who have taxable property therein, and of all non-resident freeholders who have either in person or in writing required the assessors to enter their names and the land owned by them on the roll."

Now according to this provision, a man should be assessed for personal property in the municipality where he lives; and by the 20th section, land is to be assessed in the municipality where it lies, so that the appellants, who reside out of St. Thomas in the township municipality of Yarmouth, should be assessed for their chattel interest in this road in the latter municipality only, and the law does not justify the assessing of parties who reside out of the municipality, upon personal property they may possess within it, as it does upon real property, because the words authorising the assessors to act limits them to taxable persons resident in the municipality, who have taxable property therein.

It may be urged that the applicants have different places of business, inasmuch as their toll-gates are the places whence they derive their income from the road, but it would be useless to pursue any argument founded upon the 39th section, because the appellants have no such place of business or toll gate in the municipality of St. Thomas, and because they are not residents of and have no place of business in this municipality, and for the reasons before named I do not consider them properly assessed, or assessible at all in the municipality of St. Thomas, and I order that the clerk of the municipality of St. Thomas be notified by the clerk of this court of this my decision, and that the roll be amended according to the same.

And as to the costs in this proceeding, I do order that the same be borne and paid by the respondents.

IN THE MATTER OF THE APPEAL OF EDMUND MONTAGU YARWOOD, AGAINST THE DECISION OF THE COURT OF REVISION ON THE ASSESSMENT ROLL OF THE MUNICIPALITY OF ST. THOMAS.

Income—How assessable.

Where the appellant, who was manager of a bank in the incorporated village of St. Thomas, ceased to be such in February, 1860, was then paid $170 83 the balance of his salary, had not during the year 1860, derived income from any other source and had not after the commencement of May 1860, been a resident of the village,

Held, that he could not be assessed by the village of St. Thomas for an amount greater than $170 83 and as that sum is under $200 the proper amount to enter on the Assessment Roll under sec. 83, would be $100 only.

(7th June, 1860.)

This was an appeal under and pursuant to sec. 68 of the Assessment Act.

The appellant was assessed upon an income of $1,000 as derived in the capacity of manager of the St. Thomas Branch of the Bank of Montreal.

He virtually left the employment of that institution in 1859, having obtained three months leave of absence early in November of that year.

He had not been since the beginning of May 1860, a resident of the Town of St. Thomas.

He formally retired from the bank, however, only at the end of his leave and the bank paid up his salary at the rate of $1,600 per annum—that is to say, they paid him up to the 8th February, the sum of $170 83, so that all his income for 1860, from that source was a sum over $100 and not equal to $200, and there was no proof or allegation of his deriving an income from any other source.

E. Horton for the appellant.

HUGHES, Co. J.—The 16th section of the Consolidated Assessment Act of Upper Canada specifies that the taxes imposed for the year shall be considered to be so imposed for the current year commencing on the 1st January and ending with the 31st December, unless otherwise expressly provided for by By-law.

I consider in the absence of such a by-law, if the taxes imposed for the year are to rate from 1st January to 31st December, that the property upon which rates and taxes are assessed is to be that which the rated party owns or possesses within the same period and no more, and if he were a resident of the town when the assessment was taken or after the first of January he was properly assessable as a resident—because the assessment relates back to the 1st January in each year.

The 34th section cannot apply to cases where the person assessed has either no income or where the whole year's income does not exceed $200, but it is intended to apply to those who have an income whose salary exceed $200 per annum and to those cases where the present yearly income has not been fixed or known when the assessor is going round upon his duties: then in all cases where the 34th section applies, the income should be set down as not less than that of the year next preceding the time when the assessment is made.

This appears to me to be the true reading of the 34th section taken with the whole spirit of the Act, and I therefore, think that the 34th section does not apply to the appellant's case.

Here, when the assessors went round upon their business of assessing, the appellant had ceased to be an employee of the bank, and all the salary he was to receive by reason of the employment was fixed because the employment had ceased, so that all that his taxable income by reason of that employment amounts to, is $170 83.

The 33rd section of the Act provides that if the net value of personal property is equal to any of the sums set down in the first column of the scales given therein, but is not equal to the larger sum set opposite to it in the second column, the owner shall be assessed at the smaller sum only, thus, a person whose income is more than $100 and not so much as $200 is to be assessed at $100 only,—and as that is the case in the present instance, and as there is no evidence that the appellant has other personal property assessable, I order the Clerk of this Court to certify to the Clerk of the Municipality of St. Thomas this my decision and judgment, and do order that the roll be amended by entering opposite the name of the appellant in the 9th column under the heading "*Amount of taxable income*," the sum of one hundred dollars as the amount of the appellant's taxable income, instead of what has already been entered thereon.

I do also order that the costs of this appeal be paid by the respondents to the Clerk of this Court forthwith.

IN THE MATTER OF APPEAL AGAINST THE DECISION OF THE COURT OF REVISION ON THE ASSESSMENT OF CALDWELL ASHWORTH, ON THE ASSESSMENT ROLL OF THE CORPORATION OF THE VILLAGE OF ST. THOMAS.

Assessment—Place of business—Place of residence.

Where it was made to appear that the Appellant, though in the village of St. Thomas at the time of assessment, was there only temporarily for the purpose of winding up the business of an agency of the Bank of Montreal at that place, but that his real place of residence was London,

Held, that he could not be taxed on his income in the village of St. Thomas.

(5th June, 1860.)

It was admitted at the hearing of this Appeal that appellant was winding up the business of the Bank of Montreal in St. Thomas, as their agent; that he resided in London, had never resided in St. Thomas, and had charge of the Woodstock agency of the same bank for a like purpose with their St. Thomas agency.

E. Horton for the appellant.

HUGHES, Co. J.—The 19th sec. of the Assessment Act for Upper Canada requires the Assessor to set down, in the first column of his roll, according to the best information to be had, the names of all taxable persons *resident* in the municipality; and, in the 9th column, the amount of taxable income.

So far, the person who is to be so set down must be a *resident* of the municipality; but the 38th and 39th sections require that every person having a farm, shop, factory, office, or other place of business, where he carries on a trade, profession or calling, shall be assessed for all personal property where he has such place of business; and if he has two or more such places of business in different municipalities or wards, he shall be assessed at each *for that portion of his personal property connected with the business* carried on thereat; or if this cannot be done, he shall be assessed for part at one and part at another of his places of business, or for all at one such place, at his discretion, but he shall in all such cases produce a certificate at each place of business of the amount of personal property assessed against him elsewhere.

These sections appear to contemplate the principals, not subordinates, carrying on business; for the 40th sec. seems to embrace the classes of persons, such as foremen, salesmen, and persons whose callings are agencies of any kind. For if the person has no place of business, he ought to be assessed at his residence. For instance, an insurance company carrying on business in St. Thomas, through an agent, should be taxed there, unless they come under the exemption of the act; whilst the agent himself, if he resides out of St. Thomas, should be assessed in the municipality where he resides, because the *personal property connected with the business* carried on and the place of business is that of the company, and not of himself, and because the assessor can only assess *resident* parties for personal property.

I think therefore that the appellant belongs to the class of persons indicated in the 40th section, and should be assessed where he resides, and is not assessable in St. Thomas; and I order that

the clerk of this court do notify the clerk of the municipality of St. Thomas of this my decision, and that the roll be amended according to the same.

And as to the costs of this proceeding, I do order that the same be borne and paid by the respondent.

UNITED STATES LAW REPORTS.

SUPREME COURT OF PENNSYLVANIA.

KRAMER AND RHAM'S APPEAL.

When the surety for the payment of a debt, or one standing in the relation of a surety, receives a security for indemnity, the principal creditor is in equity entitled to its full benefit. The principle applies to acceptors and endorsers, in favor of creditors, as well as to cases of surety in form.

Where a judgment note is given by the principal debtor to an accommodation acceptor for his security, a trust is created which attaches to the debt, and should go in satisfaction of it in default of payment otherwise, unless divested by a *bona fide* assignment for value, and without notice of its character.

Appeal from the Common Pleas of Blair Co. (LOWRIE, C. J., and WOODWARD, J., dissent.) Opinion by

THOMPSON, J.—In *Curtis* v. *Taylor and Allen*, 9 Paige, 432, the Chancellor of Walworth asserted, and sustained by many authorities, the equitable principle "that where a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security. And it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence." *Maure* v. *Harrison*, 1 Eq. Cases Abridg. 1692, is to the same effect. So also is *Heath* v. *Hand*, 1 Paige, 329; *Paris* v. *Hulott*, 26 Verm. Rep. 308; *Ohio Life Insurance Company* v. *Ledyard*, Mat. Rep. 866.; *Branch Bank of Mobile* v. *Robertson*, 19 Ala. 798; *Clarke* v. *Eby*, 2 Scandf. Rep. 166; *Ten Eyck* v. *Holmes*, 3 Scandf. C. R. 428. So in Cornwell's Appeal, 7 W. & S. 305, Justice Kennedy announced the same rule saying, "it is a well established principle in equity that a creditor is entitled to all the securities taken by the surety of his debtor, either for the purpose of securing the payment of the debt to the creditor, or for the purpose of indemnifying himself." To the same purpose are Erb's Appeal, 2 Penna. Rep. 296; *Hines* v. *Barnitz*, 8 W. 89; *Carman* v. *Noble*, 9 Barr, 366; Hancock's Appeal, 10 Cassey, 155. The authorities place the principle upon the ground that, as the security is a trust created for the better securing of the debt, it also attaches to it, and hence it is, that it may be made available by the creditor, although unknown to him at the time of the purchase of the security for which it may have been given as an indemnity. The effect of such a transaction, is the placing of means in the hands of the surety by the principal debtor to meet liability on account of his contract for suretyship. It is consequently a trust for that specific purpose, and equity will control the legal title to it in the hands of the surety so that it may be applied to the object intended, viz., the payment of the debt to the holder.

Did King, who, it clearly appears, was an accommodation acceptor for Baker, stand in the "situation of a surety," as was said by the Chancellor in *Curtis* v. *Taylor & Allen?* As between him and Baker he certainly did so. As between them he was not the principal debtor, although by the law merchant he would be so to *bona fide* holders of the acceptance. But this would not change his relative position to Baker. In his hands, and in the hands of assignees not *bona fide* and for value, the indemnity afforded by the judgment on the 13th Nov., 1857, would be applicable to the payment of the acceptances. This was the trust on which it was given, as King in his receipt for it of the same date says, "to hold as security for the amount of my account against him." There is no dispute but that the acceptances of Kramer & Rham, F. Sellers & Co., and Bryan, Gardner & Co., together with other acceptances taken up by Baker, and some items of commissions and expenses constituted King's account, for which the note stood as security. The indemnity was not to apply in any order of priority to parts of the account; it attached to it all and every part of it alike. The acceptance went of course, as they were intended to do, into other hands, and the security pledged by the principal debtor for the payment must go to the extinction of the debts created by them so far as they remained unpaid by Baker, on the principles asserted in the outset of this opinion—that when a surety for the payment of a debt receives a security for his indemnity, the principal creditor is in equity entitled to the full benefit of that security, will be subverted, the security still remaining within the reach of equity as will be seen hereafter. There are many cases in the books of the application of this doctrine to the cases of surety strictly so. But that it cannot be supposed to be limited and controlled by the mere form of the transaction, is apparent from the remarks of the Chancellor in *Curtis* v. *Taylor & Allen*, by the qualified expression of "standing in the situation of a surety." The case of *Heath* v. *Hand et al.*, 1 Paige, 329, is a case of the direct application of the principle to a transaction like the present. A judgment had been given to secure for advances and acceptances. The holders of the indemnity assigned it to one of their own personal creditors for anterior responsibilities incurred for them, but on a bill being filed by the defendant in judgment, (the party giving it as a security against acceptances made for his benefit,) the collection of the judgment by the Assignee was restrained, and the proceeds directed to be applied to the payment of the bills accepted by the assignees, the Chancellor declaring that, to that extent, the holders of these notes and drafts accepted and endorsed by Hand and Kenyon have an equitable interest in the judgment; *Bank of Auburn* v. *Throp*, 18 Johns. Rep. 405, which being prior to the assignment to Lightbody, must prevail. So also to the same effect in *Eastman* v. *Foster*, 8 Metcalf, 19. These authorities, and many others might be added, show clearly the application of the principle to acceptors and endorsers, in favor of creditors, as well in cases of surety in form. The case of *Heath* v. *Hand et al.*, is also authority for another point in this case, if authority be needed, that the assignment of the judgment for an antecedent debt or liability did not constitute the assignee a purchaser for value. See also *Clark* v. *Eby et al.*, 2 Scandf. C. R. 166, and the citation of authorities therein in the affirmation of the principle, by the Assistant Vice-Chancellor of the 1st Circuit of the State of New York.

These principles established, how stands the case in hand? Baker secured King's account to the extent of the judgment note of $10,500, payable four months after date, to be cancelled on the delivery of pig-metal and blooms to the amount of it, within that time, to the latter at Pittsburg. This metal he never did deliver. The judgment note therefore remained as security for King's account. On March, 1858, judgment was entered in favor of King on the judgment note. Previously thereto King had accepted all the bills which constituted the claims of Kramer & Rham, F. Sellers & Co., and Bryan, Gardner & Co., together with other notes not necessary to be mentioned. These acceptances, with some items of expenses and commissions, constituted King's account, and it cannot be doubted that if he had paid them himself the judgment would have stood good to him as security from which to reimburse himself. He did not pay any of the bills in the hands of the holders named, but on May 4th, 1858, he assigned to Kramer & Rham $7,513 50, as collateral "security" for the payment of their drafts, and to F. Sellers & Co. $2,501 44, also as collateral security for the payment of theirs. These assignments would amount to their respective claims in full, and leave seven or eight hundred dollars, which King says he agreed should go to Bryan, Gardner & Co. Kramer & Rham, and F. Sellers & Co., have, at considerable expense, enforced the payment of the judgment by Baker, and the claim that by virtue of this and other assignments from King, they are entitled to receive their whole claim out of the indemnity in exclusion of Bryan, Gardner & Co., excepting as to the balance of the judgment after paying them.

The Auditors and the Court below were of a different opinion, and with the exception of certain modifications, hereinafter to be noticed, we think they were right. As already indicated, the judgment note was given by the principal debtor to his accommodation acceptor, a party standing in the situation of a surety for him, and it was for the purpose of saving him harmless; a trust was thereby created in favor of him, and upon the principle already stated, in favor of the holders of the acceptances; 26 Vermont Rep. 308; 8 Metcalf, 20. If a trust was thus created, and to secure the debt, it necessarily attached to the debt, and will go in satisfaction of it in default of payment otherwise, unless divested by a *bona fide* assignment for value, and without notice of its character. But this element does not exist in this case. The assignment

was not, in the legal sense of the term, *bona fide*. It was merely a "collateral" security for the payment of the drafts for which it was given, or securities parted with, and for this reason it remained subject to the equities of others interested, just as if no assignment had been made; *Clark* v. *Ely et al.*, sup., and cases thus cited. Under these circumstances, the assignment had no effect on the relative rights of the parties interested whatever. They stand as they did at the creation of the trust, their right neither impaired nor strengthened by the act of the trustee. Equality is equity; and as the payment was the security of the entire account of King, consisting of accommodation acceptances, made or to be made, we think the holders of the acceptances are entitled to it, and equally to a *pro rata* share of the account raised from the original debtor.

The maxim "*prior in tempore, prior est in jure,*" is strictly a legal maxim. In a case like the present, it cannot be allowed the effect contended for, because the assignment was not a sale for value, but a pledge with notice, or an opportunity to know by enquring the true character and purpose of the judgment assigned. It is with the equities of the parties, and not with legal rights, we are dealing. The argument of the appellant, that if metal had been delivered as agreed, it would have extinguished the bond, and King would have been obliged to give it up to Baker, and that the money received from the sale of the metal could then have been disposed of by King as he pleased, in payment of the acceptances in any order he might choose, and that equity could not have compelled a *pro rata* distribution under such circumstances, proves nothing against the principles asserted, even if true; for we deal with a different state of facts; with a security that equity can follow as trust property, and will follow and appropriate in accordance with the trust. The force of the proposition lies in the difficulty assumed of following and identifying the money substituted in lieu of the judgment, and not in the fact that equity would not treat it precisely in the same way as the judgment, if it had come into court for distribution. The argument does not disprove the principle, but only shows the difficulty of its application under a different state of facts.

Again it is contended that Bryan, Gardner & Co. cannot compel this distribution against the claimants under King, until they do equity towards King, who, it is alleged, has a claim for that part of his account, which were expenses and commissions. It is enough to say that King himself claims nothing out of the judgment. He assigned it all as already noticed. His claim on the fund is therefore extinguished, and Kramer & Rham, and F. Sellers & Co. cannot now set it up to embarass Bryan, Gardner & Co. as a shield for themselves.

It was urged that Bryan, Gardner & Co. took King's notes as security for the payment of the bills held by them, and that they were embraced in King's mortgage to Florence Kramer, and secured by it. And also, that the same debt was included in a judgment confessed by Baker to Lloyd for the use of certain creditors. It is not easy to see how these facts, growing out of the vigilance of Bryan, Gardner & Co., should destroy their right to another and independent security. It wants a consideration somewhere to establish the relinquishment of a right, but none such exists here, nor did such vigilance insure the other claimants. There is no pretence that either of these securities was taken in satisfaction of Bryan, Gardner & Co.'s claim. Their equity is not prejudiced, therefore, by these considerations. Nor is there any better reason for holding them postponed by their inaction in the litigation that Kramer & Rham and F. Sellers & Co. sustained. Their entire ignorance of the existence of the security, until the last moment, would not have prejudiced them as we have seen, if it turned out that the judgment was a security for their claim, for they ought, in the distribution, to be required to bear their share of the expenses of the litigation, and as the assets were equitable, to be distributed according to equity. I see no reason why the distribution may be made on the principle of equity in this respect, and upon the principle the Auditor very properly acted partially at least, if not to the full extent.

We do not, however, agree with the Auditors in their treatment of the independent securities held by Bryan, Gardner & Co. They do not find them to be worthless, but propose that in the event of their proving of value, that Kramer & Rham and F. Sellers & Co. may be subrogated to the rights of Bryan, Gardner & Co. in them, after the latter are satisfied. This does not comport with the equitable principle governing the case of a party having only one security, and another, the same and an additional one. There, equity, in a proper case, will require the latter to take his satisfaction out of the security which was not common to the latter, unless it trenched injuriously in some way, upon the vested rights of the latter. We think that rule should be applied in this case, that Bryan, Gardner & Co. should be required to exhaust their independent securities in the first place, before taking any part of the fund out of the court, or satisfy the court that they are worthless. This will enable the court to administer equity fully between the parties. Kramer & Rham and F. Sellers & Co. may in the meantime, be allowed to take out of the court their *pro rata* of the proceeds of judgment, and whether they shall be entitled to more, will afterwards depend upon how much, if anything, may be realized by Bryan, Gardner & Co. upon their securities. If nothing can be realized by them, or not enough to satisfy their claim, they will in the first contingency be entitled to take out their *pro rata* share of the judgment, and in the second, so much only as with what may have been received by them from their independent securities, as will satisfy them in full, provided that does not exceed their *pro rata* share in the judgment. We see no other errors in the decree.

And now, to wit: Oct. 3, 1860. It is adjudged and decreed, that there be paid and distributed of the fund in Court, to Kramer & Rham, the sum found by the Auditor, viz., $5,685 20, together with such other sum out of the *pro rata* share of Bryan, Gardner & Co., as the court shall find to be their fair *pro rata* share of expenses and costs to be paid of the litigation to recover the said money, if not already fully accounted for in the Auditor's report; and to F. Sellers & Co. the sum of $1,974 55, the sum found by the Auditor in their favor, together with their fair *pro rata* share of the cost of expenses and collection, to be paid as aforesaid; the costs and expenses to be borne equally, in proportion to the amount of their claims respectively. And that the distribution to Bryan, Gardner & Co. be suspended until they shall have exhausted their other securities, after which distribution be made to them upon the principles of this opinion, if they shall not receive an amount sufficient to pay and satisfy the acceptances of King as shown to be held by them before the Auditor, and in case of full satisfaction by them from said securities, then distribution to be made of the fund in court to Kramer & Rham and F. Sellers & Co., in satisfaction of their claim. Each party to pay the costs of this appeal.

MONTHLY REPERTORY.

CHANCERY.

V. C. S.

CONYERARE V. THE N. B. AND C. RAILWAY AND LAND COMPANY, LIMITED.

Joint stock company—Purchaser of shares—Representations—Suit to rescind contract—Costs.

The purchaser of shares in a joint stock company who alleges that he has entered into the contract on the faith of statements contained in the reports of the directors or communicated to him by the secretary cannot obtain relief in a court of equity on the ground of misrepresentation unless he can shew that he was induced to make his purchase by a specific misrepresentation of fact.

A bill filed by such a purchaser against the directors of a company formed under the limited liability act was dismissed but without costs, as the court was dissatisfied with the defective balance sheet appended to the reports, and with the ambiguity of the statements therein contained.

V. C. S. SLIM V. CROUCHER. *Feb. 24.*

Mortgage—Advance on faith of an illusory grant—Suit for re-payment—Remedy in equity.

A. agreed to advance £300 to B. on the security of a certain property in Middlesex, a lease of which at a pepper corn rent B.

represented was about to be granted to him by C. then landlord. C. also wrote at B's request to A's solicitor to the same effect. Shortly afterwards C. knowing as alleged that A. was about to advance the money on the said security executed a lease of the property to B. and on the faith of the said assurance and letter, and of the lease so granted, A. advanced the money and a mortgage to him by way of underlease was executed by B., A. afterwards discovered that C. had a few months before executed a lease of the same property to B. who had mortgaged it to another person. That lease had been registered. A. accordingly filed a bill against B. and C. for payment of the money. B. was then insolvent, C. alleged by his answer that he had forgotten the former lease at the time of his execution of the second and that no part of the £300 came to his hands.

Held, that the case was within the jurisdiction of the court and that A. was entitled to a decree against C. for re-payment of the £300 and interest.

M. R. BENNETT v. WHITEHOUSE. *Feb* 9.

Right of inspection—Mines—Inspection of defendant working under plaintiff's land.

Where a plaintiff has a *prima facie* case supported by direct evidence, that a defendant is working a mine under his land from pits in the adjacent land belonging to the defendant and the defendant will not allow him or his agent to inspect the mine the court will on motion grant an order to allow the plaintiff to inspect defendant's mines.

M. R. LLOYD v. COCHRE. *Feb.* 20.

Marriage Settlement—Construction—Advancement.

By a marriage settlement the trustees had authority with the consent of the husband and wife or survivor to raise £2,000 for placing the issue of the marriage "to any profession, trade or business, or for their advancement in life."

Held, that "advancement" in the case of a daughter might be taken to mean advancement in life by way of marriage.

V. C. W. EKINS v. MORRIS. *Feb.* 18.

Legates—Charge of debts—Cross demand.

A testator bequeathed all his personal estate free from debts to A. and directed that his debts should be paid out of the real estate. At the time of his death the testater owed various sums to his tenants, but the arrears of rent due from these exceeded those sums.

Held, that A. was only entitled to the balance between the sums due from the testator and the arrears of rent.

V. C. W. KNAPP v. BURNABY. *March* 6.

Debtor and Creditor—Declaration by creditor—Discharge.

In 1841, £4,500 was advanced by the testator to her son B. but no security or acknowledgment was executed by B. No interest was directly paid but an allowance covenanted to be paid to B. by the testator was set off against the interest which at four per cent came to the same amount. In 1843 the testator made a codicil containing a declaration that the £4,500 was due and owing from B. and that his appointment as executor was not to have the effect of cancelling the debt. In 1854, a further codicil was made revoking the appointment of B. as executor, but confirming the will and codicil in all other respects. In 1855, the testators wrote to B. as follows: "You must know when I gave you the money, I never could intend it as a loan, but as an absolute gift; and I hope you will live many years to enjoy it.

Held, that this letter being written under a mis-apprehension of the nature of the original transaction, and being inconsistent with the previous conduct of the parties did not discharge the debt thereby created.

L. C, LOSLEY v. HEATH. *Feb.* 25.

Settlement—Marriage contract—Parol agreement—Representation made good—Specific performance.

Upon a treaty for a marriage, H. the father of the lady wrote to L. the intended husband, what H. and his wife were able to promise their daughter on her marriage and at their death; and saying that all they possessed would be divided at their decease equally among their children. By an indenture of settlement made in contemplation of the marriage reciting that H. had on the execution thereof paid £500 as a marriage portion with his daughter, L. settled a policy of assurance for the benefit of his intended wife and the issue of the marriage.

Bill to have it declared that L. was entitled upon the death of H. as the legal personal representative of L.'s wife (H.'s daughter) to a child, share in the residue of H.'s estate, dismissed.

V. C. S. DILKES v. BROADMEAD *March* 8.

Following assets—Residiary legatee—Marriage settlement.

A. the lessee of certain premises demised the same to B. for the residue of the term wanting a few days, B. assigned his lease to C. who after B.'s death allowed the rent to fall into arrear, and the ground—landlord recovered the same from A. B. had bequeathed his residuary personal estate to his daughter, who settled it on her marriage. A filed his bill praying to be refunded out of B.'s residuary personal estate.

Held, that A. could not follow B.'s assets as they had been transferred to trustees, and were protected by consideration of marriage.

V. C. W. GRANT v. MUSSETT. *March* 12

Will—Construction—Stock and money in the funds.

Testator bequeathed all his "stock and money in the funds" and all the residue of his estate and effects whatsoever both real and personal, upon trusts after payment of debts, &c., to convert into cash all his residuary estate and effects except the freehold, copyhold, leasehold and stocks.

Held, that certain long annuities of the testator were as "stock and money in the funds" within the exception from the general direction, to convert the residuary estate.

V. C. W. *March* 10.

RE THE MAGDELENA STATE NAVIGATION COMPANY.

Joint Stock Company—Increase of capital—Irregularity.

A joint stock company was empowered under the deed of settlement at an extraordinary general meeting, and by resolution of at least two thirds of the subscribed shares to increase the capital and raise money on debentures. Money was raised on debentures by a resolution passed at an extraordinary general meeting of the company, but at which two thirds of the shares were not represented. The money so raised was applied in payment of debts and liabilities of the company, and interest was paid for more than two years up to the dissolution of the company.

Held, that although the issue of the debentures was irregular and invalid, the shareholders who had obtained the benefit of the money raised, and with full notice had recognized the transaction, were precluded from disputing their liability to the holders of the debentures for the monies thereby secured.

V. C. K. *March* 23.

IN RE THE DUKE OF CLEVELAND'S HARTE ESTATE.

Infant—Guardian ad litem—Railway Company—Trustee—Costs.

Where an infant appears upon a petition for the investment of trust funds in which he is interested the special appointment of a guardian *ad litem* is necessary.

Where a petition is presented for the investment of the proceeds of railway purchase money, the produce of trust estates, the trustees being made respondents in such petition are entitled to their costs as against the company.

L. J. WRIGHT v. CHARD. *March* 26.

Mesne rents—Relief at law and in equity—Jurisdiction—Trustee—Committee of lunatic—Account.

Where a person who holds under two titles which are inconsistent with each other, takes upon himself to decide under which he will act and decides wrongly, the rights which others would have had if the proper course had been taken are not altered or defeated. A trustee for a married woman who was also committee of the estate of a lunatic by the decision of the Court declared to be tenant in tail of certain estates, had received the rents of the same estates and paid them over to the married woman who was deceived by him to be entitled to them.

Held, that the representatives of the tenant in tail were entitled to recover from the trustee as committee the mesne rents so received and handed over.

Where equitable conduct entitles a person to equitable relief, that relief is not gone because the remedy at law is gone.

V. C. W. WARD v. SHAKESHAFT. *March* 20.

Foreclosure—Disclaimer—Costs.

Where a judgment creditor is made a defendant to a suit and is aware of the fact and disclaims by answer, he is not entitled to his costs. Where a creditor defendant puts in an answer and subsequently by affidavit disclaims he is not entitled to his costs. Where an assignee or the mortgagor is made defendant to a suit and undertakes to appear, but before appearance disclaims but is still continued on the record and puts in his answer, he is entitled to his costs. Where after bill filed but before services of a copy of the bill a defendant undertakes to appear, and disclaims he is entitled to his costs.

COMMON LAW.

C. P. DUNCLIFF ET AL v. MALLOT.
DUNCLIFF ET AL. v. BIRKEN ET AL.

Patent—Distinct part of—Assignment of—Infringement.

If a separate and distinct part of a patent be assigned the assignee may sue in respect of an infringment of such separate and distinct part without joining as plaintiffs persons interested only in the other part of the patent.

Q. B. WRIGHT v. STAVERT. *April* 24.

Statute of frauds—Interest in land—Contract for board and lodging.

The appellant agreed orally to pay to the respondent for the board and lodging of himself and man in the repondent's house, and accommodation for his horse in the respondent's stable, £200 a year from a day specified, a quarter's notice to be given on either side; no particular rooms were assigned to the appellant, and he never commenced to reside in the respondent's house, but gave notice of his intention not to perform the contract.

Held, that this was not an agreement relating to an interest in land within the fourth section of the statute of frauds, and need not therefore be in writing.

Ex. DICKSON v. RIGHT. *Jan.* 19.

Consideration—Marriage settlement—Illegitimate child.

The gift of an estate to an illegitimate child under a marriage settlement, is good against a purchaser under 27 Eliz., ch. 4.

Ex. WISE v. BIRKENSHAW. *April* 28.

Garnishee—Common Law Procedure Act.

The issuing of a writ under the 64th section of the Common Law Procedure Act against a garnishee who refuses to pay money which has been attached, is matter of discretion for the Judge which he need not exercise without grounds to suspect the conduct of the garnishee.

Ex. PRICE v. TAYLOR ET AL. *April* 28.

Promissory note—Friendly Society—Note binding on trustees who sign.

A promissory note was made on behalf of a benefit building society by the Trustees and Secretary in the following form:

"Midland Counties Building Society No. 3,
"Birmingham, March 12, 1858.

"Two months after demand in witing, we promise to pay Mr. Thomas Price the sum of one hundred pounds, with interest after the rate of six per cent. per annum, for value received.

(Signed) "W. R. HEATH, } *Trustees.*
"JOHN TAYLOR, }
"W. D. FISHER, *Secretary.*"

Held, that the persons signing the note were personally responsible.

C. C. R. REG. v. JOHN DANBERRY HIND. *April* 28.

Evidence—Dying declaration.

A dying declaration is only admissable in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration.

Upon an indictment for using instruments with intent to procure abortion, the dying declaration of the woman was held inadmissable.

C. C. R. REG. v. CHARLES HALLIDAY. *April* 28.

Evidence—Husband and Wife—Admissibility of a husband's evidence when the crimnality of the wife is involved.

The prisoner was indicted in one count for obtaining money from trustees of a savings bank by pretending that a document produced to the bank by E., the wife of T., had been filled up by his authority; and in another count for a conspiracy between the prisoner and E. to cheat the bank; but E. was not indicted. The evidence of T. having been received in support of the prosecution, the prisoner was acquitted on the count for conspiracy, and convicted on the other.

Held, that the evidence of T. was properly received and the conviction good.

Q. B. GUNNER v. FOWLER. *May* 8.

Arbitration—Special case—Proceedings in error.

A cause was referred by consent to arbitration with a special provision that neither party should take proceedings in error on any matter relating to the arbitration. At the request of the parties, the arbitrator made his award in the form of a special case for the opinion of the Court, and in accordance with this opinion the judgment was to be entered up. The Court gave their opinion in favor of the defendant, whereupon the plaintiff took proceedings in error.

Held, that sec. 32 of the Common Law Procedure Act, 1854, which gave power to bring error on a special case, did not apply to such a case as this, which must be taken to be such a special case as is contemplated by sec. 5 of the same act.

Held, also, the parties were bound by their agreement not to take proceedings in error.

C. P. HOLDER v. SOULBY. *April* 30.

Lodging-house keeper—Liability of in respect of goods stolen from lodgers.

The plaintiff hired apartments in the defendant's house, and while there had some of his goods stolen; and the declaration alleged that the defendant did not take due and proper care of his house, by means of which dishonest persons obtained access to it and took the plaintiff's goods; to which the defendant demurred on the ground that the declaration did not allege the defendant to be a common innkeeper, and therefore did not disclose any duty or liability on the part of the defendant.

Held, that the declaration was bad, and that the defendant as a lodging-house keeper was not liable.

C. P. *Jan.* 26.

CROSSLEY AND THE E. & A. STEAM SHIPPING COMPANY.

Arbitration—Appointment of umpire by lot.

A submission was made to two arbitrators who were (in the event of their not being able to agree) to appoint a third person as umpire; they could not agree and accordingly met for the purpose of appointing the umpire. Each proposed a person for the duty but only one of the two proposed was known to both the arbitrators, the other being only known to his proposer who said that he possessed the qualifications necessary for the duty. Upon this the two names were put into a hat with the understanding that the one drawn out should be appointed and the name of the one not known to both the arbitrators was drawn and he proceeded with his duties.

Held, that the appointment was bad, having been made by lot and the party so appointed not being known to both the arbitrators.

EX. FOULGER V. TAYLOR ET AL. *Jan.* 31.

County Courts—Execution—Interpleader summons—Rent—Bill of sale.

Where the goods of a third party are taken in execution under County Court process on the premises of the judgment debtor and the owner claims his goods the landlord is not entitled to be satisfied arrears of rent out of the proceeds of such goods or to insist that his rent shall be paid before their removal.

EX. WHALEY V. LAYING. *April* 18.

Costs—Taxation—Arrest of judgment.

If judgment is arrested, the plaintiff is entitled to the costs of issues found in his favour under the 145th sec. of the Common Law Procedure Act 1852; and the general rule is not affected by an agreement that certain items of the costs are to abide the event.

REVIEWS.

THE CHRISTIAN EXAMINER for January, published in Boston, is before us. We first meet a review of Alger's History of the Doctrine of a Future Life, in which, while congratulating the author upon the success of his labors, the reviewer enters at length into considerations the most important to mankind, and in a manner becoming the subject of which he writes. The place of 'Modern Painters in Art Literature offers a criticism' upon the writings of John Ruskin, with some observations upon vexed questions in art. The Origin of the Gospels will be read with interest by the biblical student. A paper upon Garibaldi gives a summary of his life and the recent events in the history of his country. The number closes with the usual review of current literature.

MACMILLAN'S MAGAZINE for December contains an interesting article upon the opinion of Mr. Darwin regarding the Origin of Species. Very many able papers have lately appeared upon this contested question, but this article is no less interesting because of the varied treatment which its matter has received. Next follows a continuation of Tom Brown at Oxford. A well written article upon the English Evangelical Clergy; and papers upon 'Poetry, Prose, and Mr. Patmore;' English Women at Naples, &c., conclude the number.

THE ECLECTIC MAGAZINE for February is embellished with a portrait of the great Engineer Robert Stephenson, and a plate expressive of a stirring event in French history known as "The morning of the 18th Brumaire." The reading matter is as usual made up of the best articles of the British periodicals; and it is sufficient to say, that the selections from such excellent sources form a volume interesting in narrative and in subjects of a Geographical and Scientific character.

THE MONTHLY LAW REPORTER, for January, has come to hand. It contains, with the Narrative of a Celebrated Trial, Reports of the United States District Court of Massachusetts, and of the Supreme Court of that and other States. Its fine appearance and intrinsic value insures its success.

The number of the UNITED STATES INSURANCE GAZETTE for January, published at New York, affords a large and well digested mass of information regarding insurance matters of all kinds, and is thus worthy of an extended support.

THE ANNUAL REPORT OF THE NORMAL MODEL GRAMMAR AND COMMON SCHOOLS, for the year 1859, is received. The various reports do not form so large a volume as in the preceding year, because of the omission of those of the Local Superintendents of Schools. The statistical tables are in a convenient form, and afford every information relating to the subject.

THE LOWER CANADA REPORTS. Edited by M. Le Lievre; published by Augustin Coté, Quebec.

Number twelve of volume ten of these valuable Reports is received. Besides the ordinary number of reported cases, this number contains the annual index of cases and digest of matters reported. One of the cases reported (*Hynes* v. *McFarlane*) we shall probably give in our next number. It decides that a party setting fire upon his land at an improper time is by that mere fact responsible for the loss thereby of a threshing machine which had been brought on his land for the purpose of threshing his grain. The action was differently decided in the Superior Court in the District of Ottawa, but on appeal was reversed, Duval Justice dissenting.

GODEY'S LADY'S BOOK. Louis A. Godey, Philadelphia.

The number for February is received. The Lady's Book is useful and entertaining as usual. It has taken the lead of all other magazines of a similar description, and is determined to keep it. So far as we can discern any change in successive numbers of Godey, it is for the better. The proprietor is bent on proving himself worthy of the great and wide-spread patronage which his magazine receives. He exchanges with no less than 2,460 cotemporary publications. What therefore must be the circulation among subscribers of his well known and much admired magazine? We have heard it said that the circulation is 300,000, and have no reason to doubt the statement. It is by reason of this enormous circulation that the magazine is furnished to each subscriber at the low price of $3 per annum, though intrinsically worth more than double that amount.

MACMILLAN'S MAGAZINE for January has reached us. We first find three entertaining chapters, forming the commencement of a story, entitled, "*Ravenshoe*," by Henry Kingsley. A letter upon Sheridan and his biographers, by the Hon. Mrs. Norton, will be read with pleasure. The author of "John Halifax, Gentleman," offers "A few words about Sorrow," and a poem upon "Fergus Seat." Tom Brown at Oxford has a few more interesting chapters; and papers upon Venetia and Pekin are particularly welcome at the present moment.

APPOINTMENTS TO OFFICE, &c.

PROVINCIAL ARBITRATORS AS TO PUBLIC WORKS.

THOMAS KIRKPATRICK, of Kingston, Esquire, LOUIS A. MORIEAU, of Montreal, Esquire, and the Honorable PHILIP VANKOUGHNET, of Cornwall, to be Arbitrators and Appraisers for the Province of Canada, under the provisions of s. 41 of Consol. Stat. of Canada, cap. 28.—(Gazetted 5th January, 1861.)

TO CORRESPONDENTS.

"A SUBSCRIBER, AYR"—Too late for current number.

"WILLIAM COSSEY" will receive attention in our next.

DIARY FOR MARCH.

1. Friday..... Last day for ret. of Col. Rolls where time ext. by Mun. Council.
3. SUNDAY ..... *3rd Sunday in Lent.*
4. Monday ..... Last day for notice of Trial County Court.
5. Tuesday..... Chancery Examination Term, London & Belleville, commences.
[Last day for notice Brantford and Kingston.
10. SUNDAY ..... *4th Sunday in Lent.*
11. Monday ..... Last day for service of Writ for Toronto.
12. Tuesday ..... Quarter Sessions and County Court Sittings in each County.
[Last day for not. Chancery Exam. Hamilton & Brockville.
17. SUNDAY ..... *5th Sunday in Lent.*
19. Tuesday.. ..... Chanc. Examination Term, Brantford & Kingston, commences.
[Last day for notice for Barrie and Ottawa.
21. Thursday ..... Last day to declare for Toronto.
24. SUNDAY..... *Palm Sunday.*
26. Tuesday ..... Chancery Exam. Term, Hamilton and Brockville, commences.
[Last day for notice for Goderich and Cornwall.
29. Friday..... *Good Friday.*
30. Saturday ..... Last day for notice of Trial for Toronto.
31. SUNDAY..... *Easter Sunday.*

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

MARCH, 1861.

THE ENGLISH WRIT OF HABEAS CORPUS.

John Anderson, the negro, arrested under the provisions of the Ashburton Treaty and the Provincial Statute passed to give effect to that treaty, and recently discharged by our Court of Common Pleas, upon the ground of defects in the warrant of commitment under which he was arrested, is reported to have said, when discharged, "that he never thought there was so much law in Canada as he had experienced."

The remark, though bluntly put, is indicative of the many vexed questions to which the arrest, detention, and subsequent discharge of this man gave rise. From the day of his arrest till the day of his remand by the Court of Queen's Bench, in Upper Canada, much doubt was entertained as to the proper construction of the provisions of the treaty and statute under which he was arrested, and by virtue of which he was detained in custody. From the day of his remand by our Court of Queen's Bench till the day of his discharge by our Court of Common Pleas there was a continued ferment throughout the Province. That ferment was not lessened by a knowledge of the fact that the Court of Queen's Bench *in England* had presumed to exercise a jurisdiction *in Canada* opposed to every principle of legislative independence, judicial independence, and of self-government. Though divided, as our people were, in the construction of the Ashburton Treaty, all united in the opinion that the English Court, in sending a writ of *habeas corpus ad subjiciendum* to Canada, had done wrong. Men, legal and lay, joined in the condemnation of the proceeding, as being one calculated only to sting us in the most sensitive part of our body corporate—our national pride. Men of all politics, conservative and reform, ministerial and opposition, pronounced the act of the English Court both high-handed and unfounded. Birth was given to a feeling of resistance which will not in all probability slumber till the assumed jurisdiction of the English Court is tested and defeated on national grounds.

When, however, we speak of a feeling of resistance, we do not desire to depict overt acts of treason; we do not intend to indorse the absurd stories circulated in the neighbouring States, about "the ring of 1775." Such stories were a libel on our loyalty. While determined to resist encroachments on our rights as an independent colony, by all constitutional means, there never was nor is there the slightest intention to kindle the flame of rebellion.

Men argue that if an English Court can command *our* Sheriffs to obey writs of *habeas corpus*, why not writs of execution and other process of a similar kind? They ask themselves, where is to be the limit? Who is to define it?

There was a time when Colonial Sheriffs and other public officers were appointed in England, under the great seal of England, and imposed upon us whether we liked them or not. That time is passed. Then our Sheriffs were English officers appointed by English authority. Then English Courts might have attempted to issue writs to Canada without much murmur, but now, when in the enjoyment of powers of self-government, we appoint our own officers by our own provincial seal and dismiss them when we please, the exercise of such a jurisdiction grates upon our ears.

But the fact that the exercise of the jurisdiction is distasteful is no argument against the existence of the jurisdiction itself, but rather against the exercise of it. Does the jurisdiction in fact exist? If it does, was it rightly and discreetly exercised in the case of Anderson? These are questions, to the solution of which we are about to apply our mind.

The writ issued was a *habeas corpus*, the right to which is one of the great bulwarks of the liberty of a British subject. So long as the *right* to that writ exists, so long must liberty in Britain be more than a name. The right is only suspended under circumstances of great national peril. The writ is described by Blackstone as a high prerogative writ, running into all parts of the King's dominions. The reason he assigns is, that the King is at all times entitled to have an account why the liberty of any of his subjects

is restrained, wherever that restraint may be inflicted.—(3 Black. Com. p. 131.) But is not the Queen as much present in the Superior Courts in Toronto as she is in the Superior Courts in London? And if she, a body corporate, receives the information as to the cause of the detention in custody of her subject in Toronto, is it necessary for her once more to hear the same story in London? The presence of the Queen in her Courts at Westminster is a legal fiction. She is as much present in her Courts at Toronto as in Westminster. When we speak of the Queen we do not mean Victoria, we mean the Crown—the body corporate of that name. In England, the Crown has its great seal. In Canada, the same Crown has a different seal. We therefore see that though the Crown acts in Canada as well as in England, the machinery of its action is not in Canada *the same* as in England.

When we presume to question the jurisdiction of an English court of justice to issue a writ of *habeas corpus* to a Sheriff in Canada, we do not attempt to dispute the *right* of a British subject to the writ. Sir William Blackstone does not say that a writ of *habeas corpus* issued by the Court of Queen's Bench *in England* runs into all parts of Her Majesty's dominions; but simply that the writ, which may be issued in any part of Her Majesty's dominions where there is proper machinery for the purpose, runs into all parts of the jurisdiction that issues it. If he intended more, his remarks made a century since, at a time when colonial independence was unknown, must be read with much qualification as applied to modern times. There is a great distinction between "the plantation" of his time, when a British subject in London could, by an affidavit made in London, have execution against his debtor in a Colony, and our time, when the Colony makes its own laws, has its own courts, and is substantially an independent power. The idea of such a Colony never occurred to the great commentator, and, had it, he would have entertained the idea only to smile at its supposed absurdity or impracticability.

The writ of *habeas corpus ad subjiciendum* may derive its existence when issued from one of three sources—the Common Law, the statute 31 Car. II. c. 2 (passed in 1677), or the statute 56 Geo. III. c. 100 (passed in 1816); and its effect when issued will in some degree depend upon the source of its existence.

The writ is very seldom, if ever, issued at common law. When issued under the statute law it is much more effective, and therefore it is generally issued under the 31 Car. II. c. 2. Of the extent of its operation at common law little is known, and that little is not at all satisfactory. Most of the expressions attributed to learned Judges in regard to its effect at common law will be found, when closely examined, to have reference to the writ under the statute of 31 Car. II. c. 2. One thing is clear. The object of the statute was not to diminish the effect of the common law writ, or the powers of the Courts in regard to it, but rather to make the writ more effective and to give increased powers to the Courts, so as to place the writ as nearly as possible within the reach of any person deprived of his liberty in any part of Her Majesty's dominions. We may therefore safely assume that the effect of the writ at common law, and the powers of the Courts in regard to it before the statute, were, if any thing, less than under the statute.

Then what is the effect of the writ under the first statute 31 Car. II. cap. 2, passed in 1677, and the jurisdiction of the English Courts under that statute? By sec. 11 of this act, it is expressly declared that "an *habeas corpus* may be directed and run into any county palatine, the cinque ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey, any law or usage to the contrary notwithstanding."

If before this act a writ of *habeas corpus* issued in England would run into the privileged places named, the enactment is unnecessary. If therefore entitled to assume any thing, we must assume that before the enactment the English Courts had not the jurisdiction, and that the enactment was made to confer the jurisdiction. It is, by sec. 16 of the same act, provided, "that if any person or persons, at any time *resident in this realm*, shall have committed any capital offence in Scotland or Ireland, or any of the islands or foreign plantations of the King, his heirs or successors, where he or she *ought to be tried for such offence*, such person or persons may be sent to such place, *there to receive such trial*, in such manner *as the same might have been done before the making of this act.*" Thus the Legislature, so far from intending by this act to interfere with local courts or local jurisdictions in colonies or plantations, for the sake of precaution, expressly provided against any such interference; and went further, by declaring that even residents in England charged with capital offences committed in the plantations, instead of being tried by English Courts, should be sent to the Plantations, there to be tried. The distinction between English Courts and Colonial Courts is here expressly observed.

This tends to support the dictum of Lord Denman in the case of *Carus Wilson*, 7 Q. B. 984, to the effect that "a court within the Queen's dominions, exercising public authority, must be taken to be competent to judge of its own law"—a dictum mentioned with approbation in the more recent case of Dodd, 2 DeG. & J. 510.

It does seem to us that, for the purposes of our inquiry, the Courts in England are as to England as much *local* as

the Courts in Canada are as to Canada *local*, and that, where in each country there are Courts of superior jurisdiction, the assumption by the former of a territorial jurisdiction over the latter, for any purpose whatever, is as if the Courts of Canada were, in spite of the Courts in England, to assume a territorial jurisdiction over England; and we think that this view will be strengthened rather than weakened by a reference to authorities.

Before leaving the statute of Charles, we may as well mention that the "counties" mentioned in it are English counties, and therefore the jurisdiction intended to be exercised, except where otherwise provided, is *a local one*. By sec. 18, it is provided that, "to the intent that no person may avoid his trial at the assizes or general gaol delivery, by procuring his removal before the assizes, at such time as he cannot be brought back to receive his trial there, that after the assizes proclaimed for *that county* where the prisoner is detained no person shall be removed from the common gaol upon any *habeas corpus* granted in pursuance of this act, but upon any such *habeas corpus* shall be brought before the Judge in open court, who is thereupon to do what to justice shall appertain." Until lately there were no such divisions as "counties" in Canada, these divisions being almost peculiar to England, and this of itself would be one argument to show that the jurisdiction was restricted to England, where counties at the time of the passing of the act did and do still exist. But look at the absurdity of attempting practically to apply the jurisdiction territorially to a colony like Canada? The Court of Queen's Bench in England, without knowing any thing of the time when assizes are held in Canada, or whether assizes are in reality held here at all or not, grants a *habeas* to bring up the body of a man in gaol, accused of an indictable crime in Canada? The answer might be that the assizes had been proclaimed for the county in which he is imprisoned, and therefore that he must be brought before *our* Judge of Assize. Our Sheriff might in fact be commanded at that very time to have the body before our Court of Assize. If he obeyed the English writ he would be punished by our Court for disobeying their writ, and, if he obeyed our writ, ought for the same reason to be punished by the English Court for disobeying theirs. Between two fires the Sheriff would be distracted, and his usefulness as an executive officer of our courts, to whom *alone* he is responsible for his conduct, be seriously impaired. His duty is to obey the mandates of our courts, no matter what the consequence in relation to foreign courts. And yet by sec. 5 of the statute of Car. II. the act of obedience to the mandates of our courts, which might be in effect a disobedience of the mandates of the English courts, would, under certain circumstances, if the English writ were to have any operation in Canada, render the Sheriff "incapable to hold or to exercise his office!" In other words, the performance by a Canadian Sheriff of his duty towards the Canadian Courts, might have the effect in England of rendering him incapable of further holding or exercising his office—an office conferred upon him by colonial authority, and the duties of which he had properly discharged according to the laws of Canada!

The only way of preventing such a conflict is to read the statute as giving to English Courts local jurisdiction in England and to Canadian Courts local jurisdiction in Canada; and this seems to us to be its true construction.

Next, as to the third source of a *habeas corpus*, 56 Geo. III. c. 100, passed on 1st July, 1816. In this act the Colonies are not named. It cannot therefore, according to well understood legal principles, have any force whatever in the Colonies. We may however look at it, in order to see how far the English Legislature designed English Courts to have more than local jurisdiction. By the first section, it is enacted "That where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit), within that part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or *Man* (for the first time mentioned), it shall and may be lawful for any one of the Barons of the Exchequer, of the degree of the coif, as well as for any one of the Justices of one Bench or the other; *and where any person shall be so confined in Ireland*, it shall and may be lawful for any one of the Barons of the Exchequer, or of the Justices of the one Bench or the other, *in Ireland*, and they are hereby required, upon complaint, &c."

By the previous act (31 Car. II. c. 2) it was declared that the writ issued in England might run into "any county palatine, the cinque ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey," but no mention was made either of the isle of Man or of Ireland. The Isle of Man having, in the mean time, been by Act of the Legislature 5 Geo. III. cap. 26, expressly annexed to England, extended operation was given to the writ; but as to Ireland, though in the words of Sir William Blackstone, a part "of the Queen's dominions," still, having Superior Courts *of its own*, the power to issue the writ for Ireland was left to be exercised as before, by *its own courts*.

What, for the purposes of our inquiry, is the difference between Ireland and Canada? Each, is governed by a Viceroy. In each, the Crown acts by deputy. Each, has its Superior Courts of Law and Equity. One is as much

subject to Imperial control as the other. In fact, Ireland is at the present time more under the direct dominion of the Crown than Canada. Canada has its own legislature. *Ireland has not.* Certainly there is more resemblance between Ireland and Canada than between Jersey and Canada —the Isle of Man and Canada—Calais and Canada—St. Helena and Canada? And yet English Courts hesitate not to exercise a jurisdiction *in Canada* which dare not be attempted *in Ireland!*

It is said that the laws of England and of Canada are identical. This is a mistake. The laws of Canada are no more identical with those of England than are the laws of Ireland identical with those of England. Ireland, before it came under British sway, was a distinct kingdom—a foreign dominion. Canada, before 1759, was a French colony—a foreign dominion—a dominion of the crown of France. When Ireland was, in 1801, brought under the direct dominion of England, the laws of Ireland were preserved. So when Canada was, in 1759, surrendered to the British, it was expressly stipulated that she should retain her former laws. It is true that the criminal laws of Canada resemble those of England; but the same thing may be said of the criminal laws of Ireland. When Canada, in 1792, was divided into two Provinces, Upper and Lower Canada, with independent legislative powers, it is true that the Legislature declared that in all matters of controversy relative to property and civil rights, resort should be had to the laws of England as the rule for the decision of the same; but it must be borne in mind that, since 1792, the legislature of Upper Canada and (now that the Provinces are re-united) of Canada have altered the laws of England as it existed in 1792, in an endless variety of ways. It must also be borne in mind that since that year England has also been altering her laws. Though in 1792 the laws of both countries, in relation to civil rights, were as nearly as possible identical, since that year England and Canada have been travelling in different directions—each making laws for the government of its own people, without any regard to the laws of the other. This remark applies with as much force to the criminal as to the civil laws of both countries. How then can it be said that, in 1861, the laws of the two countries are identical? They are in truth no more identical than are the laws of the State of New York and of England. And so far as the oneness of the laws is relied upon to give jurisdiction for the issue of a writ of *habeas corpus*, the writ might as well go to the State of New York, or any other State of the Union, as come to Canada.

It is said, however, that the jurisdiction did once exist, and that it has not been taken away by the Legislature. Did it ever exist as regards Canada, or a colony in the situation of Canada? We deny that it ever did, and challenge the proof.

We are told that it lies to Jersey.—(Bac. Abr. Habeas Corpus, B. 2; Viner's Abr. Habeas Corpus, E. 2; Anon, 1 Ventris, 357; 2 Burr. 856; *Belson in re*, 7 Moo. P. C. 114; *In re Carus Wilson*, 7 Q.B. 984; *In re Brennan*, 10 Q.B. 492; *In re Dodd*, 4 Jur. N. S. 291.) What is the analogy between Jersey and Canada? It is true that Jersey is governed by laws and customs somewhat different from those of England. It is true that this island is not bound by an act of the English Parliament, unless particularly named in it. It is true that all causes are originally determined by their own officers, the bailiffs and jurats of the island. It is true that an appeal lies from them to the Queen and Council, as the last resort. But it is not equally true that as far back as 1677, and before any of the decisions above quoted, it was by Act of Parliament expressly enacted that the writ of *habeas corpus* issued by Courts in England should run to Jersey. Is there any such Act of Parliament in relation to Canada? Is there, moreover, any comparison to be made between the circumstances of the Province of Canada, with its independent legislative government, and the Island of Jersey, governed by the ducal customs of Normandy?

We are told that the writ runs to the Isle of Man.—(*Ex parte Crawford*, 13 Q.B. 613.) Is there any analogy between Canada and the Isle of Man, which, in 1765, was purchased by England for £70,000? Is it not true that, by the statute 5 Geo. III. cap. 26, the whole island and all its dependencies was unalienably vested in the British crown, as an integral part of the British Empire? Is it not true that since (and not before) the Vesting Act, the English Legislature has provided for the issue of the writ of *habeas corpus* to the Isle of Man? Is it not true that the decision as to the Isle of Man was since the Vesting Act, and has express reference to it? Are there any such acts in relation to Canada? There are none. The comparison is not only void of analogy but ridiculous in its nature, viewed either from a legal or a national point of view.

We are told that the writ ran to Calais when in the possession of the British?—(Bac. Abr. Habeas Corpus, B. 2; Viner's Abr. Habeas Corpus, E. 2; Anon, 1 Ventris, 239; 2 Burr. 856.) Of this there is no satisfactory proof, nothing except dicta without foundation, and apparent precedents, about which little or nothing can be ascertained. But was Calais such a colony as Canada—a colony possessing independent legislative and judicial powers? The reference to the Calais precedents is of no weight, not only because we have no reliable report of them, but because there is no parallel between Calais in the fifteenth century and Canada in the nineteenth century. The comparison is

absurd, and could never have been made by any person possessing the slightest knowledge of Canada, its constitution, its institutions, or its resources.

We are told that the writ runs to the Island of St. Helena. There is no authority for this assertion. The case cited (*Ex parte Lees*, 9 El. B. & El. 828) is no authority for the position. The writ of *habeas corpus* as well as *certiorari*, asked for in that case, was refused. Lord Campbell, in giving judgment, said "This was an application for a writ of error or *certiorari*, to be directed to the Supreme Court of the Island of St. Helena, to bring before the Court of Queen's Bench in England the record of a conviction alleged to be erroneous. Some old precedents of writs issued out of this Court to the French dominions of our early Sovereigns were cited to show that the writs might lawfully issue. No precedent, however, of any such proceeding with respect to a dependency like St. Helena, for several centuries, was brought before us; and it was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus*, could be enforced in such dependencies. Without, however, deciding how far we might be empowered to issue such a writ, we are clearly of opinion that we ought not to direct such a writ to issue in the present case."

England's colonies of the present day are not what her colonies were in the fifteenth and sixteenth centuries. Even as to the latter, however, we assert there is no satisfactory proof of the exercise of a jurisdiction such as was recently exercised with regard to Canada. The jurisdiction is one which in our belief never did exist, and for which in modern times at least there is no necessity. No case can be found of a writ of *habeas corpus* ever having issued from the English Courts to Canada, or to any other colony of independent legislature and independent judiciary. The jurisdiction appears to us to have been usurped in the Anderson case. The cases of the Isle of Man and Jersey, chiefly relied upon by the Court when ordering the issue of the writ, are, for reasons already mentioned, wholly inapplicable; and the case of St. Helena, so far as applicable, is an authority against the jurisdiction.

The exercise of the jurisdiction appears to us to have been the more extraordinary, if the right to exercise it had been undoubted, when it is considered that the Court was not under any obligation to issue the writ upon the materials before them.

Anderson, who, when escaping from slavery in the State of Missouri, was arrested under the laws of that State by one Digges, slew Digges and fled to Canada. His surrender as a fugitive from the criminal justice of Missouri was demanded of Canada. He contended that he was not guilty of "murder," within the meaning of that term as used in the Ashburton Treaty, which provides for the surrender of fugitives from justice, as between Great Britain and the United States. He appealed to the Court of Queen's Bench for Upper Canada, a court of superior jurisdiction in this colony, and his appeal failed. He was remanded under warrant of the Court to his former custody. His case was about to be appealed to the Court of Error and Appeal, or Supreme Court of Upper Canada. A cry of sympathy for an escaped slave is raised and is wafted across the Atlantic. The Secretary of an Anti-Slavery Society in London hears the cry, and, fired with zeal, hastens to make an affidavit in order to invoke the aid of an English Court by writ of *habeas corpus*. He knows nothing of the facts, but still he must make an affidavit. He swears that Anderson is a British subject domiciled in Toronto. He swears that Anderson is illegally detained in the gaol of that city. He swears that Anderson has never been legally accused or charged with or legally tried or sentenced for the commission of any crime or of any offence against the laws in force in Canada. He swears that Anderson was not otherwise liable to be imprisoned or detained under or in virtue of any such laws. He also swears that, unless a peremptory writ is issued, the life of Anderson will be exposed to the greatest and to immediate danger. This was what might be called a pretty stiff affidavit. It was made by a man more than 3,000 miles distant from the place where all the occurrences about which he swore took place, but of which he had no personal knowledge. He, however, took good care to suppress facts in regard to the cause of Anderson's detention, about which, if he knew anything of the case, he must have had some knowledge. With him, however, the end probably justified the means.

We say there was no obligation on the English Court of Queen's Bench to grant the writ on such materials. In the first place, the jurisdiction was, to say the least of it, doubtful. In the second place, the affidavit was not made by the prisoner himself, nor was it shown that he was so coerced as to be unable to make an affidavit.—(See *In re Parker et al*, 5 M. & W. 32; *In re Carus Wilson*, 7 Q.B. 984.) In the third place, the affidavit, on its face, bore evidence of the fact that it was made by a man who appeared to be as reckless in taking an oath as he was unwarranted by the facts in making it. In the fourth place, the writ though of right is not of course.—(*Hobhouse's case*, 3 B. & Ald. 420; *Ex parte Knight*, 2 M. & W. 106.)

The course that the Court should have adopted would have been to have issued a rule to show cause why the writ should not issue.—(*In re Crawford*, 13 Q. B. 613.) Had this course been adopted, the rule would certainly have been discharged, because of the deception practised by the applicant in fraudulently suppressing facts material to be

known on the application for the rule.—(*Carus Wilson's case*, 7 Q. B. 1000.) Besides the right to the writ by a person in a colony is grounded on the fact that the person in custody is a British subject, and the affidavit which stated that Anderson was a British subject domiciled in Toronto was positively untrue. He was a foreigner domiciled in Upper Canada, but not a British subject. True it is that a foreigner, *while in England*, is entitled to the protection of English laws and to the English writ of *habeas corpus* (*case of Hottentot Venus*, 13 East. 195; *Canadian Prisoners*, 1 P. & D. 516; 9 A. & E. 731; S. C. *Ex parte Besset*, 6 Q. B. 481); but the reason urged by those who support the jurisdiction of an English Court to issue writs of *habeas corpus* beyond its local jurisdiction, is that the Queen "is entitled to have an account why the liberty of any of *her subjects* is restrained, wherever that restraint may be inflicted." So that in the affidavit produced to the English Court there was not only *suppressio veri* but *suggestio falsi?*

The remarks which we have made on this troublesome question do not arise from any want of respect for the English Court of Queen's Bench. We hold that and the other English Courts of superior jurisdiction in much veneration. But we do regret the occasion which rendered necessary such remarks as we have made. It might have been easily avoided, and by not avoiding it the Court of Queen's Bench in England has established a precedent of which the Anti-Slavery Society in London will not be slow to avail itself whenever a fugitive to Canada from crime committed in the United States happens to be a colored man. We do not advance an opinion on the vexed question whether Anderson did or did not commit the crime of murder within the intent and meaning of the Ashburton Treaty. But we do say that color should be no immunity against punishment for crime. We know by experience that when a fugitive from the United States, accused of crime, happens to be a colored man, nothing is more simple than to get up a cry of slave hunters, slave hounds, &c., and that no cry is more greedily seized in England than that same cry. It is just possible for men, in their zeal for the rights of the slave, to overlook the responsibility of the criminal and so beget results the reverse of beneficial to society, either in Canada or Great Britain.

We yield to none in sympathy for the slave. We abhor the system. We deplore its consequences. But while we sympathise with the slave, while we abhor slavery, while we deplore its consequences, we cannot close our eyes to the fact that the recent action of the Court of Queen's Bench in England was alike disrespectful to the rights of our colonial judiciary and dangerous to our colonial independence. Much as we admire the English Bench, we cannot allow that admiration to blind us to the excellence of our Colonial Bench. We have men on the Bench in Canada second to none in England. They have our utmost, our unbounded confidence. It will never do to allow that confidence to be shaken, that Bench to be humiliated, by the nod of an English Chief Justice.

Standing in the relation that England and Canada bear to each other, the jurisdiction recently arrogated by the English Court of Queen's Bench can only be supported on the hypothesis of the existence of an appellate jurisdiction —a superior right—superior power. But provision is made for appeals from the decisions of our Courts to Her Majesty in Privy Council, in the same manner that appeals lie from the decisions of English Courts to Her Majesty in the House of Lords. That and that alone is the only recognized, the only constitutional, channel of appeal from the colonies. With it Canada is at present satisfied. But whenever an English Court, in its zeal for the supposed cause of the slave, or from any other cause, without having appellate jurisdiction, choses at the instance of the Secretary of an Anti-Slavery Association, or of any other zealot, to exercise such a jurisdiction, it is a duty which we owe to ourselves—to our laws—to our institutions—and to the laws and institutions of the mother country, to protest against the exercise of the jurisdiction.

We sincerely believe that if the English Court of Queen's Bench had not been as ignorant of our laws and institutions as it appears to have been of our geographical position, the writ would never have been issued. This, however, is any thing but a justification for an act so fraught with consequences so mischievous.

We object not so much to the exercise of the jurisdiction in the particular case which has occasioned these remarks, as to its exercise on any occasion whatever. The exercise of such a jurisdiction is alike distasteful to our people, dangerous to our institutions, and hostile to our ideas of self-reliance and self-government. If we pride ourselves in one thing more than another it is in our ability for self-government; and if we are grateful to the mother country for any one thing more than another, it is that she has confided to us the reins of government. Our course is onward and forward. While pushing forward to take our place on the pedestal of nations, we have well nigh forgotten the acts of colonial misrule under which we at one time suffered. A recurrence to former checks will not only revive the recollection of what is past, but make us restive in the future.

It is to be hoped that the Provincial Parliament, which is about to assemble in Quebec, will take up the subject of the English *habeas corpus*, and have an understanding with the Imperial authorities about it. Few will be found to maintain the existence of such a jurisdiction, notwithstand-

ing the ex parte determination of the English Queen's Bench to the contrary. None will be found to justify the exercise of the jurisdiction on any occasion whatever.

SPRING CIRCUITS, 1861.

EASTERN CIRCUIT.

The Hon. Mr. JUSTICE BURNS.

Perth	Tuesday,	16th April.
Brockville	Monday,	22nd April.
Ottawa	Monday,	29th April.
L'Orignal	Monday,	6th May.
Cornwall	Friday,	10th May.

MIDLAND CIRCUIT.

The Hon. Mr. JUSTICE McLEAN.

Cobourg	Tuesday,	19th March.
Peterboro'	Thursday,	28th March.
Whitby	Tuesday,	2nd April.
Belleville	Tuesday,	9th April.
Kingston	Tuesday,	23rd April.
Picton	Tuesday,	7th May.

HOME CIRCUIT.

The Hon. Mr. JUSTICE RICHARDS.

Milton	Wednesday,	13th March.
Hamilton	Monday,	18th March.
Niagara	Tuesday,	2nd April.
Welland	Tuesday,	9th April.
Barrie	Tuesday,	16th April.
Owen's Sound	Wednesday,	8th May.

OXFORD CIRCUIT.

The Hon. CHIEF JUSTICE DRAPER.

Stratford	Wednesday,	13th March.
Berlin	Monday,	18th March.
Guelph	Monday,	25th March.
Woodstock	Tuesday,	2nd April.
Cayuga	Wednesday,	1st May.
Brantford	Monday,	6th May.
Simcoe	Wednesday,	18th May.

WESTERN CIRCUIT.

The Hon. Mr. JUSTICE HAGARTY.

Sarnia	Thursday,	14th March.
Sandwich	Monday,	18th March.
Chatham	Monday,	25th March.
London	Monday,	8th April.
St. Thomas	Thursday,	18th April.
Goderich	Tuesday,	30th April.

TORONTO.

The Hon. SIR JOHN BEVERLY ROBINSON, CHIEF JUSTICE.
Monday, 8th April.

HILARY TERM, 14 VIC.

The following gentlemen were called to the Bar:

Messrs. P. O'Brien, T. B. Pardee, Sarnia; W. H. Scott, B.A., Toronto; C. F. Goodhue, London; A. Bruce, B.A., Hamilton; J. A. McKenzie, B.A., Sarnia; G. W. Des Vœux, B.A., Toronto; G. S. Papps, LL.B., Hamilton; C. D. Paul, M.A., St. Thomas; C. I. Benson, B.A., Toronto; James Windeat, Toronto.

The following, were admitted as attorneys-at-law:

Richard T. Huggard, London; Morgan Jellett, jun., Belleville; John Wright, Port Hope; Edward C. Campbell, Niagara; Thomas Boys, Barrie; Thomas Deacon, Perth; D. C. Macdonald, London; M. McCarthy, Barrie; J. A. Ardagh, Toronto; H. Wethey, Toronto; J. Carpenter, Toronto; John Paterson, Toronto; C. D. Paul, St. Thomas; G. S. Papps, Hamilton; W. H. Scott, Toronto; C. H. Benson, Toronto; C. F. Goodhue, London.

INAUGURAL LECTURE.

Delivered at the University of Queen's College, Kingston, C. W., on February 4, 1861, at the Inauguration of the Faculty of Law.

BY W. G. DRAPER, ESQ., M. A.

The custom of having Law Readers in the English Inns of Court, is one of great antiquity, for we find that so long ago as 1580, the celebrated Sir Edward Coke, one of England's most erudite Jurists, was appointed by the Benchers of the Inner Temple, Reader of Lyon's Inn,—an Inn of Chancery under their rule,—where he lectured to Students at Law and Attorneys. I have neither time nor opportunity to enquire whether Lectures or Readers were ever appointed prior to this time; but it proves the practice to be an ancient one, which is to a certain extent an argument in its favour.

The practice has, I believe, not been regularly continued in the English Inns of Court, but on the contrary, has been prosecuted at intervals; and it is only within the last half century,—I might say, within the last few years,—that it has become a positive institution.

An authority of no mean standing at the English Bar, has asserted that the system of teaching Law by means of Lectures, always has been, and must prove a failure. I mean Dr. Samuel Warren, who in his Treatise on the Study of the Law, p. 13 *et seq.*, gives his reasons therefor as follows: "The Lectures present the Student with, no doubt, a well-tempered weapon, but make no attempt to teach him how it must be used."

Dr. Warren further alludes to the various failures to establish Law Lectures in England, instancing among others, the attempt in the Inner Temple Hall, made by Messrs. Starkie and Austen, two most able professional men, as a proof of the futility of making such trials, and asserting that the almost universal opinion of the profession then was, that the attempt would not be repeated.

There was certainly a great deal of force in these objections of Dr. Warren at the time of his writing them, some sixteen or eighteen years ago.

The plan then adopted was, to give Lectures and nothing but Lectures,—learned and erudite disquisitions on the most difficult and abstruse principles of Law which were written out at great length, and read over to the Student in a period of time not exceeding an hour's duration. The idea appearing to be not to convey instruction, but to write a brilliant essay.

I cannot better illustrate my meaning than by giving a portion of a summary of a Lecture given by Professor Amos, who delivered a course at the London University in 1834-'5. it runs thus: "Corporeal, Incorporeal, and Derelict property; Blackstone's Classification; Property, why called Incorporeal; Corporeal profits and Incorporeal property; Modes of transferring property; Livery of Seisin; Statute of Frauds; Uses; Effect of Statute Henry VIII. Springing and shifting Uses; Transfer by Deeds, Effect of delivery; Statutes requiring signature contrasted with Common Law; Authorities respecting Execution of Deeds collected; Escrows' Antiquities of Deeds; Maddox's Formulare; Spelman's Posthuma," and so on for ever so much more. Now judging from the summary, the Lectures must have been most abtruse. Let any one get these Lectures and read them for his own benefit, and it will take a long time thoroughly to comprehend the different subjects treated of,—even if the reader have been many years at the Bar. If that be so, how much more difficult for a Student to comprehend this jargon, and carry away the finest subtleties of the English Law in their heads, in the short period of one hour. The impossibility is apparent, and hence, the failure of the system.—the only wonder being, that the acute penetration of English Lawyers passed over, without notice, so glaring an absurdity.

In England, now-a-days, a different plan is being adopted, as well at the Universities, as at the Inns of Court, at the

King's College, and the Incorporated Law Society, viz: To publish a list of works on which the Lecturer discourses during the hours of Lecture. And secondly, to hold public examinations, at the end of each Session upon the works treated of.

In the first system, the Student would scarcely be able to take down half-a-dozen notes on the subjects treated of. In the second, he has the advantage of being able to prepare himself, by reading the text-book beforehand, so that any difficulties encountered in the course of his study, can be easily solved and removed by the Lecturer.

With ordinary care and ability, no Student could, under this system, fail to pass the requisite examination, and at the end of his three year's course, obtain his Degree of Bachelor of Laws, and the benefit which such Degree confers. And while on this point, I may as well mention what such benefits are.

Any Student articled to a practising Attorney before 1st March, 1860, will only be required to serve three years, provided he takes a Degree either in Arts or Laws. If articled after 1st March, 1860, the Student must serve for three years after taking his degree.

And any person having taken a Degree, may be admitted to practice at the Bar in Upper Canada, after having been on the Law Society's Books for three instead of five years,—which is required if no Degree has been conferred—and in case of Degrees conferred in Upper Canada, the Student may be admitted to the Bar at the end of three years, notwithstanding his having been entered on the Law Society's Books before taking the Degree,-provided he was entered prior to 1st March, 1860—otherwise the Degree must be prior to the date of his admission.

Having referred thus casually to the system about to be adopted here, and to the advantages which will accrue therefrom, I will now proceed to give a sketch of the difference which exists between the Profession in England, in America, or the United States, and in this country; offer a few remarks upon the different systems; shall next endeavour to give a slight history of the rise and progress of Law and Lawyers in Canada, and conclude with a few suggestions on the Study of the Law, and the various advantages which belongs to our profession.

In England, the different branches of the profession are kept distinct and separate. There is no amalgamation between Barristers and Attorneys, as there is here. To a certain extent, the Barrister looks down upon the Attorney,—although in a vast measure he is dependent on him for his success. Indeed, in former days, I believe it was considered highly derogatory for a Barrister—especially if he were young at his profession—to be seen conversing with an Attorney, as it was considered to be symptomatic of "touting for briefs." No better illustration of this feeling can be given than by relating an anecdote of the late Lord Norbury, who, being once applied to for a shilling subscription to bury a pauper Attorney, waggishly pulled out a guinea, and tendering it to the applicant, said: "What! only a shilling to bury an Attorney? Here's a guinea! Go and bury one-and-twenty of 'em."

The profession,—as in this country—is divided into two classes, viz: Barristers and Attorneys, and Solicitors. The difference between these two last being that one practices at Common Law and the other in Equity. There are others who follow special branches of the profession, such as Proctors, Conveyancers, Special Pleaders, &c.

In the United States there is no such distinction. The term *Lawyer* indicates one who practices all the branches of the Law. Their practical minds and levelling spirit have wiped out all nominal distinctions in the profession. Their only qualification is five year's study in an office, and the passing of an examination. That accomplished, every avenue of distinction which the profession affords is open to the young candidate, without any questions been asked as to whether he studied as a Barrister or an Attorney, at Chancery, or at Common Law.

In Canada, the distinctions between the Barrister and the Attorney or Solicitor, are recognised as in England, with this difference, that it is here permitted to practice all three and combine them together, so that the same person may be at once Barrister and Attorney and Solicitor.

The advantage of this system has been recognised by high legal authority in England, and strong opinions expressed in favor of our Canadian plan.

In a number of the *Law Magazine*, and *Law Review* of last year, the following passage occurs.* After referring to the practice of advertising as adopted by Lawyers in Canada, who in a plain straightforward way insert their names as Barristers, Attorneys, Solicitors, Conveyancers, &c., in the different local newspapers, the editor compares it to the English dodge of publishing a book, or an Act of Parliament, somewhat after this style "The Metropolitan House-maid's Window Cleaning Protection Act, 1860, with notes by Job Briefless, Esq., Barrister-at-Law, Lincoln's Inn."

The editor then goes on to say: "In Upper Canada it will be seen the same men practise both as Solicitors and Barristers, and form themselves into firms. The practice is recommended by good sense and reason. The state of Society no doubt favors the combination, and much might be said for the system in England were it openly adopted with us. A paper issued by the Law Amendment Society, published in 1852, on the relation between the Bar, the Attorney and the Client, affords ample evidence of what is the opinion among liberal minded men in the profession on this subject."

Indeed, the Canadian system has been to a certain extent recognised in the High Court of Admiralty in England. This Court is divided into two Inferior Courts, the Instance Court and the Prize Court, in which Barristers and Attorneys practise with equal privileges. It is therefore a matter of great congratulation, as well to those practising the profession, as to those about to commence the study of it, that we have a system which in this respect combines the advantages of both the English and American plans—the dignity and learning of the first, with the practical utility and strong common sense of the Second.

However, on reflecting on the peculiar circumstances under which the practice of the Law was commenced in this country, it will be seen that it could hardly have been otherwise. Now-a-days there is scarcely a village of any note in Canada that does not contain one or two Lawyers, in whose offices some instruction can be obtained as to the practice and principles of the profession, and where suitors can obtain redress. But how different was the case some fifty or sixty years ago, at the commencement of this century? I doubt if there were half-a-dozen Law Books in the country, and there were certainly not a dozen Lawyers.

Litigation must have been slight; but slight as it was, the number of Lawyers was insufficient to meet the demand for their services—so much so that in 1803 Parliament passed an Act authorizing the Governor to license six individuals to practise Law, and these six together with the other practitioners, were only too glad to transact any description of business, whether as Barristers, Attorneys or Conveyancers. There was scarcely work enough to earn a livelihood by practising all the branches at once; money was scarce, and necessity therefore compelled the adoption of the plan now universal in this country of combining them all together, leaving it optional to the practitioner to choose one or more as it pleased him. No doubt the same reasons, combined with the republican element, produced the same result in the neighbouring States.

* See 6 U. C. Law Journal, p. 157.

When Canada was finally conquered—that is to say after the Treaty of Paris, which was concluded on 10th May, 1763, the English Government granted to the Canadians, being then an entirely French population amounting to about 60,000 souls, the privilege of having their own Laws and Religion, and an Act was passed to that effect by the Imperial Parliament in 1774. At that time Upper Canada was little better than a wilderness, and the necessity for bringing English Laws into this part of the Province did not occur until long after.

The Declaration of Independence in 1774, and the consequent war between Great Britain and the United States, drove a great number of loyal British subjects to take up their abode in that portion of Canada now known as Upper Canada. The population being entirely British, and having increased to a great and unexpected extent for the reasons above given, the application of the French Law was found irksome to a great degree, and it soon became necessary to effect a change.

This was effected through the instrumentality of Lord Dorchester, in 1791, by dividing the province of Canada into Upper and Lower Canada, and giving to the Upper province a separate Constitution and Laws.

The first Upper Canadian Parliament met in Niagara, then called Newark, on 17th September, 1792, and at once passed an Act adopting the Laws of England as the rule for the decision of all controversies relative to property and civil rights. This was the first Act passed, and the second was equally important. It established Trial by Jury for the decision of all issues of fact.

It was not however until the year 1794 that a Court called the Court of King's Bench was established; on this Court was conferred "all such powers and authorities as by the Law of England are incident to a superior Court of Civil and Criminal Jurisdiction," and was to be presided over by a Chief Justice and two puisne Judges,

(To be continued.)

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "The Editors of the Law Journal Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(Continued from page 37.)

In 1838 the number of courts was 173, the number of commissioners presiding therein 1068—on an average six commissioners (judges) to each court! In some of the larger towns two only of the commissioners for the court presided, the others following in their turn, unless a difference of opinion arose, when it became necessary to have a third commissioner present. In other places three commissioners held the court, and in many places from four to six of these gentlemen occupied the seat of justice at the same time. Each commissioner doubtless had his own opinion on the cases coming before him, and each court its own notions of what was right, changing, it may be supposed, with every change in the presiding commissioners. In fact they had no settled rule of decision; and justice, or more frequently injustice, was administered by a thorough contempt of law. With one thousand and sixty-eight commissioners what could be expected: few of them had that training in the rules and course of law, and forms of business which concerned their office, without which they could not be expected to determine rightly, and keep within the bounds of their jurisdiction.

It is easy to suppose that this would lead to a mischievous and embarrasing contrariety of decision in the same court, and amongst the different courts; so that each tribunal would have almost a law to itself—nay, changing at every sitting of the court.

The intrinsic objections to this system were too marked to admit of question; and they would every day have become more apparent as the growing business of the country presented cases involving new and more complex questions for determination. The rapid advance in the population, wealth, and business operations of Canada would, doubtless, in a few years necessarily have suggested some decided change. But other grounds were superadded of a tangible character, and established a general conviction in the public mind that some improved system should be devised for dispensing justice in the inferior tribunals.

The commissioners of the courts of requests were openly charged not only with ignorance and incapacity, but with corruption and partiality, as well as making merchandize of their office. A number of complaints against them were from time to time preferred to the Executive Government; but in the great majority of cases the parties who felt themselves aggrieved went no further than to express their dissatisfaction in general conversation, or in the public prints of the day.* In fact these courts appear to have fallen into thorough contempt. They failed to give satisfaction in any way to the public, and did not even command that small share of respect which would enable them to preserve common order and decorum at their sittings. Such a state of things could not last long. In May, 1839, the House of Assembly passed an address, praying the Lieutenant Governor to appoint fit and disinterested persons to "make such an investigation and scrutiny into the public departments of the Province, as would enable them to report thereon and recommend such changes in the system as they might deem beneficial."

In compliance with this address commissions were issued in the October following; and to Mr. Draper and Mr. Hagarman (the law officers of the day) was committed the investigation respecting "the courts of requests, and commissioners of these courts."

* Many of the complaints, doubtless, arose from the disappointment of losing suitors; for some of the courts were most respectably constituted, and gave satisfaction in their mode of conducting business. The writer recollects the present Judge of Middlesex presiding in the Court of Requests for the town of York, and other gentlemen of education and intelligence; but the great majority of commissioners were in a high degree ignorant, and as presumptuous as they were ignorant.

The points proposed for the consideration of this committee were few. The main one was, "Whether it might not be practicable to provide for the recovery of small debts in a manner more consistent with the fixed principles of law and equity, by dispensing with the services of numerous commissioners then acting in the courts of requests, and substituting a system of occasional circuit courts in each district, by the judge of the district court, with liberty of a jury in certain cases;" and the committee were not restricted to the specified queries, but were invited in the spirit of their instructions to investigate generally the subject proposed.

After a *thorough* investigation of the subject referred to them, the commissioners in the month of December in the same year reported. They arrived at the conclusion that courts of requests ought to be abolished; and in order to render the system of local tribunals for the recovery of small debts useful and efficient, that new courts should be established.

They recommended for adoption the organization of courts with similar jurisdiction as to amount to that of the courts of requests, in every district in Upper Canada, presided over by the judges of the several district courts (thereafter to be barristers of three years' standing), and that salary should be substituted for payment by fees. In support of the proposed change was, amongst other grounds, urged the strong probability of uniform principles of decision, not only in each district but throughout the Province: that the jurisdiction of the courts would be confined within the limits intended by the Legislature, and would not be overstepped by district judges, as was often the case by the commissioners of the courts, "from a want of clearly understanding technical distinctions, and the observance of well-established rules of evidence and law, as regards the responsibility of parties; a competent knowledge of which, it was assumed, existed in the different judges of the district courts:" and that the administration of justice would be on a more independent footing by substituting salaries for fees—the existing system making remuneration depend on the amount of business done.

"Without pausing," said the report, "to consider what may have been the effect, the tendency of such a system to encourage litigation is sufficiently obvious; and indeed one ground of accusation against the commissioners which has been urged is, that they are inclined to favor those parties who bring the greater number of suits before them for adjudication."

This report was laid before the House of Assembly the following year but too late in the session for proper consideration, and no further action was taken upon it by the Parliament of Upper Canada.

(*To be continued.*)

EXPENSES IN THE COURTS.

The difficulty which Mr. Cossey suggests in his letter published below is worthy of consideration. It is one the practical remedy for which is not easy to determine. At the utmost it could only be in cases where a sum certain was claimed for debt or the like that a judgment by default could be entered. It would never do to apply the rule to actions for damages. The entry of appearance would be a notice of defence and failing such notice judgment could be entered of course. Look on the other side and suppose a defendant having a good defence fails to enter it with the clerk, a thing that would often occur, or be brought about by contrivance of a dishonest plaintiff—even if a certain time were given to apply to have that judgment set aside there would be no end to the difficulty and inconvenience.

In the case put we have no compassion for B. he could have saved all the expense he was put to by giving a confession of judgment to the bailiff who served the summons, which confession that officer would have been bound to take—or he might after service and a proper time before the Court day, have attended at the clerk's office and acknowledged judgment to him. We happen to know that many of the leading County Judges are not in favour of allowing a judgment by default to be entered in any case by the clerk, believing that it would open the door to fraud and complicate the simple procedure of the Courts.

Mr. Justice Burns we believe, when holding the office of County Judge, was against even the modified rule allowing judgment to be entered on confessions except as now upon order of the judge made at the sittings of the Court. The interest of defendants are studiously cared for under the Division Court Law. They can give a confession to either bailiff or clerk, or if the suit is one to which the ordinary confession would not be applicable, the defendant can under rule 30 serve a notice of admission on the plaintiff or on the clerk—and a plaintiff may do the same thing as to defendant's set off. The rule will best explain itself.

"With a view to save unnecessary expense in proof, the "defendant (or plaintiff) shall be at liberty to give the op-"posite party a notice in writing that he will admit on the "trial of the cause any part of the claim (or set off), or any "facts which would otherwise require proof, and after such "notice given the plaintiff (or defendant) shall not be "allowed any expense incurred for the purposes of such "proof—the notice to be according to the form," &c.

We are not prepared to deny that in some cases the present practice may operate to the loss or injury of *plaintiffs* without their ability to prevent it, but deny in toto that defendants can justly find fault with the law as it is in this particular. Perhaps a provision of this kind might be an improvement, allow judgment by default in cases of *debt* for sums certain where the claim entered is accompanied by an affidavit from the plaintiff that the same is due and unpaid. And to guard against an improper judgment standing allow the defendant to apply for a new trial on terms at any time before actual sale of his property.

We should like to hear from clerks on the subject generally. Will some of our old friends state their views?

To the Editors of the Law Journal.

GENTLEMEN,—The Division Court Act was intended to afford a cheap and speedy remedy for the recovery of small debts.

I submit that experience in its working shows in many instances a very expensive remedy to litigants under the present procedure; this is inevitable, as plaintiffs rarely know until their cause is called in court whether there is any defence or not, and are often mulcted in heavy expenses for not being prepared or in being expensively prepared when there is no defence, I think the procedure in the County Court should be adopted which would give all parties timely notice of what they are to meet at court and to be prepared for every contingency. I will give you an illustration of what I assert, and it is not an exceptional one; they are numberless. A. of Hamilton, sues B. of the County of Perth, where debt was contracted, and brings with him two witnesses to prove his claim. On the cause being called, B. makes default and consequently no evidence is required. Distance A. and witness travelled, seventy miles, the two witnesses are allowed say, $6 each, amount $12 which may or may not be collected. Then there is A.'s expenses, say $6 more, which in any event is lost. Now, if B. had been required to put in an appearance a certain time before court, and did not do so, $6 would have been saved to A. and $12 to B. The costs had there been judgment by default under the procedure, I recommend would have been only $1 50, a clear saving of $16 50. My plan would be to have the process so framed that defendant should appear in eight or ten days after service with a notice of the day court, would be held for the trial of issues and in default of appearance the clerk might enter judgment, and after a time to be named issue execution thereon. I would allow on every judgment so entered for fee fund the same as an undefended hearing. This method would save thousands of dollars now paid under the present procedure. How very simple for plaintiffs who reside at a distance to write to the clerk if any appearance entered, and if not, how very satisfactory to remain at home and not be compelled to waste valuable time and money in attending court? The plan I propose would at once silences the very frequent and emphatic words of defendant!! I NEVER INTENDED TO DEFEND, AND IT IS HARD TO PAY SO MUCH EXPENSES. I have had long experience in the working of the Division Courts, having been clerk for seven years, and what I say I am confident is the unanimous opinion of all the clerks in the Province. Our judge takes every pains in his power to make the working of the courts as inexpensive as possible. I have often heard him when parties who made no defence complain of the expenses of witnesses who attended to give evidence, say parties must come prepared as they do not know what they have to meet until defendant is called; and the expense must be allowed, at the same time remarking he could not agree but that a different procedure should be adopted by the legislature.

Yours, &c.,

WM. COSSEY.

Clerk 4th D. C. Co. of Perth.

Shakespere, Jan., 8th, 1861.

A FEW VEXED QUESTIONS.

To the Editors of the Law Journal.

Toronto, February 11th, 1861.

GENTLEMEN,—I have been a reader of your Journal for some years past, and can bear testimony to the very great service you have done the public—lay as well as professional—especially in reference to questions affecting the under-current business of the people in the Division Courts and matters concerning the Municipal laws.

Having frequently occasion to do business for myself and others in the Division Courts, I have found a great difference of opinion on some points among persons administering the Division Court laws, so much so as at times to occasion great public inconvenience.

The vexed questions to which I more particularly allude are those, on which I do not know that you have given any opinion in your Journal Suppose a case:—

1st. Where "A" obtains a judgment in Toronto against "B," who lives at Barrie. In due course a transcript is sent from the clerk in Toronto to Barrie for collection, and an execution issued, upon which the bailiff returns "*Nulla Bona.*" "B" then removes to Owen Sound. "A" learns that he has property there, and goes to the clerk in Toronto for a transcript to Owen Sound. The clerk in Toronto turns to his books and finds that the Barrie clerk has sent in a return under the seal of the court, stating that "B" has no goods in his Division. The return is official, and so entered by the Toronto clerk. "A" is told by the Toronto clerk, "I cannot give you a transcript to Grey, you must apply to the clerk at Barrie, all proceedings are removed from this court to Barrie." "A" replies, that the original judgment is not removed but only a transcript, and that as soon as the Toronto clerk officially becomes aware that the Barrie clerk has not made the amount on the transcript from Toronto, he may give a transcript to any other county; or, if he is made aware that "B" has come to reside in the Toronto Division, under such circumstances he can issue an execution in Toronto and levy the amount on the original judgment. The Toronto clerk refuses to issue any transcript in either case, and refers the applicant "A" to the Barrie clerk. Is the clerk right in so acting, in your opinion, and may he not legally issue a transcript to another county on getting a return of "*Nulla Bona*" from Barrie? You will observe in the Consolidated Statutes, (Sec. 139), that the words are used in reference to transcript judgments, that "all proceedings *may be taken* for enforcing and collecting the judgment in such last mentioned Division Court *by the officers thereof* that could be had or taken for the like purpose upon judgments recovered in any Division Court." In the original act the word "may" was "shall." It is contended that the word "may" is merely directory, not concluding proceedings in any other Division. You will see that the words of the clause do not say that the transcript sent "shall become a judgment" of the Division Court to which it is sent, but the judgment of the original Division is referred to as existing and merely for the time suspended.

2nd. "*Payment of money into court on a tender previously made.*" Sections 87, 88, and 89, refer to the law governing payments into court on a tender of money. In the 88th section you will find these words: "In case the plaintiff do not further prosecute his suit, all further proceedings shall be stayed unless the plaintiff within three days give notice of his intention to proceed, &c." Now, a case like this occurred—"A" sues "B" for rent, say £10, "B" pays into Court £5, having previously tendered it under these sections. "A" does not give any notice as the law requires, within three days after learning that the money is so paid—of his intention to proceed for the balance of the £10. The case comes up for trial, or stands on the trial list before the Judge—"A" says I wish to proceed for the balance of the £10—"B" says you cannot do this—you are barred—"*all proceedings are stayed.*" "A" then says to the Judge, I am not willing to take £5 for £10, my not giving the three days notice was an oversight, I will give it for next Court, and adjourn the suit, or withdraw my case entirely and bring a new suit.

Now, under these circumstances, is "A" barred from recovering anything more—can the Judge not legally grant him an adjournment for the purpose of giving notice to proceed, or can "A" not withdraw his suit—in other words be nonsuited? Do the words "all proceedings shall be stayed unless, &c." amount to an absolute *bar*, like a judgment on the merits?

2nd. "*Dividing Causes of Action.*" Section 59 of the Division Court Act, says, "A cause of actions shall not be divided into two or more suits for the purpose of bringing them within the jurisdiction of the Court." In some Division Courts it is held that "A" having a note, say for £10, and an account for £20, all due, may at the same Court sue on the note as one cause of action, and for the account as another, both being against "B"—or, that "A" having an account for £10, and an action for damages for a breach of contract, or for a tort for £10, can divide them—both together being under £25, and in the first case both together being over £25. Now, can "A" so divide his causes of action in your opinion. Must he not in the first case (as he certainly could, and legally secure County Court costs,) sue in the latter Court?

Must he not in the latter case join the two causes of action, both being within the jurisdiction (within £25,) and sue in one action?—or does the fact in the latter—that one is for damages or tort, and the other on contract, warrant a different course? In other words, can a person in the Division Court sue for tort and contract in one action?

4th. "*Division Court Clerks Examining Garnishee Debts.*" The last case occurring under the Division Court Laws to which I will direct you attention, is the following:—The Consolidated Statutes of Upper Canada, at pages 248–9, sections 295, 296, say, "In cases in the County Courts, when the amount claimed, &c., is within the jurisdiction of the Division Court, the order to be made, &c., shall be for the garnishee to appear before the Clerk of the Division Court, &c., and if the garnishee do not pay, &c., and do not dispute, &c.," then the Judge is to make a certain order.

By this attaching order the garnishee must either go and admit the debt or deny it before the Clerk, who must of course keep some kind of a record of it—in default to do so, on certain proofs the Judge makes an order to enter judgment. Now, you will see that by this section, a burden is thrown upon Division Court Clerks, that may be onerous, yet no provision is made as to what they are to charge, nor how they are to proceed in the examination of the person garnisheed. Would not the proper compensation be found by looking at the tariff of Clerks fees, thus—

1st. "Taking confession of judgment," 15 cents—putting the taking of the confession or denial of the garnished debtor on the same footing as a confession.

2nd. "Every affidavit taken, &c.," 20 cents—supposing the Clerk to swear the debtor.

3rd. "Transmitting papers, &c.," (that is the examinations) to the County Clerk, &c., in addition to postage, &c., 20 cents. Thus in each case the Clerk's fees would be, say 55 cents. Your opinion on these four points is respectfully requested. I would remark that there are several other apparently unsettled points of law in the Division Court practice, in my mind, to which, owing to the length of this communication, I cannot now refer.

I am, yours truly, &c.,

CHARLES DURAND,
Barrister.

We thank Mr. Durand for his very acceptable communication, and regret that it did not reach us sufficiently early to enable us to enter into an examination in the present number, of the vexed questions to which he refers. We insert the letter at present.

It is by communications such as Mr. Durand's, that uniformity in the Courts will be most effectually promoted.—[EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*)

MCMILLAN v. HUGH RANKIN, REUBEN SPOONER, PATRICK DALY, AND JAMES SWIFT.

Schools—Rate levied by trustees—Voluntary Subscriptions.

The freeholders and householders of a school section cannot substitute a voluntary subscription among themselves, for the expenses of the school, instead of the provisions made by law; and a resolution to have such subscription, and that the trustees neglected to collect it, is therefore no answer to the avowry for a rule levied by them in the usual way.

(H. T., 23 Vic., 1860.)

The question to be determined in this case arose upon demurrer, and the pleadings, which it is unnecessary to give at length, were in subtance as follows:—

The plaintiff brought replevin for a cow and calf.

The defendant, James Swift, as collector of school section number 14 in the township of Kingston, made cognizance under a warrant dated the 31st of May, 1858, from the other defendants, Hugh Rankin, Reuben Spooner, and Patrick Daly, as school trustees of said section, for a rate assessed and directed to be levied by them for the salary of the teacher and repairing the school house. And the other defendants, the trustees, avowed separately for the same cause.

The plaintiff pleaded to each cognizance, in separate pleas, that before the taking, namely, on the 13th of January, 1858, at the annual school meeting of the freeholders and householders of said section, it was resolved and decided upon by the majority present that the salary of the teacher, and all expenses connected with said school, should be raised and provided for by voluntary subscriptions of the freeholders and householders of said section: that £60 was then subscribed, and the defendants were informed thereof, and the list delivered to them to collect; and thereupon it became the duty of the trustees, before the making of said rates and warrant, to cause the defendant Swift to collect the said subscriptions; yet that the said trustees, neglecting their duty, and the decision and desire of the said majority, which it was their duty to carry out, did not collect the said subscriptions, but wrongfully made the said assessment and warrant.

The defendant Swift, and the other defendants, the trustees, replied, respectively, to these pleas, that the said resolution and decision was in the following words:—

"Resolved, that the expenses of this school section be paid by voluntary subscription, and the balance to be raised from a tax to be levied upon the parents and guardians of those sending children to the school:"

That there was no other decision whatever as to the manner in which the teacher's salary and the other expenses connected with the school should be provided for: that the whole amount subscribed voluntarily, under the said resolution or otherwise, was £2 2s. 6d., which could not be collected, and would have been wholly insufficient, wherefore the rate in the said cognizance mentioned was duly imposed by the said trustees.

The plaintiff rejoined, to each replication, that he was not the parent or guardian of any child sent to the school, and that a tax could not be lawfully levied upon him in respect of the balance of the expenses of such section after said voluntary subscriptions, according to the terms of said resolution; and that for this, as well for the reason mentioned in the plea, the said rate was unlawfully imposed.

Defendants demurred, on the ground that the plaintiff being a a freeholder and householder of the section was liable to the rate, and was not exempt by reason of his not being such parent or guardian: that the mode of raising the balance of the expenses of said section provided by the resolution was insensible and illegal; that the trustees could not legally carry out said resolution; and that what was provided by it being insufficient, they were justified in levying the amount by rate on all the freeholders and householders of the section.

Richards, Q.C., for the demurrer. *Eccles*, Q. C., contra. 13 & 14 Vic., ch. 48, sec. 6, sub-sec. 4, sec. 12, sub-secs. 4, 7, 9; 16 Vic., ch. 185, sec. 13, were referred to.

ROBINSON, C. J., delivered the judgment of the court.

We were not referred to any provision in the school acts, and we can find none, which authorises the freeholders and householders inhabiting a school section at the general school meeting in January to pass a resolution to substitute a voluntary subscription among themselves, for all school purposes, which must be accepted and relied upon in lieu of all the provisions made by law for defraying such expenses; nor do we find any enactment which makes it the duty of the trustees, or gives them authority, to enforce payment of any such sums voluntarily subscribed; and without this being shewn, it is impossible to contend that the authority of the trustees and municipality to provide and collect funds is superseded by the mere fact of any such voluntary subscription having been made, which did not end in the necessary funds being produced.

Then, also, the resolution on which the plaintiff relies, as authorising the voluntary subscription, is set out by the defendants, and it is not denied that it is set out truly, and nothing could be more absurd than than that resolution, for it expresses that the expenses of the school section (that is, all the expenses) shall be paid by a voluntary subscription, and yet that *the balance* shall be levied upon the parents and guardians *of those sending children to the school*. They meant no doubt to say, upon the parents and guardians of the children sent.

The only question, therefore, is whether the defendants have in their avowry shewn a legal authority for the rate we mean, whether the trustees have, so far as they are concerned; for although they may have proceeded illegally, it may not therefore follow that the collector would be a trespasser in consequence of any thing illegal being done, which did not appear on the face of the warrant.

The school trustees rely upon a rate made by themselves, and for all that appears of their own authority given to them by law, for paying teachers' salaries, and for the repairs of the school house. We see no room for doubt that they had authority to levy such a rate under the 7th sub-section of the 12th section of the 13 & 14 Vic., ch. 48.

Judgment, in our opinion, must be given for defendants upon the demurrer.

Judgment for defendants on demurrer.

SCOTT ET AL. V. THE CORPORATION OF THE TOWN OF PETERBOROUGH.

Municipal corporations—Work and labour—Plea, that the debt was incurred in previous year without authority, and not provided for.

Declaration against the Corporation of the Town of Peterborough for 1860, for work and materials, and for goods and money supplied "to aid and assist in the construction of a certain bridge across the river Otonabee, connecting the boundary line between the townships of Otonabee and Douro, in said County of Peterborough with the boundary line between the township of Smith and the town of Peterborough.

Pleas 1.—That the cause of action arose for and concerning a debt incurred and falling due during 1859, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed.

2. That the debt was incurred in 1859, for assisting to build a bridge not within the municipality, which debt was not authorised by any by-law, nor any rate provided therefor.

3. That the bridge was not on the bounds of the said town of Peterborough.

Held, on demurrer, that the first and second plea shewed a good defence; and that the third plea was also good, for the declaration sufficiently shewed that the bridge was not within the town, though that was not negatived by the plea.

DECLARATION for money payable by the defendants to the plaintiffs for goods bargained and sold, for work and materials, money paid, and for goods and money supplied, furnished and given by the plaintiffs to divers persons at the request of the defendants, to aid and assist in the construction of a certain bridge across the river Otonabee, connecting the boundary line between the townships of Otonabee and Douro in the said county of Peterborough, with the boundary line between the township of Smith and the town of Peterborough; and for interest, for money had and received, and on account stated.

Second plea, that the plaintiffs' cause of action, if any, arose after the passing of the act 22 Vic., ch. 99, for and concerning a debt alleged to be incurred and falling due during the municipal year, 1859, by the defendants, being a municipal corporation under the said act, and for which said alleged debt, which was not within the ordinary expenditure of the said corporation during the said year, no estimate was made by the said defendants, nor any by-law passed by them for the creation of such debt, nor for imposing any rate over and above, and in addition to all other rates whatsoever for the payment of the said debt.

Third plea, that the said alleged debt in the declaration mentioned, was incurred after the passing of the act 22 Vic., ch. 99, to wit, in the municipal year 1859, by the defendants, being a municipal corporation under the said act, in assisting to build and erect a bridge not within the said municipality of the said defendants, which said assistance, and said debt was not authorised by any by-law passed by the said defendants, being a municipal corporation as aforesaid, nor any rate nor means whatever for the payment thereof provided.

Fourth plea, to the fourth count, that the bridge in the said fourth count mentioned is not situated or erected on the bounds of the said town of Peterborough.

Demurrer to all these pleas—that the defendants admitting by their pleas that they employed the plaintiffs to do the work, perform the services, and expend the money in the declaration mentioned, and that they have received and are enjoying the benefits and advantages thereof, the matters set forth in the said pleas respectively constitute no good or legal bar to this action.

Eccles, Q.C., for the demurrer.

Read, Q.C., contra, cited *Mellish* v. *The Town Council of Brantford*, 2 U. C., C. P. 35.

The statutes referred to are cited in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The first two pleas appear to come within the decision made in the Court of Common Pleas in the case cited, of *Mellish* v. *The Town Council of Brantford* (2 U.C., C.P. 35), and though that judgment was given upon the effect of the original Municipal Act, 12 Vic., ch. 81, as amended by the statute passed in the following year, yet it equally applies to the state of the law which existed in 1858, and exists at present.

The plaintiff in this case has endeavoured to maintain that, without reference to questions upon what municipal corporations ought to do, and what they may or may not legally do in regard to incurring debts and providing for their payment, it is sufficient to warrant a recovery against any such corporation that the debt upon which they were sued was incurred for a good consideration in money, or materials or labour which they have accepted and used; and that it is no defence which they can be allowed to urge that they have not themselves taken certain proceedings which the law required them to take, either in contracting such debts or providing for their payment. But we cannot, we think, rest upon any such principle. The legislature, in order to protect the interests of the rate-payers of the several municipalities against abuse of the powers intrusted to the municipal councils which represent them, and which have authority for many purposes to bind them, have provided certain restrictions upon their powers, which restrictions would be of little or no value for the purpose intended intended if persons dealing with corporations were not obliged for their own safety to enquire into and take notice of the extent of their powers, and what does or does not come within the proper scope of their authority. No doubt, when a person who has advanced his money or applied his labour at the request of a corporation, and is seeking to enforce payment, is met by defences of the kind which are set up in this action, if such defence succeeds, a case of apparent hardship is created, and sometimes of great real hardship; but it is necessary to consider what is due to the community, on the other hand, and what ruinous waste and injustice might take place if certain checks were not imposed on the actions of municipal bodies. Some checks have of necessity been imposed, and when in any such case the governing body of a corporation has clearly exceeded its legal powers, courts of justice have no discretion to make their acts nevertheless binding upon those whom they represent in one case more than in another, nor in any such case.

The defendants in their second plea object to the attempt to make them liable in this action for a debt incurred not by themselves—that is, not by the Council of 1860—but by the Council of the previous year, 1859, because they say it was not a debt contracted for anything within the ordinary expenditure of the corporation for that year, (1859,) when the debt was incurred, nor yet was there any estimate made in 1859 of the sum that would be required to meet it, nor any by-law passed to provide for its payment by imposing a special rate for that purpose in addition to all other rates; and it is alleged that the debt not only was incurred in 1859, but that it fell due within that year.

Upon the facts stated in their second plea the corporation have no power in 1860 to impose a rate for paying this debt. They have no authority and cannot be legally obliged to pay it out of the moneys raised for meeting the ordinary expenditure of their year; and the question then is, can a recovery be nevertheless had against them, to compel payment of a debt which they have no power to raise funds for?

The facts may have been such in truth as would shew the plaintiffs' claim to be one for which the corporation could in this year make provision by a rate, but, if they were, the plaintiffs should have shewn that in a replication to the plea. We have now to deal with facts admitted to be such as the plea states.

Mr. Harrison, in his very useful work, the Municipal Manual (page 108) has placed the question fairly in view, in his note to the 221st clause of the statute 22 Vic., ch. 99, and the same question is still open upon the law as it stands in the Consolidated Statutes, ch. 54, secs. 222–224. We see no means given to the Council of 1860, by which they can raise money in the present year to pay a debt incurred and falling due in 1859, and not incurred for anything falling within ordinary expenditure; and if the defendants have not means given to them by law of raising by rate the money necessary for satisfying this claim, and this not merely because the rate would exceed their authority as regards amount, but because it is for a purpose for which the defendants have no authority to raise a rate. if this we say be the position of the defendants, then it appears they cannot be liable to have a judgment recovered against them.

If in a case like this, as stated in the second plea, or in any other case whatever, a judgment and execution should be obtained against a corporation, then it appears that the 220th section will enable the sheriff to collect the amount by striking a rate and causing it to be collected, if the amount be not paid to the sheriff by the corporation within a month after the amount of the execution has been notified to them. But we take it that that clause contemplates only the satisfaction of judgments for claims which the corporation can legally discharge, for otherwise the courts of law would have the power indirectly given to them of taxing the rate-payers without their consent to pay debts which the corporation itself could not pay by a rate.

We think the second plea is a sufficient bar to the action, and that the third plea is also good, upon the authority of the case of *Mellish* v. *The Town Council of Brantford*, which applies more directly to this plea.

The 186th and 321st sections of 22 Vic., ch. 99, are to be considered in disposing of the fourth plea. By the first of these clauses the corporation are confined in their jurisdiction, as at any rate they would be, to the limits of the municipality which they represent. But by the latter clause the corporation of a town may grant aid towards making a bridge *on the bounds of such town*. The fourth plea asserts that the bridge mentioned in the fourth count of the declaration is not *on* the bounds of the town of Peterborough. Of course, not looking out of the plea, we could not say that that was any reason against the plaintiffs recovery if the bridge was within the bounds of the town. But the question is, whether the declaration does not negative that supposition. It appears to us to do so, and if so, then the plea is a good bar.

Judgment for defendants on demurrer.

ELECTION CASES.

(*Reported by* ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*)

THE QUEEN EX REL. JAMES FLEMING V. JAMES E. SMITH.

(Before the Honorable WILLIAM HENRY DRAPER, C. B., Chief Justice of Common Pleas.)

Municipal laws—Cities—Qualification of Candidate—Residence—Consol. Stat. U. C. cap. 54, sec. 70.

Held, that for the discharge of every duty and for the exercise of every power, right or function of a municipal character, the City of Toronto does not form part of the County of York though territorially within its limits and an integral part of it as to the administration of justice, and therefore that a resident in the County of York, without the limits of the City of Toronto is not, under sec. 70 of the Municipal Act, a person qualified to be elected a member of the Municipal Council of the City.

(Chambers, January 25, 1861.)

This was a summons in the nature of a *quo warranto*, under the Municipal Institutions Act (Con. Stat. U. C. cap. 54), dated 18th January, 1861, calling upon the defendant to show by what authority he claimed to use, exercise or enjoy the office of Alderman for the Ward of St. John, in the City of Toronto.

The objection raised to his election was that at and during and for 12 months previous to the election he was not a resident either within the ward or the city, as required by law.

It was not denied on the part of the defendant that in point of fact the objection was well founded; that is, that though carrying on business in the City of Toronto he was not a resident in the city, his place of residence being outside the city limits, within the County of York.

The defence was, that in point of law residence within the city is not necessary, provided there be residence in the county.

J. McBride for relator; *A. Wilson, Esq., Q. C.*, for defendant.

DRAPER, C. J.—The question turns upon the construction to be given to the 70th section of the Statute, which enacts that "the persons qualified to be elected mayors, members of a council, or police trustees, are such *residents of the County* within which the municipality or police village is situate, as are not disqualified under this Act, and have at the time of the election, in their own right or right of their wives, as proprietors or tenants, freehold or leasehold property rated in their own names on the last assessment roll of such municipality or police village, to at least the value following: in cities, for alderman, freehold to $160 per annum, or leasehold to $320 per annum."

By the Territorial Divisions Act (Con. Stat. U. C. ch. 3), the counties of Upper Canada consist of the several townships therein mentioned as forming the same, including in such townships and counties the cities, towns and incorporated villages situate within the limits of such townships and counties respectively; and in mentioning of what the County of York consists, ten townships are enumerated, and then "the City of Toronto." Territorially speaking, therefore, the City of Toronto is within the County of York. But the very same section of this Act contains this further provision: "for municipal purposes, the Cities of Toronto, Hamilton, Kingston, London and Ottawa shall not form part of the Counties of York, Wentworth, Frontenac, Middlesex and Carleton, within the limits of which they are respectively situate, but shall, for municipal purposes, be counties for themselves." Municipally speaking, therefore, the City of Toronto is a county of itself, and does not form part of the County of York within the limits of which it is territorially situated.

Independently, however, of municipal purposes, a city may be within as forming part of a county, in respect to the registration of deeds, and for the holding of courts, such as Courts of Oyer and Terminer and General Gaol Delivery, Quarter Sessions, County Courts and Division Courts, but under the provisions of existing laws the City of Toronto has its separate Registry Office; its Recorder's Court, which is the substitute for the Court of Quarter Sessions; and its Division Court, which ousts the Judge of the County Court of so much of his prior jurisdiction. In fact, except for the Assizes and the County Courts, the City of Toronto would be a county entirely separate from the County of York.

It is, however, certainly a county of itself for municipal purposes. The County Council is unconnected with it and has no jurisdiction or authority over it. But all towns (at least until

separated under the 26th section), townships and incorporated villages, are directly connected with the county, and the reeves and deputy reeves of such municipalities constitute the County Council.

What is meant by municipal purposes? This expression cannot mean that it is to be a county for the same municipal purposes that a county consisting of several townships is created, or with the same municipal institutions and powers; because in these respects the institutions and powers of a city, though a county for municipal purposes, differ very widely from those of counties. It may, I think, be properly construed thus: that for the discharge of every duty and for the exercise of every power, right or function of a municipal character, the City of Toronto does not form part of the County of York, though territorially within its limits and an integral part of it as to the administration of justice, as already noted.

If this be so, then the County of the City of Toronto cannot be within the County of York for any municipal purpose. And besides the provision in the Territorial Divisions Act, the 361st sec. of the Municipal Institutions Act expressly declares that every city shall be a county of itself for municipal purposes, and for such judicial purposes as are therein specially provided for in the case of all cities, but for no other.

Unless by making the city a county of itself for municipal purposes be a segregation of the city from all other local divisions, as to the exercise of all municipal functions general or individual, I do not see what the legislature have intended.

Then is the election by the inhabitants of the city, who are erected into a corporation, of the council, one of the municipal purposes? I think there can be no doubt, so far; and the question is narrowed to this, whether this corporation or municipality may not be truly and properly described as being within the city, whose inhabitants are incorporated, which city for municipal purposes is declared to be a county?

It is urged against the affirmative of this question, that, as the city constitutes the county, it cannot with propriety be said to be within that county which it constitutes; and that the expression in the 70th section must reasonably be understood as referring to territorial and not to municipal divisions, and therefore the county of York and not the county of the city is intended as that in which the candidate must be resident

The repetition of this provision as to certain cities being counties for municipal purposes, in the Municipal Institutions Act, tends, I think, to a contrary construction; for it is plain that no resident out of a county (not being a city) could under this act be elected a member of a council of any municipality within that county; and when for municipal purposes each city is declared to be a county, it may be inferred that the members of the council of the municipality of that city-county were intended to be resident within that city-county. Speaking of counties proper, it is easy to understand why it was thought expedient to allow the electors of each separate municipality within the county to elect any otherwise qualified resident of the county—because the County Council itself is composed of one, or in certain cases, two members of the council of every such municipality. There is a common interest and bond of union throughout the whole county; nothing of that sort, or analagous to it, exists as between cities and counties.

Again, it was argued that in regard to officers, ministerial and judicial, spoken of in the Municipal Institutions Act, no provision in that statute requires their residence to be within any municipality, and that electors even for cities need not be residents if they are freeholders and rated as such upon the assessment roll of the municipality within which they claim to vote. But the case of officers has no bearing on the question. Residence may be and usually is imposed as a condition, and it was a matter which the legislature saw fit to leave to those who had the appointment. Here the Act certainly requires residence—the question being as to the limits. And with regard to electors: as real property within the municipality was subject to taxation, it may well be that the legislature thought it reasonable that non-resident owners of such property should, under certain conditions, be entitled to vote.

It was further urged, to show that the legislature in regard to residence gave a wide latitude, under which it might happen that when a union of two counties was being severed, every member of the provisional council of the junior county might be a resident of the senior county under the section now under consideration. But on examining this section in connection with the Territorial Divisions Act, I do not adopt this conclusion, for senior county and junior county are by this last named Act distinct counties, composed of distinct territory, divided into townships and villages, &c., each of which is a separate municipality. It cannot be truly affirmed that the resident of a municipality of any township which constitutes a part of the county of Peel is a resident of the county of York, though these counties form a union of counties; and if not, such resident would not be qualified to be elected for a municipality within the county of York, according to the plain meaning of the 70th section.

Many other provisions of the acts were also referred to as showing that, notwithstanding the provision making cities counties for municipal purposes, there were matters in common between them, as the making aldermen of cities justices of the peace for the county, when the territorial and not the municipal divisions are plainly referred to; or that the cities, counties, or the general counties, were not in all cases limited to their own boundaries, as with respect to the power of holding industrial farms by cities, the right of county councils to hold its sittings in the city, and of city and other councils to hold their sittings out of the limits of their municipality. As to all which it is enough to say that, being plainly expressed, there is no question as to them, but that they do not help the construction of the clause under consideration.

It was also said that it was a species of disfranchisement to deprive a resident of a county, otherwise qualified, from being elected a member of any municipality within its limits. This however is begging the question, for the franchise is conferred on a defined class; and it is no disfranchisement to say that a man who possesses all the defined qualities, except one, does not come within that class. He is not enfranchised unless he has the entire qualification.

On the whole, I think the relator is entitled to judgment.

A case precisely similar in all respects (*The Queen on the relation of Blasdell* v. *Rochester*) was decided by my brother, Burns, not quite a year ago.* He took the same view of the statute which I do; and though I have not seen the reasons on which he arrived at that conclusion, I am confirmed in my opinion by knowing that he placed a similar construction on the act.

(Before the Honorable WILLIAM HENRY DRAPER, C. B., Chief Justice of the Common Pleas.)

THE QUEEN ON THE RELATION OF DONALD MCGREGOR *v.* H. KER.

Municipal Act—Qualification of Councillors—Joint assessment—Sufficiency of rating—Evidence—Interest—Competency.

Where, on the assessment roll, under the general heading, "Names of taxable parties," were entered the names of "Ker, William and Henry," for two separate parcels of land, in the proper columns were the letters "F." and "H.," and in the column headed "Owners and address" was entered opposite to the parcels of land and the names in the first column, "Wm. Ker & Bros.": *Held*,

1. That "William Ker and Henry Ker," and not "William Ker & Bros.," were the persons in whose names the properties were rated.
2. That sec. 80 of the Municipal Institutions Act, which provides that when real property is owned or occupied jointly by two or more persons, and is rated at an amount sufficient, if equally divided between them, to give a qualification to each, then each shall be deemed rated, though placed in the act under the head "Electors," extends as well to candidates as to electors
3. That the defendant named in a *quo warranto* summons is an interested party trying an issue, and therefore not competent to give evidence on his own behalf.

This was a summons in the nature of a *quo warranto*, calling upon the defendant to show by what authority he claimed to use, exercise or enjoy the office of councillor in the village of Streetsville.

The objection raised was, that the defendant had not, at the time of his election in January last, in his own right, or in right of his wife, as proprietor or tenant, freehold or leasehold property rated in his own name on the last revised assessment roll of the village, as required by the 70th section of the Municipal Institutions Act.

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* No report of this case can be found. Should it be hereafter found it will be inserted in the columns of the *Law Journal*

The affidavits on which the summons issued showed that the defendant was not, at the time of the election, rated in respect of property, freehold or leasehold, on the last revised assessment roll of the village of Streetsville, otherwise than as in the extract from the roll produced, of which the following is a copy:

NAMES OF TAXABLE PARTIES.										VALUE AND DESCRIPTION OF REAL PROPERTY.								PERSONAL PROPERTY.			
Nos.	Occupants.	Profession, Occupation, &c.	Freehold.	Household.	Age.	Owners and Address.	Non-Resident.	School Section.	Street, Square, or other Designation.	No. of Lot, or House, &c.	No. of Acres, Feet, or other measurement.	Yearly Value of each Lot.	Yearly Value of each House or Building.	Total Yearly Value of Real Property.	Taxable Income.	Total Value of Personal Property.	Total Yearly Value of Personal Property or Income.	Total Yearly Value of Real and Personal Property.
29	Ker, William and Henry	Cabinet Makers.	F.	H.	40 & 35	W. Ker & Bro's.	.....	V.	Queen.	.....	.....	.....	$60	$96	.....	$400	$24	$120
	Do.	Do.				Do.	.....		Credit.	.....	.....	.....	$36		.....			

It appeared by this that under the general heading, "Names of taxable parties," were entered the names "Ker, William and Henry," for two separate lots—one on Queen street, the other on Credit street—in the village of Streetsville.

In the proper columns were the letters "F." and "H.," as required by the 163rd section of the Municipal Institutions Act, in order to show whether the persons named were freeholders or householders, or both.

The yearly value of the house or building on Queen street was entered as $60, and of that on Credit street as $36.

In the column headed "Owners and address," was entered, opposite these lots and the names in the first column, "Wm. Ker and Bros."

The affidavits stated that the firm of William Ker and Brothers was composed of William Ker, Henry Ker and John Ker; that William Ker was assessor for the village of Streetsville for 1860; and that the property on Credit street, set forth as above, was freehold. This was stated in an affidavit correcting a former statement of its being leasehold, which was sworn to, to the best of the deponent's knowledge and belief. But on search made in the Registry office, the registrar, on the 26th January, 1861, stated that there was no deed registered of the property above mentioned, on Queen street or Credit street, or of any part thereof, to William Ker and Brothers, or to any one of them.

An affidavit, sworn 31st January, 1861, was put in from Dr. Crombie, who swore that he conveyed to Henry Ker (the defendant) the lot situate on Queen street in the village of Streetsville; that before making this deed, deponent asked whether it would be safe for the others, William and John, to make the title in Henry's name; and that William Ker replied, it would not make much difference in which of their names it was drawn, and that it might as well be made in Henry's name.

R. A. Harrison for relator; *D. McMichael* for defendant.

Draper, C. J.—I am of opinion that I must consider William Ker and Henry Ker as the persons in whose names these properties are rated. Under the 19th sec. of the Assessment law, it is the duty of the assessor so to frame his roll. If land be occupied by owner, it is to be assessed in his name; but if the owner, being the included in one of the classes mentioned in section 22, be not the occupant, but some other person is, then the names of both owner and occupant must be entered, and the land is to be assessed against both. The 24th section shows how one is to be distinguished on the roll from the other; and I infer from the 22nd and 24th sections, read together, that the name of each should appear as rated for the land. The 79th section of the Municipal Institutions Act provides that in case both the owner and occupant of any real property are rated therefor, "both shall be deemed to be rated within this act." This I think confirms the view, that each of them is to be considered as the taxable party, and should be so stated on the roll, under the 19th, 22nd and 24th sections of the Assessment law.

The qualification required by the 70th section, may be thus divided: first, residence in the county; second, having at the time of the election freehold or leasehold property, of a specified value, in their own right or the right of their wives; third, that such property should be rated in their own names on the last revised assessment roll.

For the relator it has been contended that the first column, headed "Occupants," is to be treated as having no relation to the Municipal Act at all; and that for the purposes of this act, William Ker and Brothers are to be considered as the parties in whose names this property is rated; and that this entry in effect is an entry of William Ker alone, because his brothers are not named, in accordance with a decision of Sir J. B. Robinson, in the case of *Reg. ex rel. McVean* v. *Graham* (not reported). I do not in the least dissent from that decision; but it does not appear to me to apply; for, as I have already said, I think this property is rated in the names of William Ker and Henry Ker; and as the 79th section, above quoted, recognizes the rating, for the purposes of the Municipal Act, of both owner and occupant, we need not enquire into the effect of the rating under the head "Owner," if the defendant is sufficiently rated as occupant.

But it is further objected, that the 70th section requires a separate and individual rating of real property to the candidate, and

that a rating to him jointly with another person is insufficient; and that the 80th section of the statute, which enacts that where real property is owned and occupied jointly by two or more persons, and is rated at an amount sufficient, if equally divided between them, to give a qualification to each—"then each shall be deemed rated within this act," otherwise neither shall be deemed so rated—is confined to the case of electors, because that word is put as a heading indicating a group of clauses relating to electors. In my opinion, this is not a sufficient reason for restraining the words "deemed rated within this act," which are used in the 79th and are repeated in the 80th sections, to the case of electors only. I think they extend to all cases of rating mentioned in the act, and include the qualification as well to be elected as to elect.

Concluding, therefore, that these two landed properties on Queen street and Credit street, in the village of Streetsville, are rated to William Ker and the defendant, and that under the 80th section referred to the qualification is divisible, and as the amount of the values is ninety-six dollars, the question is, whether the half of that amount (forty-eight dollars) constitutes a legal qualification? The qualification required by law is, freehold to forty dollars per annum, or leasehold to eighty dollars per annum, or in those proportions in case the property is partly freehold and partly leasehold.

I think, upon the affidavits put in by the relator, I may treat the defendant as rated, as for freehold property, for the lot on Credit street. This is rated at the yearly value of $36, and one half of it amounts to nearly four-ninths or rather less than half of a qualification by freehold. Looking at the entries as affecting the other lot, I do not see how the defendant can claim to have more than a leasehold interest in that. Assuming, for the sake of the argument, that to be so, then the whole yearly value is sixty dollars, one half of which is just three-tenths of a leasehold qualification; so that the defendant falls short of half a leasehold as well as of half a freehold qualification.

It is only upon the assumption that both the qualifications are freehold, thatthe defendant can possibly sustain his election; and as William Ker and brothers are stated as owners on the assessment roll, the presumption is against the defendant being rated as for a freehold interest in either property.

It would not be right to hold a party too rigidly to the entries on the assessment roll. If in fact he had a legal qualification, I should be inclined to go as far as possible for the purpose of reconciling the mode of rating as thereon expressed with the actual facts, so as to support the election; and therefore I will give the defendant an opportunity to file affidavits to show what the true state of the title to both lots was at the time of the assessment, and at the time of the election. Such affidavits should be those of competent witnesses, not his own merely, as he is on the points suggested an interested party trying an issue.

Let the case therefore stand over till the 9th instant, at 10 a.m., with leave to both parties to file affidavits on the points suggested.

If on enquiry the facts appear so clear that there can be no doubt of the result, the parties may, if they please, consent to a judgment without further hearing.*

THE QUEEN, UPON THE RELATION OF WILLIAM CLINT v. EDWARD UPHAM.

(Before His Honor Judge McKenzie, County Judge for the United Counties of Frontenac, Lennox and Addington.)

Municipal Election—Qualification of Voters.

Held, That into a municipality divided into Wards, a voter cannot vote in a ward in which he is not assessed for real property lying in the ward.

Held, that a Municipal Council has no authority to place names on the assessment roll, after it is finally passed by the revising tribunal.

Held, that it is wrong in a municipal clerk to add a name after the commencement of an election, to the copy of the roll furnished by him to the Returning officer.

Held, that when a voter, having an interest in an election is the relator, claiming the seat for an opposing candidate, and after a scrutiny it is found that the opposing candidate has a clear majority of the legal votes polled, the seat will be awarded to such candidate, notwithstanding that the votes for the defendant whose right to the seat is disputed.

(28th January, 1861.)

A writ of summons, in the nature of a *quo warranto*, was issued in this cause on the fiat of the County Judge of Frontenac, Lennox and Addington, calling upon the defendant to shew by what authority he used, exercised and enjoyed the office of Municipal Councillor for Ward No. 1 of the Township of Loughborough. The relator claiming an interest in the election to the said office as an elector, and that William Boice was duly elected, and should have been declared, duly elected and admitted to the said office.

The relator contested the election of the said defendant, and claimed the seat for William Boice, on the ground that William Boice had the majority of the legal votes entered on the poll-book.

He objected to the votes of William Pensyle, Peter Foxton, John Cromer, George Ockley, and Harvey Simpkins, on the ground that they were not rated on the last revised assessment roll relating to the said Ward No. 1, in respect of real property, as freeholders, or householders, their names having been put on the roll by order of the Council in November last. He objected to the vote of one Charles McCullough, on the ground that he was improperly placed on the voter's roll, the second morning of the election, not being qualified according to law—being assessed in Ward No. 2 of the Township of Loughborough, and not in Ward No. 1.

The relator complained that the Returning officer improperly rejected the votes of Hugh McCaul, Thomas Philips and Martin Grooms, which were tendered to William Boice at the election.

The defendant on his part denied generally the allegations of the relator, and objected to several votes recorded for Wm. Boice at the election. He objected to the votes of James Boice and Peter Ruttan, on the ground of bribery. He objected to the votes of William McDougall, Bryan Kelly, David Hyet or Hyat, and Nelson Holister, who voted for William Boice at the election, on the ground that their names do not appear on the last revised assessment roll for the Township of Loughborough. He objected to the vote of John Hatton, which was recorded for William Boice, on the ground that he was not a freeholder or a householder at the time of the election, nor at any time during last year.

The election was held at the village of Sydenham, on the 7th and 8th January, 1861. The defendant, Edward Upham, voted for William Boice, and Wm. Boice for the defendant.

Sir Henry Smith, Q.C., for relator; *O'Reilly*, for defendant.

MACKENZIE, Co. JUDGE.—According to the poll-book returned to me, 45 votes were recorded for the defendant, Upham, and 44 votes recorded for the opposing candidate, Boice; so that the defendant was returned as duly elected by a majority of one vote.

The names of William Pensyle, Peter Foxton, John Cromer and George Ockley were placed on the assessment roll only on or about the 24th of November last, under an order made by the Municipal Corporation of Loughborough, on the seventeenth November last, directing the Clerk of the Municipality to insert these names on the Roll.

This was a very wrong proceeding on the part of the Council. It was a very perilous violation of the law, involving in all probability criminal consequences to the actors. If pernicious practices of this kind could be tolerated, the members of any Municipal Corporation might make themselves permanent, by placing a few weeks before each election, the names of a sufficient number of persons favourable to them on the Assessment Roll, as householders or freeholders, rated in respect of real property. It is a very serious proceeding to interfere in any shape or form with the Assessment Roll, after it has been finally passed by the revising tribunals.

I will strike the names of William Pensyle, Peter Foxton, John Cromer, and George Ockley, out of the poll-book, as they should have never been there, or on the Assessment Roll, of last year.

Charles McCullough was rated on last year's Revised Assessment Roll of Loughborough for real property, as occupant in Ward No. 2 thereof. He removed out of Ward No. 2 to Sydenham, in Ward No. 1, on the 12th of November last. He was not rated on the Assessment Roll for any real property in Ward No. 1. The Clerk of the Municipality, on the morning of the second day of the election, inserted the name of Charles McCullough, on the copy of the Assessment Roll, furnished by him to the Returning Officer

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* There being a dispute as to the facts, the learned Chief Justice, at the suggestion of counsel for the relator, ordered the production of oral testimony. Witnesses both for relator and defendant were, on 25th February ultimo, examined by the Chief Justice, and the case now stands for judgment on the testimony then adduced.

for that ward as a person entitled to vote in Ward No. 1, though rated for real property in Ward No. 2 only. The Returning Officer received the vote of Charles McCullough, after his name was so improperly inserted, and recorded it for the defendant.

This was also a wrong proceeding on the part of all parties concerned. Wrong on the part of the Clerk for improperly inserting a name after the commencement of the election, on the copy of the Roll delivered by him to the Returning Officer, verified by his own solemn declaration. Wrong in the Returning Officer, for recording the vote of a person whose name was not entered on the copy of the Roll when it was delivered to him by the Clerk of the Municipality, and who was not rated on the last revised Assessment Roll of Loughborough, for any real property in Ward No. 1. Wrong in McCullough for voting in a ward in which he was not rated on the Assessment Roll for any real property.

On consulting the 20th section of the "Consolidated Assessment Act of Upper Canada," which directs, "that land shall be assessed in the Municipality or Ward in which the same lies," and the 78th section of "The Upper Canada Municipal Institutions Act," which provides, "That when a Municipality is divided into Wards, no elector shall vote in more than one Ward, and if entitled to vote in the Ward in which he resides, he shall not be entitled to vote in any other Ward," and the 2nd sub-section of the 97th section of the latter Act which provides, "That the Clerk of each Municipality shall deliver to the Returning Officer a correct copy of so much of the last revised Assessment Roll for the Municipality or Ward as contains the names of all Male Freeholders and Householders rated upon the Roll in respect of real property lying in the Municipality or Ward." It will be seen that when a Municipality is divided into Wards, that the right of voting is restricted to the Ward in which the elector resides, if entitled to vote therein—which means, if he is rated on the Assessment Roll, in respect of sufficient real property within the Ward.

The 74th section of the Act points out very clearly who shall be the electors, "The Elector of every Municipality, for which there is an Assessment Roll, shall be the male freeholders thereof, and such of the householders thereof as have been residents therein for one month next before the election, who were severally rated on the last Revised Assessment Rolls for real property in the Municipality, held in their own right, or that of their wives as proprietors or tenants." Being rated on the last Assessment Roll seems to constitute the basis of voting. When a Municipality is divided into Wards, an elector has no right to vote in a Ward in which he is not rated on the Roll as proprietor or tenant for real property lying in the Ward in which he proposes to vote. The law is not as was contended for on behalf of the defendant, on the argument, namely, that a residence in a given Ward in the Municipality at the time of the election, gives the elector the right of voting in the resident Ward in respect of real property lying in another Ward and rated upon the Roll as such property lying in another Ward. I hold the law to be, that an elector, whether a Freeholder or a tenant in a Municipality divided into wards, cannot lawfully vote in a Ward in which he is not rated on the last Assessment Roll for real property lying in the Ward. On the other hand every such elector must vote, if vote at all, in a Ward in which he is rated on such Roll for real property lying in the Ward.

Charles McCullough certainly had a lawful right to vote in Ward No. 2, but no right whatever to vote in Ward No. 1. His vote consequently must be struck out of the Poll Book.

The vote of Charles McCullough together with the votes of William Pensyle, Peter Foxton, John Cromer and George Ockley, will make 5 votes which must be deducted from the 45 votes recorded in the Poll Book for the defendant. This will reduce the aggregate number of votes received by the defendant to 40 lawful votes.

It was admitted by the defendant's counsel with commendable candour, on the argument, that the opposing candidate William Boice had 41 lawful votes recorded for him at the election in the Poll Book. The state of the Poll then would give William Boice a clear majority of one over the defendant. And as a majority of one is, in the eye of the law, as effectual as a majority of one hundred, there will be no occasion to enquire into the validity of the exceptions taken on behalf of the defendant to the votes of James Boice, Peter Ruttan, William McDougall, Bryan Kelly, David Hyatt, Nelson Holister and John Hatton, which were given to William Boice, or into the alleged improper rejection of the votes of Hugh McCaul, Thomas Phillips and Martin Grooms, which were tendered for William Boice.

The real question for me to decide is, whether a new election for Ward No. 1 should be ordered under the circumstances, or whether the opposing candidate William Boice should be ordered to be admitted into the seat at once. Before deciding this point I would make an observation on the trivial objection urged against the vote of "William McDougal." The omission to add the letter D to the L in the surname in entering the name in the copy of the Roll sent to the Returning officer, and in the Poll Book, is gravely urged as a ground for depriving Boice of McDougal's vote. The name of McDougal is one of great antiquity, and often found in law-books and historical writings, especially in the history of Highland warfare. The letter D is sometimes added to L, and sometimes not, but I believe never pronounced. The objection could scarcely be urged in earnest, Boice is entitled to his vote.

As to the question of a new election, or admitting Boice to the seat at once, I can find no case in point. In the present case the opposing candidate is not the relator, and the opposing candidate Boice, voted for the defendant. This clearly disqualified Boice for a relator. Then, can a person who cannot claim the seat in his name, obtain it in the name of a third party, a municipal elector? The cases have gone so far as to establish that a third party, who acquiesces in an election, or takes part in promoting the election of the party complained against, cannot afterwards become a relator, to dispute that which he himself has concurred in, and helped to bring about. But it is urged that Clint, the present relator, has not acquiesced in the election of the defendant, and has done nothing so far as I can see to promote it.

There are persons who would rather pay a penalty, than fill a municipal office. And, no doubt, the 183rd section of the Municipal Institutions Act was passed to meet such a contingency. It is there enacted 'that every qualified person, duly elected to be Mayor, Alderman, Councillor, &c., who refuses such office, shall be liable to a penalty of not less than eight and not more than twenty dollars. It sometimes happens that a party is put in nomination as a candidate against his own will—elected against his will, and compelled to serve against his will, or pay a penalty; there would be nothing out of the way in such a person voting for another candidate to get rid of what he deemed a troublesome office.—This remark cannot apply here, as the present opposing candidate, Boice, seems anxious enough to get the seat, now usurped by the defendant.

By the 127th section of the Act, 'any candidate at an election, or any municipal elector, who gave or tendered his vote at an election, may be a relator to contest the validity of the election of a councillor, &c.' The law has given the relator Clint, then, a clear right to contest the election of the present defendant, and to demand the seat to be awarded to Boice. The present relator has done nothing so far as I can see, to compromise himself in the matter, or to prevent his demanding that William Boice should be admitted to the office of councillor, to which he the relator and the majority of the legal electors of Ward No. 1 of the township of Loughborough, elected him. The law has given to the relator Clint, as well as to every other elector in the Ward, the right to contest the election of the defendant as relator, and when the right is exercised by an elector, the legal consequences must follow in the same manner as if an opposing candidate was contesting the election. The relator Clint, is asserting a right common to himself and his co-electors, irrespective of the individual claim of William Boice. In deciding the validity of contested election of this kind, the law seems to regard the rights and interest of the tax-payers and the legal electors as the criterion of judgment. The relator, Clint, has made out a clear case against the defendant by legal evidence, and established that William Boice was elected to the office by a majority of the legal voters of the Ward, and claims the office for Boice.

I cannot depart in this case from the rules laid down by myself in the case Reg. ex. rel. *Pomeroy* v. *Watson*, decided in 1855, in the case Reg. ex. rel. *Atcheson* v. *Donoghue*, decided in 1857, and in the case Reg. ex. rel. *Forward* v. *Bartells*, decided in 1858. In each of which cases I ordered the defendants, after a scrutiny,

to be unseated and the relators to be admitted into the office. The same principles must govern the present case. Boice and through him the majority of the electors of Ward No. 1 have been deprived of a legal right by the illegal election of the defendant, and I am bound by law to see that the candidate who had the majority of legal votes shall be restored with as little delay as possible, to the now usurped seat.

As I do not feel myself at liberty to order a new election in the face of the cases which I have justified, and others in the books, the defendant must be removed, and Boice admitted into the office at once.

I therefore adjudge and order, that the defendant Edward Upham, be removed from the office of councillor for Ward No. 1 in the township of Loughborough; and that William Boice be admitted in his place; and that a proper writ of mandamus issue, commanding the Municipal Corporation of Loughborough to admit him accordingly, and that the defendant pay the relator his proper costs.

Judgment for the relator with costs.

THE QUEEN ON THE RELATION OF JOHN FORSYTH AND JOHN L. DOLSEN.

(Before W. B. WELLS, Esq., Judge of the County Court of the County of Kent.)

Towns—Qualification of Mayor—Contract—Declaration of Office.

Held as follows:—1. That the mayor of a town, though not now elected by the town councillors from among themselves, is equally subject with them to the statutory disqualifications of the Municipal Act, but that under the circumstances of this case defendant could not be said to be interested by himself or partner in any contract with the municipal corporation, so as to be disqualified to be elected mayor of the town. 2. That the neglect of a person elected mayor, within twenty days after knowing of his election or appointment, to make the declarations of office and qualification under s. 183 of the Municipal Act, does not work a forfeiture of office in addition to the pecuniary penalty by that section imposed.

The statement and relation of the relator against the Defendant, declared that he usurped the office of Mayor in the Town of Chatham, and that the election of defendant to the office should be declared invalid and void, for the causes following, viz:—

First—That the said John L Dolsen was not duly or legally elected or returned as such Mayor, in this, that at the time of the said election he was, and still is a lessee of the Municipality of the Town; and that he has not since his said election taken the oaths or made the declarations required by the Statute in such case made and provided, before entering on the duties of said office.

Second—That the said John L. Dolsen is a member of the firm McKeller & Dolson of Chatham, aforesaid, lumber merchants and mill owners.

Third—That during the month of August 1853, the said McKellar & Dolsen applied by petition to the Town Council of Chatham, asking for a lease for five years of the extremity of Second street, in the said Town, between King street and the River Thames, and offered the use of an equal width of their lot adjoining one John Sherriff's property, for public purposes, for an equal period therefor.

Fourth—That by Resolution of the said Town Council in the month of August, 1853, the said piece of ground so by the said McKellar and Dolsen applied for, was in consideration of their offer to give a like width of land aforesaid, granted to them for the term of five years from the date of said Resolution.

Fifth—That the said McKellar and Dolsen have ever since continued to occupy the said piece of land, and are now in possession of the same, as tenants of the said Municipality.

Sixth—That the said John L. Dolsen did not before entering on his duties as such Mayor, on the 21st day of January, make the necessary oath or declaration as required by the Statute, and is thereby disqualified from holding the said office of Mayor.

A summons against the defendant was issued on the above complaint, on the 25th January, returnable in eight days from service, and the parties were heard on the 4th of February.

In reply to the complaint, the Defendant stated that he was properly qualified for the office of Mayor, that the only transactions that he or his partner, McKellar, ever had with the Corporation of Chatham in reference to the pretended lease of the extremity of Second street, mentioned in the relation, were fully detailed in the certified extracts from the minutes of the Corporation of the town, filed in the court—That he was elected to the office of Mayor of the town on the 7th and 8th January 1861—That he did on the 21st of the said month, make and subscribe the declaration of qualification and office, under the statute, a true copy of which was filed—That he did afterwards, on the 28th of January 1861, take, make and subscribe the declaration of qualification and of office under the Statute—a true copy of which was also filed—That he did on the day of the date of the said several and respective declarations cause the same to be filled in the office of the Clerk of the Corporation of the town of Chatham.

Copies of the following resolutions were filed:—

Resolution passed by the Council of the Town of Chatham, 19th August, 1853.

"McKellar and Dolsen's petition relative to their occupation of a portion of Second street as a Lumber Yard, was brought up, upon which is was moved by Mr. Woods, seconded by Mr. Burns, that in consideration of the offer of Messrs. McKellar & Dolsen, that they will grant to the Municipality the use of a like amount of land, as an approach to the water from King street, as that now occupied by them on that portion of Second street and between King street and the Water, they be allowed to continue to occupy the said piece of land for the term of five years from this date."

Resolution passed by the Council of the Town of Chatham, 29th June, 1855.

"The Committee apointed at last meeting to take into consideration the Petition of John Walton and others, praying that the obstructions on Second street, between King street and the River, ought to be removed, presented their report, recommending that the said Street be opened up within a definite period:

Upon which it was moved by Mr. Winter, seconded by Mr. Ireland—That that part of Second street occupied by Messrs. McKellar & Dolsen, be opened up by them, and the obstructions removed within one year from this date."

Woods for relator. *McCrea* for defendant.

WELLS, Co. J.—By the 73rd sec. c. 54, Con. Statutes, it is enacted that "no person having by himself or his partner, an interest in any contract with or on behalf of the Corporation, shall be qualified to be a member of the Council of the Corporation."

By the 102 Sec. of the Act, "The qualification of a Mayor shall be the same as that of an Alderman in Cities, and of a Councillor in Towns."

By the 120 Sec. "The Mayor shall be deemed the Head of the Council, and the head and Chief Executive officer of the Corporation."

The Mayor of a Town, therefore, although not now elected by Councillors from among themselves, is equally subject with the them to the above disqualifying clause.

The first Resolution of the Council of the Town relative to the portion of Second street, in the said Town, occupied by the Defendant and his partner, was passed on the 19th August, 1853. The "Corporations amendment Act," 13th and 14th Vic. c. 64 Sec 192. will govern the case. By it, it is declared "not to be lawful for any of such Municipal Corporations to make any By-Law for the opening, stopping up, altering, widening or diverting any public highway, road, street, or lane until they shall have caused at least one calendar month's notice to have been given, by written or printed notices, put up in the six most public places in the immediate neighbourhood of such highway, road, street, or lane, nor until they shall have heard in person, or by Counsel, or Attorney, any person through whose land such highway, road, street or lane, or proposed highway, road, street or lane, shall run, and who may claim to be so heard before them."

The proposed stopping up of one street of the town and the opening up of another on the land of McKeller & Dolsen, unquestionably came within the purview and restrictions of this clause of the statute, and probably no previous consent of the parties on whose land the new street was to be opened, could have enabled the Council to dispense with the necessary notices. The Council were precluded from passing a By-Law save under certain conditions of a month's notice, &c. Much less could they attain the object of di-

verting even for a season, a public highway or street, by mere resolution. The then Municipal Law, extended no power to Councils to perform any act of such importance, save under the formality of a By-Law even could the notice required by the section controlling this case, be dispensed with.

In reference to the question whether there may not be a tenancy of some kind of the road, by the Defendant and his partner, it will be borne in mind that a tenancy for a term of years is always created by express contract between the parties. If such a tenancy were created by the resolution of the Council, it may not have been in their power to determine it before the expiration of the five years, by the second resolution—but the five years expired in 1858, and the tenancy was put an end to by the efflux of time. A tenancy at will can only exist during the joint will of both parties, and it has not been made to appear that the Corporation has ever properly expressed its will on the subject, even if it have the power of doing so. The possession of the road cannot be considered a tenancy from year to year on the part of defendant and his partner, as no rent or equivalent for rent, has been paid or tendered by the possessors, or any act done by either the Corporation or themselves, which would create a presumption that such a tenancy was intended. A tenancy by sufferance is the very lowest known to the law,—and is described as a mere invention of the law, to prevent the continuance of the possession of one who comes in by right, and holds over without right, from operating as a trespass. This sort of tenancy never can arise by contract either express or implied—and therefore if the defendant and his partner were tenants at sufferance of the corporation they would not have any contract with the same within the meaning of the Statute. The word *contract* must be construed in its ordinary legal signification, and under no view of the case can I hold that the defendant has anything even tantamount to it, with the corporation. It is not necessary for me to go into the question as to the power of the corporation to enter into a contract for the lease of land, without the same being in writing and under the corporate seal.

The other objection against the defendant holding his seat, is, that he did not take the proper oath of office before entering on his duties. He was elected on the 8th of January ult. On the 21st of the same month he made the Declaration of Office, and transacted business as Mayor. On the 25th of the same month these proceedings were instituted. It appears in evidence that on the 28th of the same month he made other declarations of office, which it is contended were made within the twenty days allowed by the Statute and that the relator is premature, if he objected in this way at all, in making his objections to any irregularity or omission in the first declaration, and should have waited until twenty days from the election had expired. I am of this opinion. In the case of *The Corporation of Asphodel and Sergeant et al.*, 17 U. C. Q. B., 593, the Councillors proceeded to business, elected the Reeve, &c., without having made any declaration whatever, yet they did not thereby forfeit their offices; though their acts were null. I must hold, therefore, that the clause 183. chap. 54, Con. Stat., requiring the declaration, is merely *mandatory*, and does not impose the penalty of a forfeiture of office for non-compliance with its provisions.

Judgment in favour of the defendant with costs.

CHAMBERS.

Reported by ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*

WALLIS *v.* HARPER AND GIBSON.

Examination of judgment debtor—Consol. Stat. U. C. cap. 24, sec. 41.—Committal—Mode of committal.

Held, that the proper way to apply sec. 41 of Consol. Stat U. C. cap. 24, where the debtor without excuse fails to attend, or, being examined, refuses to answer upon any point as to which he is properly interrogated, or answers equivocally or evasively, so that he is evidently endeavoring to conceal the truth, is to punish him as for a contempt of the order, or to compel him to obey it by directing him to be imprisoned for a period, within the discretion of the judge, not exceeding twelve months; but that, when attending, his answers are such as to lay a reasonable ground for the suspicion that he has concealed his property, or made away with it, in order to defeat or defraud his creditors, the proper course for the judge is to allow a *ca. sa.* to issue.

(Jan. 24, 1861.)

J. B. Read, under the Consol. Stat. U. C. cap. 24, sec. 41., moved for an order to commit, or for the issue of a *ca. sa.* for the arrest of the defendant Gibson, under the following circumstances.

Gibson was examined under the authority given in that clause.

It appeared from the examination that he had been in business as a builder in Toronto till five or six years ago, when he retired, having been engaged in speculations in real property, and his circumstances or prospects being such, he stated in his examination, as to lead him to believe that he could maintain himself comfortably without continuing in the business of a builder.

He was examined before Mr. Heyden, the Clerk of the Crown and Pleas for the Court of Common Pleas, in regard to the state of his affairs at the time he retired from business—the debts he owed then, and his assets or means of payment; also in regard to his transactions since—what moneys he had paid out and on what accounts, what moneys he had received and how they had been applied, and what had become of the property he had when he retired from business; with a view to show that he actually had the means in his possession or under his control of satisfying the plaintiff's claim, or a considerable part of it.

His transactions had been numerous in mortgages or notes, made and endorsed for the accommodation of himself and others, to which he was a party.

The examination lasted ten days, and was extremely voluminous.

It also appeared that this plaintiff's judgment was obtained in October last, and that many other judgments had been obtained against defendant in the Courts of Queen's Bench and Common Pleas—not less, as he admitted, than ten or twelve, of which he gave a detailed account—all of which were unsatisfied at the time of the examination; and among the judgments was one obtained against him by the co-defendant in this suit, Harper, upon process sued out in March last; to which he made no defence, but allowed judgment to be recovered on as many as eighteen promissory notes—most of them for large sums—and admitted that it was understood between him and Harper that he was to make no defence, but allow judgment to go by default, which he did.

He gave a mortgage also to Harper upon his real property, as a security for any sums for which Harper might be made liable upon paper signed and endorsed by him for defendant Gibson's accommodation.

This account on oath, of this judgment and mortgage, and of his affairs with Harper, was in the highest degree unsatisfactory and suspicious; for he admitted that in regard to a large portion of the notes for which he allowed judgment to go against him by default in Harper's suit, he was neither in law nor justice liable to Harper at all, for they were notes which he had either made or endorsed for Harper's accommodation. He admitted also that Harper having lately made a general assignment for the benefit of his creditors, he Gibson had ranked as one of his creditors, and in that character had executed the deed of assignment.

This plaintiff's judgment was on a promissory note for $800, made by Harper and endorsed by defendant Gibson, and which the plaintiff bought from an agent or broker of Gibson. The defendant Gibson appeared from the examination to have little or no visible personal property remaining which the sheriff could seize in execution;—he swore that his real estate, which had been large and various, would not sell for enough to pay the money for which it is mortgaged.

The plaintiff's attorney arranged and classified the answers given by Gibson upon his examination, as they applied to the different descriptions of property, and to his transactions and affairs generally since he retired from business in 1855 or 1856, and endeavored to show from it that the defendant ought, according to his own account, to have upwards of £900 at his disposal, after setting against what he admitted he had received, all sums which he stated himself to have disbursed.

ROBINSON, C. J.—Having read all the notes taken by Mr. Heyden of the examination, and compared with them the result at which the plaintiff's attorney claims to have arrived, I can only say that I look at the defendant's account of his business and affairs as altogether untrustworthy, and such as to show that he is unable or unwilling to give such an account of them as it would be reasonable to expect from any careful man of business of ordinary

intelligence; but as to deriving satisfactorily from it any particular conclusion in regard to the defendant's ability to pay off this debt, I cannot say that I have succeeded in doing so.

It would not surprise me to learn that the defendant Gibson has means under control to a much greater extent than nine hundred pounds, which he might, if he pleased, apply towards the payment of this debt. On the other hand, considering the enormous rates of interest at which he has been raising money, the irregular manner in which his affairs have been conducted and his accounts kept, and his want of knowledge of accounts, or his apparent recklessness, it would not surprise me to learn that he has no such sum as nine hundred pounds, nor any considerable sum, in his possession or within his control, out of which he could satisfy the plaintiff's judgment.

It is certain, however, that the account he has himself given of the judgment which he allowed Harper to obtain against him, and the want of foundation for that judgment to anything like the amount recovered, throws great suspicion on the defendant's conduct, not only in this matter but in others, so as to prevent much reliance being placed upon his statements.

The questions put to the defendant, with very few exceptions, are not reported; only the answers are given; and in many instances, where they appear evasive and unsatisfactory, that may be owing to the defendant not having been so interrogated as to call for a more precise statement.

Taking these answers altogether, as to the account the defendant has given of his means of payment, I must say that they are very far from satisfactory.

Then the question is, what is the proper mode of dealing with such a case, under the existing law? The Consol. Stat. U. C. cap. 24 sec. 41, provides for obtaining an order on any judgment debtor to submit to an examination as to his estate and effects, the property and means he had when the debt for which judgment has been signed was incurred, or to the means which he still has of discharging the judgment, and as to the disposal he may have made of any property since contracting the debt; and then it enacts, that in case such debtor shall not attend, as required by the order, and does not allege a sufficient excuse for not attending, or, if attending, he refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property, in order to defeat or defraud his creditors or any of them, the court or judge may order the debtor to be incarcerated in the common gaol of the county in which he resides, for any time not exceeding twelve months, or may direct that a *ca. sa.* may issue against him; and such writ may thereupon be issued upon such judgment.

In case such debtor enjoys the benefit of the gaol limits, such court or judge may make a rule or order for his being committed to close custody, under the 35th section of the same act.

I have always hitherto thought that the proper way to apply this provision, when the defendant without excuse fails to attend, or, being examined, refuses to answer upon any point as to which he is properly interrogated, or answers equivocally or evasively, so that he is evidently endeavoring to conceal the truth, he should be punished as for a contempt of the order, or, to compel him to obey it, by directing him to be imprisoned for a period, within the discretion of the judge, not exceeding twelve months; but that when his answers are such as to lay a reasonable ground for the suspicion that he has concealed his property or made away with it in order to defeat or defraud his creditors, the proper course then for the judge is to allow a *ca. sa.* to issue; for in that case I think the intention of the Legislature was, that although it should no longer be allowed to the plaintiff, by his own affidavit of belief or suspicion, merely to entitle himself to execution against the person, yet, when the court or a judge sees that upon the statements made by the defendant himself, after fair opportunity of explanation, that the plaintiff may reasonably entertain such belief or suspicion, then the execution against the person may be allowed to go, and the debtor will thereupon be subject to be dealt with as debtors in execution had been before the act, under the provisions which are now embodied in the 26th chapter of the Consolidated Statutes. The object, then, is, not to punish as for a contempt of the order, but to place in the power of the creditor such means of coercion as an execution against the person may afford, under the restrictions and modifications to which that remedy is now made subject.

CHANCERY.

Reported by A. Grant, Esq., *Barrister-at-Law.*

Burnham v. Peterboro'.

Principal and surety—Municipal Corporation.

Where a corporation, having a debt to pay, which it is their advantage to discharge immediately, raised money upon an accommodation note of an individual, and applied the money to the payment of the debt, promising to protect the note, or to repay, relief was given in this court against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note will be entitled to stand in the place of the corporation creditor.

Mr. *Adam Crooks* for plaintiff.

Mr. *Hector*, for defendants.

Esten, V. C.—The facts of this case are clear beyond dispute. A sum of £700 was raised upon the note of the plaintiff, at the request of the mayor, and applied to the use of the town in discharging a balance due upon its subscription to the railway, whereby its debt was paid, and it was enabled to recover interest on its stock, which it is doing by means of an action at law. The proceeding was sanctioned by resolution of the council. It is true that it was expected at the time that about £1800 would be recovered from Messrs. Whitmarsh and Conger, a balance on the debentures, which, however, is still unpaid. This circumstance is, I think, immaterial. The charges of embezzlement or misappropriation are clearly rebutted. I cannot imagine what Mr. Sawers means by saying that the debt was an unjust one, and one which ought not to be paid. The corporation owed a debt which it was unable to pay; a third person intervenes at its request, and pays this debt upon its promise to idemnify him. Can any demand be more just in the abstract than this demand of the plaintiff? It would be much to be regretted, if any technical difficulty stood in the way of the satisfaction of so just and equitable a claim. But I think none such exists. I cannot doubt that it would be competent for the corporation to apply any surplus moneys it might have, not applicable to any particular purpose, to the satisfaction of this debt without resorting to a new loan. But even supposing none such to exist, and that a new loan would be necessary, it would require time to accomplish it, and the demand was urgent. The same remark is applicable to the alleged misappropriation of the £1500 sterling, with which, however, the plaintiff is in no way connected. Under any of these circumstances it would be highly advantageous to the corporation that the debt should be paid at once, for it would not subject them to any liability, to which they would not be otherwise subject, and it would instantly entitle them to a large sum, by way of interest, on their stock. I have no doubt that if a third person under such circumstances were to pay this debt at the request of the corporation, or to raise money on his credit to enable them to pay it, on a promise of repayment with interest, or on a promise to protect the note, and the contract were performed, and the corporation had the benefit of it, they would be legally liable. This is precisely that case. The plaintiff is, however, substantially, although perhaps not technically, a surety, and entitled to indemnity, and has a right, therefore, to the aid of this court. His right may be rested on another ground. It is an old and well known head of equity that although a loan to a married woman is invalid, yet if the money be actually applied in payment for necessaries, unprovided by her husband, the party furnishing the money may apply to this court to stand in the place of the persons who have supplied the necessaries, and to proceed against the husband in their names. It cannot be doubted that the corporation could have been compelled to pay the balance of their subscription, and this money having been applied to that purpose, the plaintiff may stand in the place of the railway company. I think the plaintiff should have a decree with costs.

COUNTY COURT CASES.

WILSON J. SWITZER v. THE TRUSTEES OF SCHOOL SECTION NO. 8, IN THE TOWNSHIP OF ERNESTTOWN.

(Before His Honor Judge McKENZIE, County Judge for the United Counties of Frontenac, Lennox and Addington.)

Common Schools—Teacher's Salary.

Held, that an action at law will not lie on an award made under the 84 section of the U. C. Common School Act between a school teacher and trustees.

Held, that under section 12 of the amended School Act of last session, all agreements between teachers and school trustes must be in writing signed by the parties ane under the corporate seal.

(28 January, 1861.)

This was an action on award. The declaration alleged that the plaintiff was a duly qualified Common School teacher, and that he was employed by the defendants to teach a Common School in School Section No. 8, in the township of Ernesttown, for a period of 12 months, at a salary of £60 a year, payable quarterly. That the plaintiff in pursuance of said engagement, entered upon his duties of teacher of said Common School, and during the period of his engagement did teach in said School, according to the terms of his engagement; and that the sum of £30 being the last two quarters of salary, is due to him from the defendants. That differences having arisen between the plaintiff's salary, board, and the manner in which he conducted the school, as well as the right of the plaintiff to receive the balance of his salary, for an alleged want of qualification; and that in order that the matters in difference between them might be satisfactorily settled, the matter was left to arbitration, according to law, and that the arbitrators made their award, in writing, in favor of the plaintiff, for £30 to be paid within a certain time now past. Yet that the defendants, although often requested so to do, have not paid the said sum of £30 nor any part thereof, although the time for the payment thereof hath elapsed.

The defendants demurred to the declaration, assigning as causes of demurrer:

1st, That the declaration showed no cause of action in this, that it is not alleged that the defendants contracted under their corporate seal.

2nd, That no action at law can be sustained for the claim of the plaintiff as set forth in the declaration.

G. L. Mowat for the demurrer; *O'Reilly* contra.

MACKENZIE JUDGE, C. J.—I have not been able to meet with any case in which the point, whether an action, will lie upon an award made under the 84th section of the Common School Act, has been decided.

By section 84, cap. 64, Upper Canada Consolidated Statutes it is enacted, 'in case of any difference, between trustees and a teacher, in regard to his salary, the sum due to him, on any other matter in dispute between them, the same shall be submitted to arbitration,' and by 85th section, the arbitrators, or any two of them may issue their warrant to any person therein named, to enforce the collection of any moneys by them awarded to be paid, and the person named in such 'warrant shall have the same power to enforce the collection of the moneys mentioned in the warrant, by seizure and sale of the property of the party or corporation, against whom the same has issued, as any bailiff of a Division Court has in enforcing a judgment and execution issued out of such Division Court,' and by section 87, it is enacted that 'no action shall be brought in any Court of law or equity to enforce any claim or demand between trustees and teachers which can be referred to arbitration as aforesaid."

I have persued the elaborate judgment delivered by the Chief Justice of Upper Canada in the case of *Kennedy* v. *Burness*, 15 U. C. Q. B. 478, also the judgment of Mr. Justice Hagarty, in the case of *Kennedy* v. *Hall*, 7 U. C. C. P., 218, and the judgment of Mr. Justice Richards, in the case, *Kennedy and Murray* v. *Burness et al*, 7 U. C. C. P., 227, and find the object, force and effect, of awards like the one set out in the declaration examined at great length. Although the point now under consideration has not been decided, still, from the language of the judge, it seems to me that they thought an award between trustees and a school teacher was final, and conclusive, not liable to be made the subject of an action in any court. The words 'no action shall be brought to enforce any claim or demand' between trustees and teachers, in the 87th section, seem to point out at attempts to build up actions in our Courts upon awards. The present action is brought to force a claim which has been already decided.

In looking at the 9th section of the amended School Act of the last session of Parliament, 23 Vic., cap. 49—I feel convinced that no action at law will lie against the School Corporation upon an award made between teachers and trustees who wilfully refuse or neglect for one month after publication of an award, to comply with or to give effect to award under the Statute. It is enacted by the 9th section of the amended act that if trustees under section 84 of the U. C. School Act, the trustees so refusing or neglecting shall be held to be personally responsible for the amount of such award, which may be enforced against them individually by warrant of the arbitrators within one month after the publication of their award. It appears to me that the Legislature has substituted arbitrators for Courts in all matters of dispute and claims between trustees and teachers, investing the arbitrators not only with powers of adjudication, but also with very high and extensive powers of enforcing the collection of any moneys by them awarded to be paid.

I am of opinion that the present action against the School Corporation cannot be sustained. As to the exception taken by the demurrer to the declaration, for want of an allegation in the declaration, that the defendants contracted under seal, from the judgment of the Court of Queen's Bench in *Kennedy* v. *Burness*, I think such an allegation unnecessary. If the cause had gone to trial, the plaintiff would require to produce an agreement in writing. But, for the future, under the 12th section of the amended School Act of last session, agreements between teachers and trustees must be in writing, signed by the parties thereto, and sealed with the corporate seal.

In the present case, judgment must be for the defendants on the demurrer.

Judgment for the defendants on the demurrer.

DIVISION COURT CASES.

In the First Division Court of the County of Elgin.

GEORGE LIGHT v. ROBERT LYONS AND JOHN LYONS.

Division Courts—Splitting causes of action.

Where plaintiff sued for the breach of a contract in the hiring by the defendants of a yoke of oxen belonging to the plaintiff, on an alleged promise to return them in as good order and condition as when hired, alleging as a breach that they were not returned in as good order, &c., but were injured, &c., and it was made to appear on the trial of the plaintiff that the defendants had been on a former occasion sued by the plaintiff for the hire of the same oxen on the same contract for hiring, which suit resulted in judgment for the plaintiff. This was held to be a splitting of the plaintiff's cause of action within the meaning of the Division Court Act, and judgment in the second suit was given for defendants.

(18th March, 1857.)

This was a suit brought by the plaintiff to recover £10 for the breach of a contract in the hiring by the defendants of "a yoke of oxen belonging to, and the property of, the plaintiff," on an alleged promise "that they were to be returned in as good order and condition as when hired;" and alleging for breach that they "were not returned in good and proper order, but were injured," &c.

It was urged as a legal defence on the part of the defendants, irrespective of the facts and merits of the case as they transpired upon the examination of witnesses, that as the defendants had been sued by the plaintiff in this Court, in a previous plaint for the hire of the same oxen on the same contract for hiring, as the present suit was founded upon, which suit was tried and judgment was rendered for the plaintiff for the use and hire of the same cattle, for £4 8s. 1d., the plaintiff had split up his cause of action and brought two suits where one would have sufficed, thereby subjecting the defendants to the costs of a second suit, and contrary to the 26th section of the Division Court Act of 1850, and contrary to law, irrespective of the statute.

It was admitted by the plaintiff, that this suit was brought on the promise for the same hiring of the same oxen as the former suit.

HUGHES, Co. J.—The 24th section of the Division Court Act of 1850* requires the plaintiff in any suit brought in a Division Court, to enter "a copy of his account or demand, in writing, in detail; and the particulars of his demand in any case of tort or trespass which shall be numbered," &c., and then, after providing for a summons, the clause requires that a copy of the summons, to which shall be attached a copy of the plaintiff's account or of the particulars of such demand, as the case may be, shall be served ten days, &c.

Then the 26th section† enacts "that it shall not be lawful for any plaintiff to divide any cause of action into two or more suits for the purpose of bringing the same within the jurisdiction of a Division Court," &c.

The 26th section, I apprehend, was to restrain parties from bringing several suits for a cause of action or items of account amounting in the aggregate to more than £25, which is the ultimate limit of the jurisdiction of the Court for the recovery of a debt account, or breach of contract or covenant, or money demand, or to recover damages for torts amounting in the aggregate to more than £10—which is the utmost limit of the jurisdiction for torts—by splitting up their cause of action and bringing two or more suits in order, apparently, to give the Court jurisdiction, and thereby avoid the limit of jurisdiction fixed by the 23rd section of the act,‡ which enacts that the judge shall have power, jurisdiction, and authority to hold plea of all claims and demands whatsoever, &c., of debt account, or breach of contract or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed shall not exceed the sum of £25, and in all torts to personal chattels to, and including the amount of £10; with certain exceptions and provisions thereinafter expressed.

The jurisdiction of the Court has been since extended to other personal actions, to which it is not necessary to allude in the present case.

It becomes now necessary to enquire how the 26th section affects the present case. I think it refers only to actions where the claims or demands of two or more suits for the recovery of a debt account, or breach of contract or covenant, or money demand, would, when added together, amount in the aggregate to more than £25, or where for a tort the aggregate would amount to more than £10; and where they are "split up for the purpose of bringing the same within the jurisdiction of a Division Court," and that that section does not affect the present case, because the aggregate of these two suits would not amount to more than £15, this being a suit, as it is expressd in the summons, "for damages on contract," and the former being also upon a contract for "the use and hire of cattle," as upon an ordinary action of assumpsit or debt. So that it cannot be said the cause of action has been "split" or divided, as expressed by the statute, for the purpose of bringing the same within the jurisdiction of the Division Court.

It may be useful to state what I conceive the law to be generally, upon this subject, to guide suitors as well as myself in future cases, for the sake of uniformity in so far as the Courts of this County are concerned, and also to give my judgment as I take the law to affect this particular case, irrespective of the Division Court Statutes.

Wherever I have found parties bringing two suits when one might have sufficed, and thereby subjecting a defendant to the hazard or possibility of paying the costs of two plaints instead of one, and where one would have answered every purpose, I have uniformly exercised the discretion given to the judge by the 3rd section, by apportioning the costs between the parties in such a manner that the plaintiff was obliged to pay half the costs, and indeed, in one case, where it was manifest that a third party's name had been used as a plaintiff in order to oppress a defendant with the costs of a second suit, where the real *bona fide* holder of a note had indirectly split up his cause of action and brought one in his own name and another in the name of a third party, I ordered the plaintiff to pay the costs in one of them.

It has been a matter of discussion in the Superior Courts in England, as to what is meant by statutes in England containing similar provisions to our own, by "dividing a cause of action," and what is meant by the words "cause of action."

The Court of King's Bench in England, in the case of *Bagot* v. *Williams*, 3 B. & C. 235, had this subject before them. It was an action of assumpsit for money received as steward of the plaintiff. The defendant pleaded a recovery in a former action of debt of £4,000, which he alleged to be for the identical causes of action in that suit. This was denied. It appeared by the evidence of the steward who succeeded the defendant, that he investigated defendant's accounts and found there was due plaintiff £7,000; that in the estimate he took into account all the sums claimed on the then present action, except a sum of £46 which the defendant had received previous to the first suit, but that he had only discovered it since the recovery in the first suit; after he had investigated the accounts, he directed an action to be brought in an inferior local court for £4,000, and judgment passed by default. He verified only for £3,400, because the defendant (as he then thought) had not any property exceeding that sum. Upon these facts the learned judge was of opinion, that whatever constituted a subsisting debt at the time when the proceedings in the inferior Court was instituted, and was known to be so by the agent who managed the whole transaction, was to be considered as included in and constituting one entire cause of action, and he therefore directed the jury to find a verdict for the plaintiff for £46, but reserved leave to the plaintiff to increase the verdict as the court should afterwards direct. The Court upheld this view, and Bayley, J., held that the plaintiff by his own act was as equally bound as he was by the verdict of a jury, and that having chosen to abandon his claim once, he had done it forever.

It is laid down in 2 Taylor on Evidence as a general rule, which is recognised alike by Courts of law and equity, that where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case.

The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belongs to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time, *Henderson* v. *Henderson*, 3 Hare 113. It has been held, in the United States, that if a plaintiff sues for part only of an indivisible claim, as if one sues another for a year under the same hiring and then brings an action for a month's wages, it is a bar to the whole (1 Wendell's Reports. 487). On page 1314 of first volume Taylor says, "The original County Court Act contains an important clause relative to this subject, for it enacts in section 63, that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the County Courts, but any plaintiff having cause of action for more than £50, for which a plaint might be entered under this act, if not for more than £50, may abandon the excess, and therefore the plaintiff shall, on proving his cause, recover to an amount not exceeding £50, and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly. The term 'cause of action' here employed, is one of indefinite import, but the Courts have fixed its meaning to a certain extent by hodling, first, that it is not limited to a cause of action on one separate entire contract, but that it extends to trademen's bills where the dealing is intended to be continuous, and where the items are so far connected with each other that if they be not paid they form one entire demand (*In re Akroyd*, 1 Ex. R. 479 is cited), and next, that it does not preclude the plaintiff from bringing distinct plaints whenever the claims are of such a nature as would justify the introduction of two or more counts in the declaration, if the action were brought in one of the Superior Courts."

In conformity with this, a landlord has been allowed to sue his

* Con. Stat. U. C. ch. 19, sec. 74, p. 147. † Con. Stat. U. C., ch. 19, sec. 59.
‡ Con. Stat. U. C., ch. 19, sec. 55.

tenants in one plaint for rent, and in another for double value, in consequence of the premises being held over after the expiration of a notice to quit (*Wickham* v. *Lee*, 12 Q. B. 526). *Wood* v. *Perry*, 3 Ex. 442, is an authority shewing that the Court of Exchequer held the words cause of action in a similar British Statute, meant 'cause of one action,' and were not to be limited to an action upon one separate contract.

Broom in his legal maxims, page 249, in applying the rule "*nemo debet bis vexari pro una et eadem causa*" says, "The plaintiff in trover, where no special damage is alleged, is not entitled to damages beyond the value of the chattel he has lost, and after he has once received the full value he is not entitled to further compensation in respect of same loss; and by a former recovery in trover and payment of the damages, the plaintiff's right of property is barred, and the property becomes vested in the defendant in that action as against the plaintiff, *Cooper* v. *Shepherd*, 3 C. B. 266."

After what has been said, and giving the best consideration in my power to the case, I think the plaintiff in bringing his first suit against the defendant upon the contract proved, voluntarily abandoned his right to recover damages for the alleged breach of the same contract in this suit, for it properly belonged to the subject of litigation between them, and might have been brought forward all in one plaint. In other words, I consider the claim for damages upon that contract indivisible, and that plaintiff cannot be permitted to bring separate suits for that which I consider to be but different parts of the same plaint, any more than could the payee of a promissory note be permitted to bring one plaint for the recovery of the principal, another for the interest, and another for the damages, by reason of protest or the like, which would to any person of common sense appear unreasonable.

Irrespective of the law of the case, I do not consider that the plaintiff has made out a sufficient case even upon the merits.

Judgment for the defendant.*

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Ayr, January 17, 1861.

Gentlemen,—Please to give your opinion on the following in your next number, and oblige

Your obedient servant.

1. A is owner of lot number one in the eighth concession of B. About sixteen years ago A employed and paid a licensed surveyor for running out his lot. Trees which were then blazed can still be traced. Monuments which were then planted still stand. And fences have been put up on the line which was then running between lots one and two. Is this line good? Will it be considered the *original line* according to the amended Surveyor's Act of June, 1857? No other line has ever been run between lots one and two. Again, no lines have ever been run between lots two and three, nor between lots three and four; but between lots four and five there is an attested monument standing. The owners of lots two and three intend having their lines run out in a short time. Will the surveyor that they employ have to commence at the monument planted on the line run between lots one and two, and measure to the monument standing between lots four and five, and divide equally, according to the Surveyor's Act of 1849? Or will he have to commence at the town line, where there is a monument which was planted by the Government Surveyor when he run out the township, and measure to the monument between lots four and five, and divide accordingly? If he does the latter, he will alter the line between lots one and two some links on to lot number one. If this is done, which of the two lines will stand good or be legal, the one which was run sixteen years ago, or the one to be run now?

2. W, becoming insolvent, made a deed of assignment (without the release clause), for the benefit of his creditors, to X and Y, who were none of his creditors. The assignees advertised it regularly in the local newspaper. They notified the creditors by letter, requesting them to come forward and execute the deed of assignment, but none of them has done it except Z. When the property, real and personal, has been sold, and the debts collected, will any of the creditors receive benefit from the funds besides Z, who is the only one that has executed the deed of assignment? If the proceeds have to be divided ratably amongst *all* the creditors, how will the assignees act? They cannot know the amount unless each creditor lodge his claim, justly authenticated, with the assignees.

3. Again, T held a mortgage against part of the estate. T sued W on the mortgage, and got judgment against him, and has sold the mortgage property, but has failed to get his pay in full out of it. Will T receive his apportionment for his balance along with the other creditors?

I am, yours, &c.,

A Subscriber.

[It is not our purpose to answer questions of general law, and when we do so it is only where the questions if answered will convey information useful to the general body of our readers.

The *first* question put by our correspondent is one in which "the owner of lot number one in the eighth concession of B" may have a very great interest; but really it would be imposing too much on the good nature of our readers to occupy our space with an opinion as to whether, under the particular circumstances stated, "the line run sixteen years ago, or the one to be run now," is to govern? Let "the owner of lot number one in the eighth concession of B" submit his case to some member of the profession in active practice—pay his fee—and be guided by *his* opinion.

The *second* question is not open to similar objections. We presume — though not so stated — that the property assigned was personalty, and that as between the assignor and his assignees there was no actual and continued change of possession of the property assigned. If correct in this supposition, then the assignment can only be sustained if made for the purpose of paying and satisfying, ratably and proportionably, and without preference or priority, *all* the creditors of the assignor their just debts. Should there be any limitation in the assignment preventing creditors, after the lapse of a given period, from taking the benefit of it, then the assignment would be probably held void, as being made for the benefit of such creditors only as shall accept the benefit within the given time, and not for the general benefit of all the creditors of the

* Though this judgment was delivered as long since as 18th March, 1857, we only received a report of it during last month, and we now publish the judgment as being one of unusual interest to Judges of Division Courts.

assignor. (*See* per Burns, J., in *Burritt* v. *Robertson*, 18 U.C. Q.B. 560.) Should there not be any such limitation then it is in the power of the remaining creditors to come in at any time and accept the benefit of the assignment. The difficulty suggested by our correspondent, that an assignee cannot declare a dividend without first knowing the number of persons entitled to share and the proportions in which they rank, is one which must exist, unless all creditors voluntarily and within a reasonable time make known their claims to the assignee, and rank under the assignment according to their claims. It is a difficulty which must exist so long as the Legislature see fit to leave the law in its present very unsatisfactory state. The only mode of overcoming the difficulty that we can at present suggest, is that of filing a bill in the Court of Chancery to administer the estate, and so compel creditors to prove their claims, or be barred. This is a remedy which, owing to its expense, might, in the case of a small estate, prove worse than the disease.

To the *third* question we answer, that T is entitled to rank on the estate for the balance of his mortgage money.—Eds. L. J.]

Municipal Government.—Law and Equity.—Conflict of decisions.

To the Editors of the Law Journal.

Peterboro', 19th Feb., 1861.

Gentlemen:—I beg to call your attention to two judgments, one by the Queen's Bench (*Scott* v. *The Corporation of the Town of Peterborough*),* and the other by the Court of Chancery, (*Burnham v. The Corporation of the Town of Peterborough*)† touching matters of great interest to municipalities.

The Queen's Bench judgment sufficiently shows the subject matter in dispute; that in Chancery, requires some explanation. The town of Peterborough agreed to take £30,000 stock in a railroad, and for that purpose by-laws were sanctioned by the rate-payers and passed, authorising debentures to be issued to the amount of £37,500, to provide the necessary funds. These debentures were sold and realized to within a trifle, if not the whole of the required amount. The town council, however, spent a portion of this money for other purposes, and in the end of 1858, when they came to settle for the stock, they found they were deficient about £700. Burnham, the plaintiff, then one of the councillors, gave his note, which was discounted and the proceeds applied to pay the balance of stock deficient, and funds for which had already, as I have said, been realized to within a trifle if not fully.

The note was renewed at various times during the year 1859 (Burnham being still a councillor) until finally it was reduced to £450, and became due in the beginning of 1860. No provision whatever was made for the payment of this note by the councils of 1858 or 1859, and when it became due, the council of 1860 refused to pay it on the same grounds as they resisted the payment of the Queen's Bench suit, viz., that it was not a debt incurred by the council of 1860, but by a previous council, also that it was not a debt contracted for any thing within the ordinary expenditure of the corporation for that year when the debt was incurred; nor yet was there an estimate made of the sum required to meet it; nor any by-law passed for its payment, by imposing a special rate for that purpose; and that, in fact, in addition to these reasons, the amount had already been raised by debentures.

Burnham upon this, filed a bill in Chancery, and the objections were as stated above, fully set forth in the answer given thereto.

You will see from the above, that the *principle* involved in both cases is precisely the *same*. No one conversant with municipal matters will hesitate to endorse the judgment of the Chief Justice as being consonant with the municipal laws of Upper Canada, as well as with sound sense and justice, and I am much mistaken if an equally decided opinion (though of a very different nature) be not come to in regard to the chancery judgment. The effects of the chancery judgment, were it to become a precedent, really deserves a very serious consideration. All controul over a municipal council must be at an end. Any object that the majority of such council may devise, although opposed to the wishes of the great majority of the rate-payers, may be carried out in the way as is approved by this judgment, simply by taking the money designed for one object and applying it to the desired one, and then to supply the gap by discounting a note and leaving it as a legacy to their successors. If they refuse to pay, file a bill, and in accordance with the judgment the rate-payers must pay up, because, forsooth, they have reaped what the council, not themselves, look upon as a benefit. Can anything be more outrageous, or more completely prove the soundness of the argument of the Chief Justice, that "in this way the courts of law would have the power indirectly given to them of taxing the rate-payers without their consent, to pay debts which the corporation itself could not pay by a rate."

In reading the chancery judgment, one cannot but remark that the Vice-chancellor altogether ignores two considerations certainly of much weight. 1st, That the money *had already been raised* to pay for the stock, though some of it was misapplied by the council; and 2nd, That the plaintiff, Burnham, being a member of the council that both misapplied the funds and then supplied the want by discounting the note in question, could in no way, therefore, be placed on the footing of an innocent third party led astray by the council.

It would have been very satisfactory had the Vice-Chancellor referred to any clause of the municipal act authorising councils to discount notes to supply funds for which they dare not lay on a rate.

There appears a strange confusion of the facts, in representing the £700 as raised to enable the town "to recover interest on its stock," which "it is doing by means of an action at law," and as if "it would instantly entitle them to a large sum of interest on their stock." The fact is that the sum for which the town is now proceeding is one it would be entitled to *over* and *above* any dividend or interest on that stock were the railroad in a condition to pay a dividend.

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* See page 65 of this Journal. † See page 73 of this Journal.

"The charges of embezzlement or misappropriation are clearly rebutted." No one here ever dreamed of *embezzlement*, but how misappropriation has been rebutted, is a mystery, the fact being that the money was raised for a certain purpose, and when it was required for that purpose, the money was *not*. Certainly then it must have been misappropriated.

"I cannot doubt that it would be competent for the corporation to apply any surplus monies it might have, not applicable to any particular purpose, to the satisfaction of this debt, without resorting to a new loan."

This appears a most extraordinary as well as alarming *dictum*. What, if such is the case, are we to make of the numerous clauses in the municipal act, directing the means to be taken for raising money by loan, and which limit councils to a rate; or taking a vote of the rate-payers for any expenditure not of an *ordinary* kind? I for one must be excused for considering it a matter of very grave doubt how far any councillors would not render themselves personally liable by paying with the rate-payers funds in their keeping, a claim in the position of the one in question, the Vice-Chancellor's judgment notwithstanding.

As to the old and well known head of equity about a loan to a married woman, to make that applicable to the present case, I humbly submit that it must be shown that the rule would apply to a husband *who had already advanced the money for the necessaries*, and that the party suing him had applied such advance to other objects, and sought to recover it a second time, could he in that case proceed against the husband with success?

In contrasting the two judgments one cannot but observe how the Chief Justice supports his by a reference as well to the laws as to cases decided, while the other alludes to neither the one nor the other, an omission (*if it could be helped*) to be regretted, as it detracts much from confidence in its soundness.

It may be asked why the chancery judgment was not appealed, and here also lies a subject for animadversion. An appeal was attempted, but the court refused to take as security the bond of the corporation, and as no private individuals chose to undertake the responsibility of being answerable for the costs and damages in case the judgment was affirmed, the appeal fell to the ground. Now the object of security being merely to prevent the respondent ultimately suffering loss in consequence of the appeal, surely there was no risk of such in allowing the appeal on the bond of the corporation of Peterboro', and therefore the refusal can only be looked on as actually denying an appeal; *why*? can only be matter of conjecture.

Your obedient servant,

F.

[The written opinion of a judge upon a question submitted to him in ordinary course for judicial determination, is a fair subject of criticism; we therefore readilly insert the communication of our correspondent.

The judgment of the court of chancery, to which he adverts, and upon which he so freely comments, certainly involves principles in direct conflict with those enunciated by the court of Queen's Bench in the other case to which our correspondent refers.

When the two courts are so much at variance on principles of municipal government, it is greatly to be hoped that ere long the court of Error and Appeal will be called upon to determine in some case or other which court is right and which is wrong. It may, however, be that both decisions are sound; one *good law*, and the other *good equity*. This conflict of decisions is one of the evils traceable to the fact that a system of jurisprudence which naturally should be solid and entire is torn into segments, and so retained contrary to reason and common sense.—EDS. L. J.]

Justices of the Peace—Compromise—Jurisdiction—Penalty—Costs.

TO THE EDITORS OF THE LAW JOURNAL.

Preston, 22nd February, 1861.

GENTLEMEN:—Permit me to request your answer to a certain question in relation to the powers and duties of a Justice of the Peace in cases where he is acting in his *judicial* capacity.

Upon an information or complaint being made before a justice of the peace, against a person for having acted contrary to the provisions of an Act of Parliament or a Municipal By-Law, for the punishment of which a fine or a penalty is imposed, and the nature of which complaint a justice of the peace is authorized to *try* and *determine*: may such justice of the peace, before the time appointed for the hearing or trial of the case, receive from the defendant (who desires to settle the matter before the trial and before additional costs are incurred) an acknowledgment of the charge preferred against him, and the amount of costs incurred, together with such an amount for fine or penalty as may seem just and meet to such justice of the peace, and thereupon stay further proceedings?

I have in vain endeavored to find an authority for a justice of the peace to receive monies as fines or penalties before the actual trial, and then discharge the defendant; for the several penal clauses of the Statutes, as also the Municipal By-laws, invariably read: *upon conviction before such justice of the peace, shall forfeit and pay such fine*—or, *shall upon conviction thereof before any justice of the peace having jurisdiction, &c., pay a fine of* ——, or words to the like effect; from which clauses the inference may be drawn that no fine or penalty can be imposed *before* a conviction is made—and that, since the conviction is subsequent not anterior to the hearing or trial, no fine or penalty can be imposed and received before the time appointed for the hearing or trial, but that the hearing or trial must precede the receiving of monies for fines or penalties; and that therefore a justice of the peace is not authorized to receive the same before the trial or hearing. It, nevertheless, appears but reasonable and just that such a power should exist, for in no instance does the law desire to incur a larger amount of costs than actually necessary, which evidently would be the case if, after the defendant, having come before the justice of the peace, expressed his readiness to acknowledge the charge, to pay costs incurred, and to pay such fine or penalty as the justice of the peace might think proper to

stipulate, the justice being obliged to refuse the offer and to issue subpœnas for witnesses, have them served, and have the matter brought to a formal hearing. Moreover, if at the time appointed for the hearing or trial of the complaint the defendant at once acknowledged the charge, there would be no necessity of examining the witnesses or of entering into any further particulars of the case, in fact there would be no trial or actual hearing in that case; the Justice of the Peace would tax the costs and stipulate the amount of fine or penalty to be paid, in the same manner as he might have done before the time appointed for the hearing, when defendant offered to pay; the only difference in the two cases would be the amount of costs, which in the one case would be unnecessarily higher than in the other. Your valued answer will oblige,

Yours, respectfully,

OTTO KLOTZ.

[When it is determined to prosecute a person for an offence either against a Statute or Municipal By-law, over which a Justice of Peace has power to exercise a summary jurisdiction, the *first* step is to lay an information against the offender, The *next* step is, procure the appearance of the defendant, in order to answer the charge. This is done according to the circumstances, either by the issue and service of a summons, or issue of a warrant and arrest of defendant thereunder. The *third* step, when the defendant appears, and no compromise is effected, is to hear the complaint, and if necessary, determine it. In most cases, however determinable, upon summary conviction, it is lawful for the litigating parties to enter into a compromise, and to supersede the necessity of a judicial adjudication. If no compromise is effected the Justice *must* proceed to hear and determine. The defendant is therefore asked to plead to the charge. He may either confess it or plead not guilty. If he confesses it, nothing more remains but to pass judgment. In coming to a conclusion, (should no compromise be effected,) the Justice must convict, acquit, or dismiss the complaint. Whether the proof of the commital of the offence arise from the confession of the party accused, or be established by the testimony of third parties, the Justice must convict before he can impose any penalty, or award any costs. The power to impose a penalty or award as to costs, both of which pre-supose a conviction, is, as mentioned by our correspondent, in general, only to be exercised upon conviction. It seems to us that our correspondent confuses a compromise with a conviction. They are quite distinct. It is not the Justice who compromises, though it is he who, if necessary, adjudicates. The compromise is the act of the parties litigant—not of the Justice. If the parties compromise, to make the compromise effective, the charge is withdrawn, and when the charge is withdrawn the Justice is completely ousted of jurisdiction. He cannot either proceed, hear the complaint or dismiss it, and therefore can neither impose a penalty or costs. If the parties compromise upon the terms of the accused paying costs, then the costs are paid, not because awarded by the Justice, but because agreed to be paid as a part of the compromise. If the parties do not compromise, the Justice proceeds to hear and determine, and upon conviction, to pass judgment, imposing such penalty as may appear to him to meet the merits of the case. The imposition of a penalty and costs is an act of judgment, and there can be no judgment till conviction. A conviction must necessarily precede the power to impose a penalty or costs.—EDS. L. J.]

REVIEWS.

THE LAW MAGAZINE AND LAW REVIEW for February is received. This Magazine is one that we delight to receive. We read its pages with much zest. Confessedly one of the most talented law periodicals in England, it is of its kind without competition. It does not seek to keep its readers informed on every case decided in England, but leaves to other periodicals, such as the *Law Journal*, the *Jurist*, the *Law Times*, and the *Weekly Reporter*, that task—a task which they conscientiously and efficiently perform. The aim of the *Law Magazine* is not so much to inform as to instruct. Its well filled pages abound with food for reflection. With all the qualities of the instructor it combines the fascination of the romance. It is this happy combination which makes the magazine so general a favorite among all classes of the profession. The number before us opens with a long and interesting paper on the trials of Lord Cochrane. The sufferings and the trials of this great seaman, now no more, are well portrayed. It is a relief to find that a gallant man, in early life so vilified, lived to tell the story of his wrongs and to vindicate his character in the eyes of the British public. His life was a chequered one, but his sun set free from the dark clouds of envy and malice which hovered about him in the mid-day of his existence. His end was one of peace and charity with all men. The second paper is on "Pleading of the present day." The writer shows how little is at present understood of pleading as an art, and how necessary it is that the art should be understood. He expresses the hope, in which we heartily join, that some member of the bar will attempt for the present system of pleading what Serjeant Stephen so successfully accomplished for the past system. He exposes the worthlessness of such a volume as the edition of "Stephens' Pleading," recently published under the sponsorship of "James Stephen and Francis F. Pinder, Barristers-at-Law," wherein they vainly attempt to alter the text of the great original, so as to adapt it to the present system. The "Precedents of Pleading," by Bullen and Leake, was received by the writer too late for comment. However useful the latter work may be as an index to precedents, it does not attempt to deal with principles. What is required is a dissertation on the Rules, if any, of Pleading; the principles upon which the Rules are founded; the operation of the Rules and their practical results. The third paper is one on the late Thomas Jarman, author of the Treatise on Wills, whose modesty was only equalled by his merits. Then follow thirteen other papers of varied interest and importance, including one on the case of Anderson, the Fugitive Slave, but want of space, not want of inclination, prevents a further reference to them.

PAPERS OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.—We regularly receive the publications of this Society, and are right glad to receive them. A Society of the kind is calculated, in a *thinking* community, to do a vast amount of good; but its power for good must in a great measure depend on the ability of its members. In every Society of the kind, while there are some men remarkable for general information and ability, there are others remarkable only for the want of these qualities. When the latter are seized with a *cacoethes scribendi* or *legendi*, and are allowed to indulge in their peculiar vein, the outpouring is a positive infliction.

Few such inflictions, we candidly confess, appear among the published papers of the Society for promoting the amendment of the Law. In our next number we hope to re-publish a very excellent paper read before the Society by Mr. Serjeant Woolrych, on "the expediency of abolishing the practice of opening biddings in the Court of Chancery."

THE WEEKLY TRANSCRIPT is the name of a law periodical recently commenced in the City of New York. It augurs well. Each number contains some original remarks of the editor on current legal topics, and the remainder of the number is filled with current decisions of permanent value. The want of such a periodical in the State of New York must have been of late much felt, and has been for a long time to us a matter of surprise. That want is now supplied by G. H. Stout & Co., 102 Nassau Street, New York, the proprietors and publishers of the *Weekly Transcript*. The want, we can add, is well supplied. The publication is in form convenient, in quality good, and in general appearance prepossessing. Each number contains sixteen octavo pages; of these, twelve are devoted to law reports, and four to original articles. The price is only $3 per annum. We wish our new cotemporary and exchange the success which the enterprise of its publishers deserve.

LOWER CANADA REPORTS, Vol. XI., No. 1, is received. It contains the reports of ten decided cases, none of which, owing to the difference between the laws of Upper and Lower Canada, are of much interest to us. One, however (*Adams* v. *the School Commissioners for the Municipality of Barnston*), commenced but not concluded in the present number, promises to be of some interest to an Upper Canadian. When concluded, if the case bears out what it promises, we shall re-publish it for the benefit of our readers. It is full time that some effort should be made to assimilate the laws of Upper and Lower Canada, so as to make Canada one Province in laws as well as in politics. The criminal laws are the same, but the laws as to civil rights differ as widely as the poles. With a Legislature composed in great part of lawyers, and including eminent lawyers both of Upper and Lower Canada, we are surprised that no effort is made to effect the great national work of assimilation of laws. Facilities are afforded by the legislature for the practice of the law in either section of the Province, by advocates from the other. But of what practical use are these facilities, when the laws are so dissimilar that the study of many years is necessary to enable any person conversant with the laws of one section of the Province to understand the laws of the other!

THE LOWER CANADA JURIST for February is received. It contains reports of fifteen decided cases, none of which are of more than local importance. Were the editors of the *Lower Canada Jurist* to imitate the example of the *London Jurist*, and furnish to its readers original dissertations on branches of the Lower Canada laws, we apprehend the publication would be more acceptable to its readers. As it is, however, its value as a record of decisions of permanent value cannot be over-rated. It appears to be a faithful chronicle, so far as it goes, of Lower Canada decisions.

THE EDINBURGH QUARTERLY AND WESTMINSTER are received. The first opens with an article like many which during the last fifty years have appeared in its pages, in earnest advocacy of a Liturgical Revision, free however, in its earnestness from any exhibition of antipathy to the English Church, or the wish to weaken the power of that religious body. The events of the last few years will cause to be read two papers upon subjects similar in a few respects, that of Japan and the Kingdom of Italy. In the autobiography of Thomas Carlyle happy selections make the reader acquainted with some of the great names in a remarkable literary age. A short paper upon the Victoria Bridge shows some attention bestowed upon Canada. Other papers upon interesting topics fill up the pages of this number.

Canada and the North-west are made the subject of two long articles in the *Westminster and Quarterly*, in which reference is made to this country in a manner calculated to satisfy its most ardent admirer. In the notices thus given to this Province, is seen one of the favorable results of the visit of the Prince of Wales during the past year. The current events are treated in its own style by the *Westminster*, in several papers upon Italian and American affairs. The characteristic paper of the present number upon Theology, is in the article upon Bible infallibility. The review of contemporary literature is useful as a ready synopsis of the chief developments in Literature.

The *Quarterly* as well as the *Edinburgh*, contains a review of Motley's historical work upon the United Netherlands, which, dealing with the chief events in the important period of a great nation's history, command the attention of the reader even to considerations regarding the sinking of a people whose power was respected wherever the name of the Spaniard was heard. In an article upon Essays and Reviews, this number undertakes a criticism from its own stand point, of a work which has lately attracted so much attention in England and America, under the name of "Essays and Reviews.

THE UNITED STATES INSURANCE GAZETTE contains the usual amount of useful matter pertaining to its subjects.

GODEY'S LADY'S BOOK for March is received. It opens with a most beautiful plate of "Christ blessing the little Children." The engraving is from the original picture, and is said to be the first engraving from the picture that has ever been published in a magazine. The fashion plate is as usual superb. The letterpress is interesting and instructive. We do not remember ever to have seen a better number of Godey. The Magazine improves as it grows old. We learn that its success has encouraged dishonest men to attempt to deceive the public by sales of imitations. Its best protection against such dishonest efforts is its great circulation and consequently low price of subscription. Without the circulation, no publisher can furnish such a Magazine at the price—$3 per annum.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

DAVID McKINNON, of Hamilton, Esquire, Attorney-at-Law.—(Gazetted Feb. 2, 1861.)

MELVILLE PARKER, of Cooksville, Esquire.—(Gazetted Feb. 2, 1861.)

SAMSON H. GHENT, of Hamilton, Esquire, Attorney at-Law.—Gazetted Feb. 23, 1861.)

ROBERT N. GOOCH, of Toronto, Esquire.—(Gazetted Feb. 23, 1861.)

JOHN B. MACLENNAN, of Cornwall, Esquire, Barrister-at-Law.—Gazetted Feb. 23, 1861.)

CHARLES INGERSOLL BENSON, of St. Catharines, Esquire, Attorney-at-Law.—(Gazetted Feb. 23, 1861.)

THOMAS COTTON, of Port Credit, Esquire.—(Gazetted Feb. 23, 1861.)

TO CORRESPONDENTS.

"A SUFFERING ONE"—Though much inclined to publish your communication with our views as to matters suggested, we cannot break through our rule which requires the real name of every writer to be furnished with his communication The name is not required for publicity, but as an assurance of good faith on the part of the writer. If furnished with your name we shall make use of your communication, otherwise not.

"M. N."—"J. FOLEY."—Too late for present number, will receive attention in our next.

"A SUBSCRIBER."—The publication of your letter will serve no good purpose, therefore refused.

"W. COSSEY," "CHARLES DURAND,"—under "Division Courts."

"A SUBSCRIBER," Ayr—"F."—"OTTO KLOTZ"—under "General Correspondence."

DIARY FOR APRIL.

1. Monday ..... *Easter Monday.* County Court and Surrogate Court Terms begin. Recorder's Court sits.
2. Tuesday..... Chancery Examination Term, Barrie and Ottawa commences.
6. Saturday..... County Court and Surrogate Court Terms end.
7. SUNDAY ..... *1st Sunday after Easter.*
8. Monday..... Toronto Spring Assizes.
9. Tuesday ..... Chancery Examination Term, Goderich and Cornwall com.
12. Friday..... Last day for setting down for hearing Chancery.
14. SUNDAY ..... *2nd Sunday after Easter,*
15. Monday ..... Last day for notice of hearing Chancery.
21. SUNDAY..... *3rd Sunday after Easter.*
22. Monday ..... Chancery Hearing Term commences.
28. SUNDAY..... *4th Sunday after Easter.*
30. Tuesday.. ..... Last day for completing Assessment Rolls. Last day for Non-residents to give lists of their lands.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

APRIL, 1861.

COURTS OF APPEAL.

Human law is ranked among the sciences, but is not by any means a perfect science, or at all events is not perfectly understood as a science. Although it contains some well understood principles much difficulty arises in their application to the various and ever changing circumstances of man.

We know that winter follows summer, that night succeeds day,—that the sun gives light by day, and the moon by night,—because these are fixed by the immutable law of nature; but widely different are the laws which regulate, or are supposed to regulate human conduct, even in the most civilized community.

Though human law is a rule for human conduct, yet, as it is impossible for man to foresee all the contingencies that may arise in the application of a given law, the law, or at least its application, must of necessity be imperfect.

Law is not enacted to meet a single state of circumstances past and known, but as far as possible is general, and designed as a rule for all cases likely to arise; but when future cases do arise, men, owing to various causes, will be found to differ as to the application of the law to the new state of facts. For this reason there must be in every civilized state some authority empowered to interpret laws, and whose judgment will be binding on parties concerned.

No two men can be found exactly to correspond in physical appearance. So it is with the mind. No two men can be found to be precisely equal in point of intellectual ability. Different men have different minds, and such will be human experience till the end of time.

One man has clearer perceptive faculties than another; one is better educated than another; one more logical than another; one more industrious than another, and so we might enumerate many other points of difference. But no matter what the cause the fact cannot be disputed, men differ in their minds and at the same time are prone to take different views of the same subject matter.

Judges are no more than men. To err is human. So it may be said, to differ is human. Then when Judges differ as to the law what is to be done? There must be some plan adopted by which the decision of the majority is to govern.

In modern times the affairs of men in a civilized community are not only numberless but of different degrees of importance, and, as a consequence, a division of judicial labor is necessary. There must be one set of judges for cases of considerable importance, and another set of judges for cases of lesser importance, the latter being by far the more numerous, and therefore requiring the greatest number of judges. This is in truth the cause of the institution of Superior and County Judges in the mother country and here.

In Upper Canada there is a very accurate division of judicial labor in matters of civil right. There are the County Judges, thirty-one in number, corresponding with the different divisions of the Province,—each judge supreme in his own county. Next there are two Superior Courts of Common Law exercising an original jurisdiction as to claims of a certain amount, and at the same time exercising an appellate jurisdiction from decisions of county judges, by means whereof to secure as far as possible uniformity in the decisions of the later. Then there is the Court of Chancery, in matters of equity exercising an original jurisdiction, and at the same time an appellate jurisdiction from the equity side of County Courts. Lastly there is the Court of Error and Appeal, consisting of the judges of the two Superior Courts of Common Law and the judges of the Court of Chancery,—in all nine judges, having simply an appellate jurisdiction over the courts to which the judges respectively belong.

Accurate as this division of labor undoubtedly is it needs improvement. The two superior courts of common law are of co-ordinate jurisdiction. If each decides without reference to the other there is a danger of conflict of decisions. A conflict of decisions is not seemly and ought to be avoided; besides it is a positive evil, as having a tendency to accumulate law costs to the loss of suitors. So far as the original jurisdiction of the Courts is concerned,

an understanding has been come to which prevents a conflict of decisions. It is usual for counsel in argument before either court to state whether or not the same question is before the other Court, and the usual result is, that the two courts consult and probably pronounce similar judgments. If through counsel or otherwise either court learns that the other has already determined the question raised, it is the practice of the former, to pronounce a *pro forma* judgment in accordance with the decision of the latter court. In this way conflict is avoided, and by an appeal to the Court of Error and Appeal, error, if any, is corrected. So far no difficulty is experienced.

But it is to be remembered that each of the superior courts of common law exercises, besides an original, an appellate jurisdiction. Here it is that a difficulty of some consequence arises. An appeal lies from any of the county courts to one or other of the superior courts of common law, (the party dissatisfied having the choice of courts,) and the decision of the latter is conclusive upon the parties. If the question involved in the appeal is one about which the courts are at conflict, the party dissatisfied chooses the court which is certain to favor his view of the law and to decide accordingly. Thus in fact the party against whom the decision is delivered in the County Court has an immense advantage over the party successful in that court. Neither party cares much which way the county judge decides. Each, hopes that the decision may be against him in order that he may while appealing so direct his appeal that the decision will be reversed without further or other appeal. Under such circumstances the party who fails in the County Court is really the successful party. This, though apparently a paradox in sentiment, is an abomination in practice.

Take an illustration. It is provided by sec. 4 of Consol. Stat. U. C. cap. 45, that "Every sale of goods and chattels not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the goods and chattels sold shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and shall be accompanied by an affidavit of a witness thereto of the due execution thereof, and an affidavit of the bargainee, &c., that the sale is *bona fide*, &c., and such conveyance, &c., shall be registered as hereinafter provided, *within five days from the executing thereof, otherwise* the sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith." The question arises as to the effect of the five days within which the instrument is required to be registered as against a writ of *fieri facias* placed in the Sheriff's hands between the day of execution and the day of registry. The Court of Queen's Bench holds that the instrument must prevail as against the writ, if registered within the five days, (*Feehan* v. *The Bank of Toronto*, 19 U. C. Q. B. 474,) and the Court of Common Pleas in a suit between the very same parties on the very same question, has arrived at a contrary conclusion (*Feehan* v. *The Bank of Toronto*, 10 U. C. C. P. 32). The Judge of the County Court of Elgin, in an elaborate judgment, (*McInnes* v. *Haight*, published in other columns,) coincides with the ruling of the Court of Queen's Bench. The suitor against whom the County Judge rules has it in his power to appeal, and will probably do so, to the Court of Common Pleas, which court will reverse the decision. If the decision of the County Judge had been different the appeal would have been to the Court of Queen's Bench with an opposite result.

In view of such facts as these the practice of law becomes a species of gambling, and the sooner the difficulty suggested is adjusted by the Legislatuse the better for suitors, the better for the profession, and the better for the reputation of our law and its administration.

It may, however, be said, how is it that the two superior courts of common law are at conflict on such a question? Why is it that the one did not deliver a *pro forma* judgment, in accordance with the decision of the other, and leave the parties to their remedy in Error and Appeal? We cannot answer the questions, but do not see that a *pro forma* judgment would have improved the matter, so long as the decision of either of the superior courts is final on an appeal from a County Court. Let us suppose that the Court of Common Pleas had, though differing in opinion from the Court of Queen's Bench, given a *pro forma* judgment, contrary to their own convictions, but in accordance with the Queen's Bench decision, that course would have been, we admit, very proper and very reasonable, but only so long as the unsuccessful party could carry his plaint into the Court of Error and Appeal. It is of little consequence which way a court decides, if the decision is given merely to enable the unsuccessful party to appeal to the highest tribunal in the colony. But the case is very different where one of the co-ordinate courts between which the conflict exists is sitting as a court of appeal from a decision pronounced by a county judge. To ask the court, under these circumstances, to deliver a *pro forma* judgment contrary to their own convictions, which would have the effect of concluding the parties, would be to ask it to perpetrate a legal farce. Hence it was that the Court of Common Pleas during last term, in the case of *Dickson* v. *Pinch*, (reported among the list of judgments elsewhere) laid down the rule, that, where a Court sits in the exercise of an appellate jurisdiction, it will not consider itself bound by the decision of a Court of co-ordinate jurisdiction, but express its own judgment on the question submitted.

This rule is a very proper one under the circumstances, and good so far as it goes, but yet has not the effect of surmounting the difficulty to which in the previous part of this paper we alluded. The parties are concluded by the judgment of the Superior Court. It may be that the leaning of the Courts as on the question of registry of bills of sale, is well known beforehand. The party unsuccessful in the Court below, avails himself of that knowledge to choose his court of appeal, and has his case decided just as he pleases. The triumph in the Court below is converted into signal and inevitable defeat in the Court above, and thus effect is given to a despicable dodge. This is a species of legal jugglery which we desire to see abolished.

It is not for us to suggest the precise remedy. We have exposed the abuse, and must leave the remedy in the hands of those who have the ability to apply it. The nature of it must entirely depend upon the extent to which reform is to be carried. If a re-construction of the appellate jurisdiction of the Courts be intended, the remedy could be applied so as to harmonize with the altered plan and to form a part and parcel of it. If something less be intended, then a simple remedy would be to provide in some form that litigants from a County Court shall not be concluded by the judgment of either of the Superior Courts of Common Law where upon the question involved a conflict of decision between it and the other Court exists, but be at liberty to carry the appeal into the Court of Error and Appeal, and there have it determined. A less expensive and more expeditious proceeding would be in such a case, under given regulations, to allow the parties at once, as if by writ of error, to carry the case direct from the County Court to the Court of Error and Appeal. Either the one or the other would be a decided improvement upon the present anomalous, unsatisfactory, and most pernicious system.

EVIDENCE OF PARTIES TO THE CAUSE.

Justice is usually personified as a blindfolded but amiable looking lady in a sitting posture, holding in one hand a sword and in the other poising scales.

Varied qualities are attributed to her. She is said to be severe, stern, impartial, and merciful; but no one attributes to her the quality of omniscience. While in search of truth she is constrained to make use of witnesses, who, being fallible creatures, are as likely to take advantage of her blindfold state as to direct her in the paths of truth.

Bentham describes witnesses as being the eyes and ears of Justice. As with the natural eye or ear when in a diseased state, it is possible to receive a wrong impression, so with these artificial eyes and ears, it is possible to be deceived.

One object of every judicial investigation is the pursuit of truth. Were all men reliable the pursuit would be in most cases direct and satisfactory. But when we reflect that a man may be mistaken in his narration of what he saw or heard, or owing to interest, or some venal motive, may not choose to narrate what he saw or heard, but the contrary, the pursuit by such means, so far from being direct may be tortuous, and so far from being satisfactory may be impossible.

The tempter is not idle in the affairs of this life. The temptations to deceit and falsehood are many. It is not every man who yields to the temptation, but while conscious that some men do so, it behoves all connected with the administration of justice to be circumspect. Taylor in his work on Evidence well says, that "in judicial investigations the motives to pervert the truth and to perpetuate falsehood and fraud are so multiplied, that if statements were believed in courts of justice with the same undescriminative credulity as in private life, much wrong would be unquestionably done."

Considerations such as these have for a long time operated so powerfully in the administration of British Jurisprudence as entirely to exclude the testimony of particular classes of persons. Rather than allow the evidence to be given and its credibility to be weighed by those whose duty it may be to hear and determine, the legislature preferred to exclude the testimony in *toto*. Of late a different rule has gained strength both in Great Britain and in Canada; the grounds of incompetency are being gradually removed.

From the earliest time the testimony of parties to a cause has been excluded on the ground of interest. Their interest in the result of the cause has been deemed an insuperable bar to the reception of their testimony. Of late years the English legislature has weakened the obstruction by the creation of numerous exceptions to the rule of exclusion, and finally has removed the obstruction itself.

On 22nd August, 1843, the English Act 6 & 7 Vic. cap. 85, was passed. It recited that enquiry after truth in courts of justice was often obstructed by incapacities created by the then existing law, and that it was desirable that full information as to the facts in issue should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony. It then enacted as a general rule, "that *no person* offered as a witness shall hereafter be excluded by reason of incapacity, for crime or interest, from giving evidence." To this Rule an exception was created in these words, "Provided, that this Act shall not render competent any party to any suit, &c., individually named in the Record, or any lessor of the plaintiff, or tenant of premises

sought to be recovered in ejectment, or the landlord or other person in whose right any defendent in replevin may make cognisance, or any person in whose immediate or individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively."

In 1846 the English Legislature while establishing County Courts went still further, by enacting in regard to these Courts, "that on the hearing or trial of any action, or on any other proceeding under this Act, the parties thereto, their wives and all other persons, may be examined either on behalf of the plaintiff or defendant, upon oath or solemn affirmation" (9 & 10 Vic. c. 95).

The experiment of universal competency having been found satisfactory as to County Courts, the English Legislature in 1851, except as to husbands and wives, repealed the Proviso to the Act of 1846, and thus in effect rendered all persons, plaintiffs or defendants, in any court, superior or inferior, in England competent and compellable to give evidence for and against themselves (14 & 15 Vic. cap. 99).

In Upper Canada we followed the footsteps of the English Legislature, but in course of time found it prudent in some measure to retrace our steps.

In 1849 the Canadian Legislature passed an Act (12 Vic. cap. 70), which may be shortly described as a transcript of the English Statute 6 & 7 Vic. cap. 43, containing both the Rule and the exceptions created by that Statute.

In 1851 the Canadian Legislature passed a second Act, in effect the same as the English Act of 14 & 15 Vic. cap. 99, our Act being 14 & 15 Vic. cap. 66; the English Act was passed on 7th August, 1851, and our Act on 30th August, 1851.

The admissibility of parties to a cause to give evidence on their own behalf was not in Upper Canada found to be conducive to the ends of public morality, and the Canadian Legislature at its next session repealed the Act of 14 & 15 Vic. cap. 66, and re-enacted the 12 Vic. cap. 70 (16 Vic. cap. 19). The result is, that our law of evidence is on the same footing as was the English law in 1846. Parties to a cause are not now competent to give evidence on their own behalf, but are compellable to give evidence at the instance of their opponents (Consol. Stat. U. C., chap. 32, ss. 3 & 4).

In the Canadian Act of 1851 a provision was made to the effect, that any party to a suit, &c., might be examined at the instance of the opposite party, provided that a subpœna were served, or at least eight days notice given prior to the time of the examination. It was also provided, that if the party should not attend the non-attendance might be taken as an admission *pro confesso* against him (14 & 14 Vic. cap. 66, s. 2).

The latter provision is still the law, and as we propose to make some practical observations upon it, we publish the clause in words at length :—

"Whenever any party in such proceeding desires to call the opposite party as a witness, he shall either subpœna such party, or give to him or his attorney at least eight days notice of the intention to examine him as a witness in the cause, and if such party does not attend on such notice or subpœna, such non-attendance shall be taken as an admission *pro confesso* against him in any such suit or action, unless otherwise ordered by the Court or Judge in which or before whom such examination is pending, and a general finding or judgment may be had against the party thereon, or the plaintiff may be non-suited, or the proceedings in the action, or such suit may be postponed by the Court or Judge on such terms as the Court or Judge see fit." (Con. Stat. U. C. cap. 32, sec. 15.)

The reading of this enactment suggests the propriety of some remarks on the enactment itself. It provides that a party to a suit may call his opponent as a witness,—it prescribes the means by which that object is to be effected,—it describes the effect of non-attendance,—it raises the question as to relief, if any, from the effect of non-attendance, and suggests an enquiry as to the effect of attendance.

It has been held that the operation of the section is restricted to parties to an action or suit resident within the jurisdiction of the court. (See *Patchin* v. *Davis*, 10 U.C. Q.B. 669; *Tyre* v. *Wilkes*, 18 U.C. Q.B. 46.) Where a party is resident without the jurisdiction, the only course to be taken would seem to be the ordinary one of issuing a commission to examine him. (*Ib.*)

The object of the enactment may be attained by either one of two courses—either to subpœna the party, or to cause a notice to examine to be served at least eight days before the time appointed for the examination. The subpœna must be personally served, but the notice to examine may be either served on the party himself or his attorney. Though the statute is silent on the point, it is only proper that at the time of service, expenses should be tendered. A suitor is under no obligation to be in court when his cause is tried. He may be living at a distance, and may be poor, or infirm, and unable to travel on foot. It is now very much a matter of course for one party to give a notice to the opposite party to attend and be examined, though in many cases, when he attends, he is not put in the box. In cases in which the party who has brought his opponent to court does not call him at the trial, the party attending has no opportunity of exacting his expenses, as he might do if called to the book to be sworn. It should therefore be understood that when the tender of expenses is omitted, the party giving the notice

is not likely to gain any advantage from it if his opponent fail to attend. (Per Robinson, C. J., in *Street* v. *Faulkner*, 15 U.C. Q.B. 116.)

If the party do not attend, the non-attendance does not of necessity entitle his opponent to judgment *pro confesso*. The court or judge before whom the cause is entered for trial, has a discretion in the matter, and may order that the non-attendance shall not have that effect. The statute provides that the non-attendance *shall* be taken as an admission *pro confesso*, &c., *unless* otherwise ordered by the court or judge in which or before whom such examination is pending. The court or judge, under the act, may, instead of allowing judgment *pro confesso*, postpone the proceedings on terms of payment of costs, &c. Unless, however, otherwise ordered, a general finding of judgment may be had against the party absent, or the plaintiff, if the party, may be nonsuited. If no order to the contrary is made, the statute is imperative, as a consequence, that the case shall be taken *pro confesso* against the party failing to attend. It is however no ground for setting aside a verdict for the plaintiff, that he, though notified to attend, failed to do so, where he is not called at the trial, and where the counsel for defendant at the time of the trial is absent. (*Pegg et al.* v. *Plank*, 3 U. C. C. P. 396.) If the party failing to attend be the defendant, and the plaintiff's cause is of a specific determinate character, by the nature of the contract between the parties, and the defendant by his pleading admits the cause of action as stated, and only relies on proving it to be discharged and satisfied, it is not clear that the plaintiff has a right to stop the defendant's counsel from entering into his evidence and endeavoring to prove his plea. It may be asked, *cui bono*, to allow the defendant to go into his evidence, when, after it is concluded, no matter how clear the proof, the plaintiff would be entitled to a verdict *pro confesso*, because the defendant did not appear when called upon by the plaintiff to give evidence on the plaintiff's case in reply. This objection does not appear to be insuperable. The court or judge before whom the cause is tried has a discretion to exercise, and the exercise of that discretion might materially depend on what might, under the circumstances, be proved. (Per Draper, J., in *McGann* v. *Keyes*, 12 U.C. Q.B. 429.)

On general principles, the manner in which discretion is exercised by a judge on whom a discretionary power is imposed, is not subject to revision. The effect is analogous to that which takes place when a party loses costs, unless the judge certify. The statutes there determine the right of the party when the judge declines to certify, and so it may be argued that this statute settles the position of the parties, where the judge has not interposed to relieve against its imperative operation. "The court or judge in which or before whom such examination is pending," evidently means only the court or judge in which or before whom the party would have been examined if he had attended, not the court in which merely the action happens to be pending. This is an important point. It may happen that a party meaning to attend is prevented, from some good cause, which cannot be made to appear, when the suit is called. So it may happen that a party is really ignorant of the notice served on his attorney, and this possibly without any fault of the attorney, who may take the usual and proper means of sending information to his client, which by some accident fails. If the judge, having all the facts before him, takes, as may be afterwards thought, too rigorous a course at the trial, or if he decides quite reasonably upon the facts as they appear before him, but something is afterwards shown which wholly excuses the non-attendance, and would have led to a different course if known at the trial, can the court in *banc* in either case give relief by granting a new trial? The court would certainly pause before giving relief in the first case supposed, even if the power to do so were clear, but might feel compelled to grant a new trial in the second case supposed. (Per Robinson, C. J., in *McGann* v. *Keyes*, 12 U.C. B.B. 429.)

Suppose, however, that the party attends; suppose he is called and sworn as a witness, and examined by his opponent, must his cross-examination be restricted to his examination in chief? The Court of Queen's Bench (Burns, J., *dissentiente*) held the affirmative (see *Lamb* v. *Ward et al.*, 18 U.C. Q.B. 304), and the Court of Common Pleas unanimously held the negative. (*Dickson* v. *Pinch*, H. T. 1861, M. S.) The question is one of the greatest importance, and unless at once settled by legislative declaration must lead to great inconvenience. The conflict of the two courts of co-ordinate jurisdiction enables each judge of either of the courts to follow his own conviction, and leaves judges of county courts to sit in judgment on, instead of following the decisions of the judges of the superior courts. Look at the actual effect of "this glorious uncertainty in the law." During the present spring, the judges of the superior courts are on circuit. A judge of the Queen's Bench is asked, in a Common Pleas cause, to rule that a party called by his opponent is a witness in the cause for all purposes, and declines; the party against whom he rules is certain to obtain a new trial, on the ground of rejection of evidence. So the reverse. A judge of the Common Pleas is asked, in a Queen's Bench cause, to rule that a party called by his opponent cannot be cross-examined except as to the subject matter of his examination in chief, and declines. The party against whom he rules must obtain a new trial, on the ground of rejection of evidence. So as to county judges. A county judge rules with the

decision of the Queen's Bench; the party dissatisfied appeals; has the choice of his court of appeal; appeals to the Common Pleas, who reverse the decision of the judge of the County Court. So if a county judge rules with the Common Pleas, the party dissatisfied appeals to the Queen's Bench, and has the decision reversed. But somebody says, why not carry the question into the Court of Error and Appeal, and have it determined there? This is easier said than done. The two vice-chancellors are known to be of the same opinion as the two senior judges of the Queen's Bench—in all, four. Then there are the three judges of the Common Pleas, and the dissenting judge of the Queen's Bench—in all, four. Hence the probability is strong, that the judges of the Court of Error and Appeal would be equally divided on the question. The fact is that the Legislature, and the Legislature alone must settle this vexed question. It really matters little in which way it is settled, so long as it be settled. It should therefore be settled without loss of time. We hope that some member, with an eye to practical legislation, will not lose the opportunity of enacting a very simple but most urgent piece of legislation.

PAY PROPER POSTAGE.

It is, we presume, known to most of our correspondents, that in Canada, as well as in other countries, the postal department is not only a great convenience to the public, but designed to be a source of revenue to the Government.

It is also, we presume, known that the postage on a letter exceeds that on a newspaper or other printed matter.

It should also be known that to enclose a letter, or to make any written marks to serve the purpose of a letter, in a newspaper, is not only a fraud upon the Government, but a misdemeanor, punishable as such.

These remarks have been caused in consequence of the receipt by us from the Post Office Department, of a notice in the following form:

"Writing having been discovered fraudulently concealed in a newspaper addressed to you, under the within envelope, the Postmaster-General requests that you will be good enough to warn your correspondent to desist from a practice so improper and illegal. An offence of the nature in question is declared by statute to be a misdemeanor, and is punishable as such.

"Post Office Department, Quebec, 21st March, 1861."

We are pained to think that any correspondent fraudulently concealed writing in a newspaper addressed to us, and should most certainly do as the Postmaster-General requests—warn our correspondent "to desist from a practice so improper and illegal"—were it not for one thing, which is, that we know no more of the correspondent than does the Postmaster-General himself.

If we had only *one* correspondent, we admit that the "within envelope" would in all probability have enabled us to "warn" him, &c.; but as our correspondents are many and far between, we must plead our inability to do what is requested of us.

For the information of all concerned (including the unknown one, if this number meets his eye), we publish the clause of the Post Office Act bearing upon the delinquency:

"To enclose a letter or any writing, or to make any written marks to serve the purpose of a letter, or to enclose any other thing in a newspaper posted to pass as a newspaper at the rate of postage applicable to a newspaper (except in the case of the accounts and receipts of newspaper publishers, which are permitted to pass folded within the newspapers sent by them to their subscribers), shall be a misdemeanor."—(Consol. Stat. Can. cap. 31, sec. 55, subsec. 10.)

To mail "a newspaper posted to pass as a newspaper at the rate of postage applicable to a newspaper," is no offence, but, so far as the Government is concerned, a very praiseworthy act, and one which, so far as we are concerned, if pre-paid, may be repeated *ad libitum;* but, in regard to the newspaper, to do any one of the three following things, is an offence within the meaning of the enactment:

1st. To enclose a letter, *or any writing.*

2nd. To make any written marks *to serve the purpose of a letter.*

3rd. To enclose *any other thing.*

The only *exception* is in favor of newspaper publishers, who are allowed to enclose accounts and receipts, which are permitted to pass folded within the newspapers sent by them to their subscribers. It is quite possible that newspaper publishers enclose to their subscribers more accounts than receipts, but that is no affair of the Government; the intention of the Government is good, whether the privilege allowed be used seldom or often.

NEW MAP OF CANADA WEST.

Messrs. Tackabury Brothers & Co., of London, C. W., have in course of preparation a new Map of Upper Canada, showing roads, concessions, lots, location of churches, school-houses, &c. This Map, we are informed, will be constructed upon the most improved principles. It is to be engraved upon copper-plate, and will manifest a very high order of workmanship. It will certainly be one of the most complete things of the kind issued in Canada, and be published at a price so low as to place it within the reach of all. We are told that it will be issued during the present year. We wish the projectors the success which their enterprise deserves.

MR. PATTON'S JURY BILL.

Mr. Patton has again brought up his bill to allow verdicts to be rendered on trial by jury in civil cases, although the jury may not be unanimous. We see the bill has passed the Upper House.

Importunity may do much, as in the case of the widow of old, but we continue to retain our opinion that the change is uncalled for, and unnecessary; and we believe that if every judge and every barrister in Upper Canada could be heard on the subject, not one in fifty would speak in favour of it.

The reason assigned in the preamble, is not correct. It is put with the double negative, that "it not unfrequently happens" that juries are unable to arrive at a unanimous decision. That is, it frequently so happens. We join issue at once with Mr. Patton, and deny the fact; and we should like to know from what source the information is derived. If we are rightly informed, not more than four such cases have occurred in the courts of the county where Mr. Patton has practised, for the last seventeen years.

We trust that the House of Assembly will require proof of the matter of fact stated in the preamble, before adopting the measure. It may find supporters among the Chancery men from Upper Canada, but we cannot think it will be favourably viewed by any member of the Common Law bar.

MR. E. S. WHIPPLE.

We published some time since, a letter from Mr. Whipple, with some remarks which appeared to be called for by the occasion. We have recently received a letter from a correspondent, but not for publication, written "to disabuse our minds with regard to what might be supposed to be a want of candor on the part of Mr. Whipple." Our correspondent gives a full and satisfactory explanation of the circumstances, and adds, "Mr. Whipple is an upright generous-hearted, honourable man, and would not stoop to a low thing. I hope, therefore, you will accept this explanation from me, even at this late period."

In view of the information now given, our readers will see that the remarks made contain no reflection on Mr. Whipple. "The cap does not fit." We willingly recur to the subject to say, we are quite satisfied. Our readers cannot, after this explanation, retain any unfavourable impression in respect to Mr. Whipple.

OFFICIAL SALARIES.

We observe that Mr. McMicken has, during the present session of the Legislature, introduced a bill intituled "An Act to provide for the attachment of official Salaries on execution for debt."

JUDGMENTS.

QUEEN'S BENCH.

Present: ROBINSON, C.J.; MCLEAN, J.; BURNS, J.

March 4, 1861.

Heck v. *Knapp*.—Rule discharged.

McDonell v. *Murphy*.—Rule to enter verdict for defendant discharged.

Rice v. *Wells*.—Rule discharged.

Irvine v. *Nicholson*.—Rule *nisi* discharged.

Robinson v. *Spry*.—Rule discharged.

VanBrocklin v. *Corporation of Town of Brantford*.—Rule discharged. McLean, J., *dissentiente*.

Reed v. *Wedge*.—Rule *nisi* refused.

Executors of Baldwin v. *Foster*.—Rule *nisi* granted.

Corporation of Sullivan v. *Kelly*.—Rule *nisi* granted.

Burwell v. *Port Burwell Harbor Company*.—Rule absolute to enter nonsuit.

Smith v. *Paisley*.—Rule absolute for new trial. Costs to abide the event.

Blenkensee v. *O'Neill*.—Rule absolute for new trial. Costs to abide the event.

Laseau v. *Leonard*.—Rule absolute for new trial, without costs.

Canada Western Assurance Company v. *Jarvis*.—Rule discharged, if plaintiffs consent to accept £6, 5s.; otherwise new trial without costs.

Armstrong v. *Little*.—Rule absolute.

Gleason v. *Ayer et al.*—Rule absolute for new trial, costs to abide the event.

Ashton v. *McMillan*.—Full costs not taxable in actions of replevin, more than in other actions, where verdict within jurisdiction of an inferior court, and no certificate.

Lavoie v. *Treadwell*.—Rule discharged.

Prosser v. *Henderson*.—Rule discharged.

In the matter of the Heirs of Mulholland.—Let the partition be recorded.

McCarty v. *Comisky*.—Rule absolute to set aside judge's order, upon payment of costs.

Pogue v. *Pogue*.—Rule absolute upon payment of costs.

Edison v. *Stevenson*.—Rule discharged.

Harrison v. *Brega*.—Rule discharged.

Kesteven v. *Gooderham et al.*—Rule discharged with costs.

Hayes v. *O'Connor*.—New trial without costs.

The Queen v. *McEvoy*.—Conviction affirmed as a conviction for assault and battery at common law.

Vidal v. *Donald*.—Rule absolute for new trial, costs to abide the event.

In re Robertson and Township of Wellesley.—Rule discharged, with costs.

March 9, 1861.

Mutual Insurance Company v. *Palmer*.—Rule *nisi* refused.

Martin v. *Clark*.—Judgment for plaintiff on demurrer.

Darling v. *McLean*.—Judgment for defendant on demurrer. Postea to defendant.

Fellowes v. *Hunter*.—Judgment for defendant on demurrer.

Drew v. *Finlayson*.—New trial upon payment of costs.

Sherman v. *The Corporation of the United Counties of Stormont, Dundas and Glengary*.—Rule *nisi* to set aside by-law discharged.

Ketchum v. *Smith et al.*—Appeal allowed.

Buck v. *Hunt*.—Appeal dismissed with costs.

Russell v. *Russell*.—Judgment for tenant.

Harvey v. *Jacques*.—Judgment for defendant on demurrer.

Abbott v. *Skinner et al.*—Appeal dismissed.

Eckhardt v. *Raby*.—Rule discharged.

Sutherland v. *McKune*.—Rule discharged.

The Queen v. *The School Trustees of Tyendinaga.*—Attachment ordered against Gillespie, one of trustees; and rule discharged as to remaining trustees upon payment of costs.

Ellis v. *The Ottawa and Prescott Railway Company and Bell.*—Rule absolute to stay all proceedings on the order for commitment, on payment of plaintiff's costs incident to the appointment, but not of application, &c.

The Queen v. *Great Western Railway Company.*—Judgment to abate nuisance and pay a fine of £20.

Scott v. *Carveth.*—Application refused, without costs.

Rutledge v. *Richardson.*—Rule absolute for new trial upon payment of costs.

Torpy v. *The Grand Trunk Railway Company.*—Judgment for plaintiff on demurrer. Rule *nisi* discharged.

Great Western Railway Company v. *The Corporation of the Town of Dundas.*—Rule discharged.

Thomas v. *Wilson et al.*—Rule discharged.

COMMON PLEAS.

Present: Draper, C. J.; Richards, J.; Hagarty, J.

March 4, 1861.

Grant g. t. v. *McFadden.*—Rule discharged.

Wilson v. *West.*—Rule discharged, upon plaintiff amending and paying costs within a month; otherwise new trial without costs.

Harris v. *Jennings.*—Rule absolute on payment of costs.

Lundy v. *Malony.*—Rule discharged.

Hamilton v. *Holcombe.*—Rule absolute.

McKay v. *Tate.*—Rule discharged.

Blevins v. *Madden.*—Rule absolute for defendant on first count; and judgment for plaintiff on demurrer to first and second counts.

Bank v. *Lizars.*—Judgment for plaintiff.

Mitchell v. *City of Toronto.*—Rule discharged with costs.

Barragan v. *Sherwood.*—Rule for new trial without costs.

In re Lount, Registrar.—Rule discharged without costs.

Taylor v. *Lamb.*—Rule discharged.

Lake v. *Biggar.*—Appeal dismissed.

Rathbourn v. *McGreery.*—Appeal allowed. Nonsuit to be entered in court below.

Smith v. *The Corporation of the City of Toronto.*—Judgment for defendants on demurrer.

Richardson and wife v. *Trinder.*—Rule discharged.

Benedict v. *Rutherford.*—Rule absolute for a non-suit.

Fraser v. *Gladstone.*—Rule discharged.

Jaffray v. *Henderson.*—Rule absolute for a new trial. Costs to abide the event.

March 9, 1861.

Hennesey v. *Weir.*—Rule absolute to reduce verdict.

VanEvery v. *Ross.*—Rule for new trial upon payment of costs in four weeks; otherwise discharged.

City of Glasgow Bank v. *Murdock.*—Judgment for plaintiff on demurrer, with leave to apply to amend within a fortnight.

Chisholm v. *Porter.*—Before ships are registered, property may be transferred as in any other chattels. Postea to plaintiff.

Foster v. *Smith.*—Appeal dismissed with costs.

Ross v. *Elliot.*—Appeal dismissed with costs.

McDonald v. *McBeth.*—Appeal dismissed with costs.

Dickson v. *Pinch.*—*Held*, that when a party to a suit is called as a witness by his opponent, he stands on the same footing as any other witness, and that his cross-examination is not to be restricted to matters as to which he was examined in chief. *Held*, also, that where a court sits in the exercise of an appellate jurisdiction, it will not consider itself bound by the decision of a court of co-ordinate jurisdiction, but express its own judgment on the question submitted.

Doane v. *Warren.*—Stands.

INAUGURAL LECTURE,

Delivered at the University of Queen's College, Kingston, C. W., on February 4, 1861, at the Inauguration of the Faculty of Law.

BY W. G. DRAPER, ESQ., M. A.

(*Continued from page 61.*)

The Legislature having now created a Court, next deemed it necessary to create Lawyers to practise in it, and accordingly passed an Act on the same day authorising the Governor to grant Licenses under his hand and seal to such and so many of his Majesty's liege subjects, not exceeding sixteen in number, as he should deem from their probity, education and condition in life, best qualified to act as Advocates and Attorneys.

The Lawyers however, did not increase in proportion as the litigation did, and this is not to be wondered at since there was not the slightest facility for the study of the Law. Consequently it became necessary in March 1803, for Parliament to authorize the Governor to create a fresh batch, and he accordingly was authorized to license six other persons to practise the profession of the Law, that is to say, six other individuals of the community who from their known integrity and standing, might safely be entrusted with the ticklish task of purveying Law for the million.

This was done solely in consequence of the great dearth of Lawyers who were only increased in number by this means to twenty-two—bearing to the population which then numbered 40,000 about the same relation as Falstaff's penny-worth of bread did to his monstrous quantity of sack. These men were the germ of the legal profession in Canada, and left behind them descendants who followed it up with signal ability and distinction. I have but to mention the names of a few such as McDonnell, Robinson, Hagerman, Sherwood, Powell, and Baldwin, to verify my remarks.

It was in the month of November of this same year (1803) that a direful accident occurred on Lake Ontario, by which Mr. Justice Cochrane, Solicitor General De Grey, and several members of the Bar, perished. They embarked on board the Government Schooner *Speedy*, Paxton, Master, and were all lost in a storm on their way from York to Presqu'ile. This further increased the scarcity of members of the profession; nor was this got over for several years afterwards.

Indeed it was not until the year 1815, that the Bar of Upper Canada obtained any real acquisition in the shape of Lawyers; but from that date it may be said to have increased in numbers and ability. In that year alone there were admitted to the Bar four gentlemen who all distinguished themselves in the profession and rose to eminence. They were Sir John Robinson, Mr. Justice McLean, Mr. Justice Jones and Mr. Justice Hagerman.

The war of 1812 retarded the progress of the profession, as it did that of everything else, and I believe all the above named gentlemen, as well as others who subsequently achieved eminence in our profession, threw aside the gown for the sword, and distinguished themselves as much in the profession of Arms as that of Law. Amongst them was the late lamented Chief Justice Sir James Macaulay.

In those days people in Canada laboured under what would be now esteemed terrible privations. There were no Railroads, no Telegraphs, scarcely means of public communication, no public Colleges, no Universities, and but few Schools, no means of obtaining a liberal education such as Canada is blessed with at the present day, communication with England, or the old country, as it was and is still fondly called, was scanty and uncertain. There were no public libraries in the country, at which the earnest aspirant after legal knowledge might slake his thirst, and it could only have been by the exercise of indomitable perseverance and application that the men above mentioned ever succeeded in attaining their rank—but then *there were giants in those days.*

As an instance of the difficulties in the way of obtaining legal education, it may not be out of place here to mention that my own father, the present Chief Justice of the Court of Common Pleas, when a student, had to walk ten miles of a morning to his office, and ten miles home again at night; and for the first two years of his apprenticeship, the only works he could obtain to study were a few musty volumes of Reports, and a volume or two on Practice, but not a single Text-book. This was in 1822, and it was not until this year that the Law Society, although duly authorized in 1797, became incorporated; since which period it has gone on steadily increasing in wealth and numbers—and some idea of the progress made by the Society since that time, may be gathered from the facts that it posesses one of the handsomest buildings in Upper Canada—perhaps I might say in America—in which the highest Courts of the land hold their Sittings, that it posesses the finest library in Canada, and that the number of its members exclusive of Students, amounts to nearly 400.

Our country during the last half century has undoubtedly made vast strides forward in the march of civilization, and it may be safely asserted that the profession of the Law has kept pace with the requirements of the age.

Our Judges would be an ornament to the profession wherever their lot might be cast, whether we regard them as belonging to the superior Courts of Common Law and Chancery or to the local County Courts. They need no eulogium at my hands,—their works speak for themselves. Indeed, in this country, an incompetent Judge could not stand before the array of the Bar and the exposure and denunciation of a free and powerful Press.

As for the members of the profession themselves, stimulated by such laudable examples as the Bench affords and the ample rewards in store for them, whether in the shape of emolument or places which alone can be filled by professional men, and spurred on by that generous spirit of emulation to excel in all that is good and honorable, they hold as high and creditable a position in the land as their brethren in England and America, or as the members of any other profession in this country.

Our system of Jurisprudence has within the last few years undergone some great and beneficial changes. Amongst the great reforms which have been effected, not the least is that accomplished by the Common Law Procedure Act, 1856, and the subsequent amendments thereto; the increased Jurisdiction of our County Courts, and the re-modelling of our Municipal, Jury and Assessment Laws.

The actions of Ejectment, Dower and Replevin have also been greatly improved. The passing of the Ejectment Law, however, was the melancholy cause of putting an end to the career of two eminent legal characters and cast a deep gloom over the minds of many old practitioners. I allude to the demise of those two most respectably litigious characters, Messrs. John Doe and Richard Roe, whose apochryphal existence was by this means ruthlessly terminated.

The only Law which has been varied for the worse, *me judice*, during the last few years is the Law of Primogeniture, by which the lands of a man instead of descending at his death to his eldest son are now equally divided amongst all his children—and I greatly fear that, unless altered, future generations will have reason to curse the name of the man who took it into his head to tinker this old settled system. A more fruitful source of litigation can scarcely be conceived.

The Common Law Procedure Act of 1856, has also effected great reforms in the way of reducing redundant pleadings, in affording speedier remedies on Notes and Bills of Exchange, in enabling parties to come before the Court with special cases without pleadings, in granting the power of Injunctions to the Superior Court, and divers other matters too numerous to mention. Indeed were I to diverge into this well beaten track, there is no knowing where I should end, so I'll turn back.

Having now cursorily discussed these various topics, let me recur to the last point of my lecture, viz., The Study of the Law, to which, in a degree, all these prior remarks have been tending.

In former years admission to the profession was gained with but little difficulty. The examinations were conducted in a loose, careless way, by the Benchers. Occasionally they were very strict, but more frequently the reverse. It is quite different now and no child's play. The enormous number of applicants has compelled great caution to be exercised in admitting Students to the Society and still more in admitting them to practise. Instead of leaving the matter of examination in the hands of the Benchers themselves, there are now Examiners who look strictly after the Student's qualifications, both on entering the study of the profession, and on entering the profession itself.

The practice of the profession was formerly carried on in a lax manner, whilst now, from the increased number of practitioners, increased strictness in practice is required.

This strictness on the part of the Law Society in admitting them, and of the Profession in their daily practice, must necessarily entail increased exertion on the part of the Student.

The benefit however corresponds to the exertion. There is no profession in this country which offers so many brilliant prizes,—if I may so term them,—for free and fair competition as that of the Law. For instance there are three Judgeships in the Queen's Bench, three Chancery Judgeships and three in the Common Pleas. There are thirty-one County Court Judgeships and as many County Attorneyships. There are four offices of Recorder, several Deputy Judgeships, besides the offices of Clerk of the peace, all of these with handsome salaries, and all must be filled by Lawyers.

Let the Student commencing to learn his Profession, and gazing upon this list of prizes, reflect strongly on the only mode by which they are attainable—industry and application.

The studies by which a man may gain the summit of legal excellence are infinitely varied. There is scarcely a subject in the world, however rare or extraordinary, which may not become matter of investigation before a Court of Law. A Lawyer ought therefore, besides being well versed in the principles and practice of his Profession, to be well read on all subjects; for it is impossible to say when his knowledge on some out of the way point may not be called for and useful.

Industry and application I need scarcely repeat, are among the chief qualities. If the Student cannot bring his mind down to habits of patient labour, he will never succeed at the Law. "To attain eminence in the Law," says Mr. Raithby, "is to achieve great honor, but the labour is proportionate."

The facilities too which are now-a-days afforded to Law Students ought to stimulate them to far greater exertions in preparing for their Profession. As I said before, fifty or sixty years ago there was scarcely a Law-book in this country. Compare that with the advantages possessed by the Student of to-day, who has all the means and appliances to boot, for perfecting himself in his studies.

Let the Student again reflect on the industry and application of the Lawyers of former days and the high and honorable position which some of them now occupy, and here is an additional incentive to exertion.

There is one qualification for the practice of Law as a Barrister which I must allude to before concluding. It is readiness,—the ability to encounter difficulty with quickness and generalship. This is a great test of fitness. An incompetent person is quickly detected, and is, as a matter of course, immediately deserted even by his most zealous friends. The Bar is a field of intense rivalry, of eagar contest for distinction. Whoever adopts it for his profession must take for his motto "*Proprio Marte*," and must rely entirely on his own mental exertions from the moment of starting till he reaches the goal.

"If you give way
Or edge aside from the direct forthright,
Like to an entered tide they all rush by
And leave you hindmost."

Patrons are of little value to a Lawyer. No Judge or friend can push him up beyond a certain point. He may rise like a rocket, but will fall like a stick, unless supported by his own inherent powers.

And now, in the words of the celebrated Sir Edward Coke, in his Commentary on Littleton, I will say, "And for a farewell to our Jurisprudent, I wish him the gladsome light of Jurisprudence, the lovelinesse of Temperance, the stabilitie of Fortitude, and the soliditie of Justice."

THE HABEAS CORPUS IN ANDERSON'S CASE.

(From the *Law Times*.)

Pending the return to the writ of *habeas corpus*, which the Court of Queen's Bench in this country has sent out to the Governor of Canada and sheriff of Toronto, commanding them to bring up the body of John Anderson, together with the cause of his detention, we may conveniently consider many of the topics which must inevitably be discussed when the return is made to the court. And as in some cases—for instance *Dodd's* case—the court has held that such writs have been issued improvidentially, we may consider both whether the court was bound to issue the writ, and also whether it was in accordance with the usual practice.

Now there is a very common, but very unfounded notion, that a British subject, when imprisoned, is entitled to his *Habeas Corpus* as of right. Such is not the case. In 3 Black. Com. p. 132. 21st edit. 1844, it is stated that such writs "do not issue as of course, without showing some probable cause why the extraordinary power of the Crown is called in to the party's assistance. For, as was argued by Lord Chief Justice Vaughan, it is granted on motion because it cannot be had of course; and there is, therefore, no necessity to grant it; for the court ought to be satisfied that the party hath a probable cause to be delivered. And this seems the more reasonable, because, when once granted, the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner." In accordance with these principles, the 56 Geo. III c. 100, enacts that a judge of any of the courts, "if it shall appear by affidavit or affirmation (when allowed by law) that there is a *probable* or *reasonable* cause, shall award a writ of *habeas corpus* in vacation returnable immediately before himself or any other judge of the same court." In all the cases which were cited in *ex parte Anderson*, 3 L. T. Rep. N. S. 622, the affidavits were full, and on the face containing *primâ facie* cases of unlawful imprisonment. In the affidavits on which the Court of Queen's Bench granted a peremptory writ for a *habeas corpus* in Anderson's case, a secretary of the Anti-Slavery Society, who must have been fully cognisant of the omitted fact that Anderson was imprisoned under a deliberate judgment of the Canadian Supreme Court, swore that he believed that Anderson was "illegally detained in Gaol at Toronto, not for any offence recognised by the laws in the said province, and that he believed his life to be in danger." On this meagre and general, as well as incorrect, statement of facts the Court of Queen's Bench have granted the writ. Yet, in point of fact, Anderson then was lawfully imprisoned according to the laws of Canada, as expounded in the Supreme Court of Canada. The deponent denied, and the English Court of Queen's Bench ignored that law.

This consideration becomes the more important when we refer to the statutes which embody the Ashburton Treaty. From the wording of them it would seem that the Home Legislature had conceded absolutely and distinctly to the Canadian local Legislature, and consequently to its executive the Canadian courts of law, the chief, if not the exclusive right, to deal with all extradition questions between the colony and the United States.

For the 6 & 7 Vict. c. 76, s. 5, authorises the local Legislature of any colony to substitute, with the consent of her Majesty and Privy Council, other enactments for carrying the Ashburton Treaty into complete effect in such colony. Accordingly, by 22 Vict. c. 89, of the Consolidated Statutes of Canada, p. 943, after reciting the expediency of making such further statutory provisions in order to carry the treaty into complete effect in Canada, it is enacted by sect. 1, that "upon complaint made under oath or affirmation, charging any person found in the limits of the province with having committed within the jurisdiction of the United States of America, or of *any of such States*, any of the crimes enumerated or provided for by the said treaty," such person may be apprehended and "brought before such judge or such justice of the peace, to the end that the *evidence* of criminality may be heard and considered; and if on such hearing the evidence be *deemed sufficient* to sustain the charge *according to the laws of this province* if the offence alleged had been committed therein, he shall certify the same, together with a copy of all the testimony taken before him, to the governor, that a warrant may issue upon the requisition of the proper authorities of the said United States, or of *any of such States* for the surrender of such person according to the stipulation of the said treaty; and the said judge shall issue his warrant for the commitment of the person so charged to the proper gaol, *there to remain* until such surrender be made, or *until such person be discharged according to law*." So by 22 Vict. c. 86, of Consolidated Statutes, it is enacted that "in case murder be charged to have been commited within a foreign country by a person who has sought refuge in Upper Canada, and in case a requisition for the surrender of such person be made by the Government of such country . . then upon such evidence of criminality as would warrant his apprehension and commitment for trial had the offence been committed in Upper Canada, the Governor may in his discretion, by and with the advice of the Executive Council, deliver up such person to justice and direct his transmission to the custody of such foreign Government: (3 Will. 4, c. 6, s. 1.) Sect. 3 reaffirms the discretion of the governor in such cases, and enables him not to deliver up the person charged if for any reason he think it expedient.

It is certainly remarkable that this latter clause, which is copied from the 3 & 4 Will. 4, c. 61, which was passed before the Ashburton Treaty was made, has been retained in the Consolidated Statutes; and it may perhaps assist diplomacy in extricating itself from the necessity of giving up Anderson. But the point on which we are now dwelling is the proposition that the foregoing statutes contemplate a diversity between English and Canadian law in the italicised words above; and this view is confirmed by the 6 & 7 Vict. c. 76, s. 1, which directs the extradition of criminals "upon such evidence of criminality as *according to the law of that part of her Majesty's dominions* would justify his apprehension and committal for trial." Now, the Canadian law, we repeat, as it stands, and must stand until duly reversed by a proper court of appeal or legislature, has declared that Anderson, in killing Digges while resisting his apprehension, which was lawful according to the law of Missouri, has committed murder under the treaty, according to the laws of Canada. If this be so, can it be contended that his extradition is not within the spirit and letter of the treaty, according to the letter of our own statutes and the judicial interpretation of the law?

At least enough appears, or ought to have appeared on the affidavits which it might be thought would have induced the court to follow the precedent of *Crawford's* case, in which the court only granted a summons in the first instance, calling on the Governor of the Isle of Man to show cause why a writ of *habeas corpus* should not issue.

Secondly, assuming the sufficiency of the affidavits, let us proceed to the principal question which must be argued when the writ is returned. Does the writ of *habeas corpus* run to the colonies? The Court of Queen's Bench, chiefly as it seems on the authorities which were cited to them on the *ex parte* application, have decided that it does so run. Undoubtedly it is

laid down in Bacon's Abridgment that "the writ lies by common law to any part of the King's dominions." In *Cowles'* case, 2 Burr. Rep. 834, Lord Mansfield said: "There is no doubt of the power of this court to issue the writ when the place is under the subjection of the Crown of England. *The only question is as to the propriety.* We cannot send a *habeas corpus* to Scotland or to the Electorate; but to Ireland, the Isle of Man, the Plantations, to Guernsey and Jersey we may: and formerly it lay to Calais." With the exception of Calais (as to which there are two ancient instances of the writ issuing there), there appears to be no authority for these *dicta*. No case was cited in *Ex parte Anderson* in which the writ has issued to Ireland; but until *Reg.* v. *Crawford*, 13 Q. B. 613, it was uncertain whether the writ runs to the Isle of Man.

In *Reg.* v. *Crawford*, a *habeas corpus* had been issued to the Isle of Man to bring up the body of a prisoner, who, as it appeared subsequently on affidavits, had been imprisoned for an alleged contempt of court in publishing a libellous commentary on the proceedings of the Court of Chancery in the island. It is remarkable, as has been said, that in this case a summons was issued in the first instance by a judge at chambers calling on the lieutenant-governor to show cause why the writ should not issue. Subsequently the writ issued, owing to the unavoidable omission of the governor, on account of the state of the weather, to shew cause within the prescribed time. In the mean time the prisoner was discharged; but cause was afterwards shown, and the judges held, but not distinctly nor without hesitation, that the writ ran to the island, at least since the incorporation of it with the King's dominions by 5 Geo. III., c. 26; but they held that the writ ought not to issue, as the commitment seemed to be good according to the law of the Isle of Man: "And we know that the law of the Isle of Man is not the law of England, but differs from it in some respect. We must leave this to the local law, as we did in *Carus Wilson's* case and *Brenan's* case. We cannot disturb what has been done in conformity with the law of the island. *We are not a court of appeal. Before this writ goes, we must see that the commitment is bad;* and I cannot come to the conclusion that it is contrary to the law of the place;" (per Patteson J.) The writ was then refused.

In *Carus Wilson's* case, 7 Q. B. 984, it was held that the writ of *habeas corpus* ran to Jersey. But the writ is expressly extended to Jersey by the Habeas Corpus Act, 31 Car. 2, c. 2, s. 8; and also by the 56 Geo. III., c. 100, s. 3, to the Isle of Man.

Two other cases were cited by counsel for the applicants, and relied on by the court in granting the writ. The first was *Ex parte Lees*, E. B. & B. 828, which was an application for a *certiorari* to bring up a record of a conviction alleged to be erroneous, of a prisoner in the Supreme Court of St. Helena; or for a *habeas corpus* to bring up the body of a prisoner. The Court refused both applications, and apparently on identical princ ples, which were thus stated by Lord Campbell, C. J. in exipress reference to the *certiorari:* "Some old precedents of writs, issued out of the court to the French dominions of our early English sovereigns, were cited to show that such writs might lawfully issue. No precedents, however, of any such proceeding with respect to a dependency like St. Helena, for several centuries, were brought before us. And it was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus*, could be enforced in such dependencies." Later in the same judgment his Lordship said, "Even supposing a writ of *habeas corpus* could run to St. Helena," it ought not to be granted in this particular case.

In *Dodd's* case, 2 De G. & Jones, 510, the application for the *habeas corpus* was on behalf of a prisoner who was alleged, in a very full affidavit, to have been imprisoned unlawfully for serving process under the English Common Law Procedure Act. There was a similar application on behalf of a prisoner who appeared to have been detained not only for the above cause, but also for debts under orders purporting to be made by the Royal Court of Jersey, and which orders were said to be irregular. In both cases the writs were issued; but in the latter case the Lord Chancellor held that the writ ought not to have been issued, and said that he would not have granted it *if he had looked at the affidavits more carefully.* His Lordship also quoted with approbation Lord Denman's dictumin *Carus Wilson's* case, that "a court within the Queen's dominions, exercising public authority, must be taken to be competent to judge of its own law."

It would seem that these authorities do not bear out very strongly the law as laid down by the Court of Queen's Bench in England in Anderson's case, when the Court said that "We have the practical exercise of this prerogative from the earliest down to modern times, and that the most remarkable cases are those where the writ was issued to the Isle of Man, of Jersey and St. Helena." Jersey and the Isle of Man are statutory exceptions. The St. Helena case is rather an authority that the writ will not issue to a foreign settlement. The old precedents of the writs to Calais are disposed of by Lord Campbell's observations in the St. Helena case.

Apart, therefore, from the *ex parte* judgment of the court in Anderson's case, it may be considered to be still doubtful whether the writ of *habeas corpus* runs to the colonies. It is plain that the Habeas Corpus Act never contemplated the writs issued at Westminster as extending to the colonies or Plantations; not only because they are not mentioned, while Jersey and Guernsey are expressly mentioned, but from the fact that the writ is made returnable in all cases within twenty days to the courts at Westminster. But it may be said that these courts have jurisdiction at common law over the colonies. But it is laid down by Blackstone, in reference to the American Plantations or colonies, that "the common law as such has no allowance or authority therein, they being no part of the mother country, but distinct, though dependent, dominions:" (1 Bl. Com. 109.) It is also difficult to avoid the force of the judgment of Lord Mansfield in *Campbell* v. *Hall*, Cowp. 204, where it was held that when the King had promised a colony a local Legislature he had thereby abandoned his prerogative of legislating for the colony. As to the laws of such colonies, Blackstone also says (1 Bl. Com. 109) what English laws "shall be admitted and what rejected, at what times and under what restrictions must in case of dispute be decided in the first instance by their own provincial judicature, subject to the power and control of the King in Council."

Thirdly, this last consideration suggests an important topic in this case—What is the right of appeal, if any, from colonial judgments to English Courts? For, if the law of the Canadian Courts be wrong, or even questionable, and if there be a proper court of appeal from those courts, it is clear that to such court only ought an appeal to be brought, and by such only ought an appeal to be entertained. Is the English Court of Queen's Bench, or any other of the Superior English Courts, such a court of appeal? Certainly not: for it is the first principle of colonial law that only to the Queen in Council does an appeal lie from a colonial court. It is laid down broadly by Serjeant Stephen (1 Steph. Com. p. 103, 2nd edit.), that "an appeal is universally allowed from the decision of colonial judges to the Sovereign in council." But this proposition is too large; for most colonial Legislatures have been invested with, or have assumed, the right to limit such appeals. Thus in civil cases the Canadian Legislature, acting in pursuance of their power, under 31 Geo. III., ch. 31, have enacted that no appeal shall lie to the Privy Council in which the sum in dispute shall not exceed 500*l*: (7 Vic., ch. 18, sec. 36). In felonies and criminal cases generally it seems that no appeal lies to the Privy Council except by leave obtained from the court below; for it has been decided that when the Crown grants a charter of justice by virtue of an Act of Parliament, it does not reserve its power of receiving an appeal in case of felony, except upon leave obtained from the court below: (see cases cited in Macpherson's Practice of the Privy Council, pp.

3 and 4). It has even been said by a high authority (Dr. Lushington) that "not only in England, but throughout the dominions of the Crown of England governed by the law of England, no right of appeal in felonies ever existed. Nor are we aware that in any one single instance the Crown has ever, by the exercise of its prerogative, granted leave to appeal in any such case:" (*Reg.* v. *Eduljee* and *Byramjee*, 5 Moo. P. C. 272; Macph. Priv. Counc. p. 4.) However this may be, it is understood that the Canadian courts have refused an appeal in Anderson's case, as it seems they have an undoubted right to do.

Fourthly, it seems, therefore, that not even the Privy Council in this country—still less any inferior court—has the right to entertain an appeal in criminal cases from the judgment of the colonial courts. If, therefore, the English Court of Queen's Bench has assumed such an authority, it seems to have clearly exceeded its jurisdiction. Are the proceedings in the *ex parte* form of Anderson's case virtually those of an appellate court overruling the judgment of an inferior court? We submit that they are of this character. Ambiguous, evasive and obscure as were the affidavits; doubtful, as perhaps it may be, whether the English Court was bound to take judicial notice of the proceedings and law of the Canadian court—it cannot be doubted that all the facts were fully in the minds of the judges; and it may be thought that in a less momentous national question—involving perhaps a horrible question of life and death—they would have yielded to a technical and even substantial objections to the affidavits. They knew that Anderson stood committed to take his trial in his own country for murder, according to international treaty, as construed by Canadian Law: therefore that he was lawfully in prison according to Canadian law. Could they, therefore, hold that a *primâ facie* case of unlawful imprisonment had been established, without virtually overruling that law? But if our premises hold, it was not competent to the English court even to question that law. The only pretence for bringing up Anderson in the case would be for the purpose of bailing him. But murder is not a bailable crime. Surely also a criminal, duly committed on so grave a charge by a proper tribunal, can hardly be admitted to even a temporary release by a court of concurrent jurisdiction, without a grave imputation on the committing tribunal; and it may be doubted whether, in the annals of England—even in the days of despotism—a case can be cited of such an interference of a Superior Court of concurrent jurisdiction with the act of a court of equal dignity. What would the Court of Queen's Bench in England say if the Exchequer, or the Court of Common Bench, interfered by *habeas corpus* to release a prisoner whom the former court had declared to be lawfully committed; or if the Court of Queen's Bench in Canada assumed a similiar jurisdiction over the committals of either of the Superior Courts in England? When the right to interfere is so doubtful—and when the integrity and ability of the tribunal are unimpeachable, the case seems to fall within many which might be cited in which the court of concurrent jurisdiction has refused to act.

Lastly, we cannot leave this subject—nearly inexhaustable as it is—without saying a few words on the main question, whether Anderson has committed murder within the terms of the Ashburton Treaty. Undoubtedly, there is plausable reason for contending, on its literal constructing that he has not committed murder. The treaty and the statutes—English and Canadian, which embody it—agree in the express declaration that the criminal is to be given up only if he be charged "upon such *evidence* as according to the law of that part of her Majesty's dominions would justify his apprehension and committal for trial . . . . If the crime had been there committed." These words, if read apart from legal canons, and by the light only of interlocutory remarks in the English Parliament before the Ashburton Treaty was accepted, seem to indicate—at least to the unlegal mind—that if the charge do not amount to the crime named in the country where the prisoner is apprehended, he cannot be legally committed for trial or given up. On the other hand, it is a first principle of English, and we believe also of American law, that the *lex loci contractus celebrati*—the law of the country where the contract was made—governs the substantial construction of the contract; the *litis ordinatio*, the mode of the procedure, depends on the law of the *forum* or country where the contract has to be fulfilled. Where is an international contract such as a treaty to be considered as made? Must it not be held to be offered and accepted in the countries of each contracting party? and, if so, is not each who seeks to enforce it, on an alleged breach, entitled to claim the benefit of the *lex loci contractus celebrati*, and so to claim that disputed words shall be construed accordingly? Again, it is laid down that the two rules of most general application in construing a written instrument, are, "first, that it shall, if possible, be so interpreted *ut res magis valeat quam pereat;* and secondly, that such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties. . . . . The construction must be such as will preserve rather than destroy; it must be reasonable and agreeable to common understanding; it must also be favourable and as near the mind and apparent intents of the parties as the rules of law will admit; and, as observed by Lord Hale, the judges ought to be curious and subtle to invent reasons and means to make acts effectual, according to the just intent of the parties. They will not cavil therefore about the propriety of words when the intent of the parties appears; but will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words:" (Broom's Legal maxims, 481, 482.)

Was it rather the intent of the parties to the treaty that each should give up to the other country only such criminals as to the restoring country should hold to be such; or such as were criminals according to the laws of the demandant country? If the former be the true construction, then either country can free itself from its obligations by daily changes in its penal code.

That construction of treaties must prevail which gives effect to the whole instrument, in preference to that which renders any part of it inoperative; (Wildman's Institutes, 180, vol. 1.) If the term murder be construed according to Canadian—or rather hypothetical English—law, it becomes partly inoperative as to the United States.

"Good faith clings to the spirit, and fraud to the letter of the convention; *in fraudem vero legis agit qui, salvis verbis legis, sententiam ejus circumvenit:*" (2 Phillimore International Law, 97.) "When the object of the agreement is universally to include everything of a given nature, and general description will comprise all particular articles, although they may not have been in the knowledge of the parties: (Ib. 98.)

Does not the larger definition of murder, according to the United States law, afford the canon of construction under this rule, rather than the restricted signification of the word in the English law?

The American view on the subject of ambiguities in treaties, has been well expressed by Judge Chace, whose opinion seems to have been adopted by Dr. Phillimore: "The universality of terms is equal to an express specification on the treaty, and indeed includes it. For it is a fair and conclusive reasoning that if any class of cases were intended to be exempted, it would have been specified. The indefinite and sweeping words made use of by the parties exclude the idea of any class of cases having been intended to be excepted, and explode the doctrine of constructive discrimination:" (2 Phillimore 108.)

Such are some of the objections which will have to be met, if the Ashburton Treaty is to be interpreted solely by English technology and law, rather than by American law. Whatever may be the result, it is to be hoped that no fear of public opinion will make our judges shrink from their only function as pronouncers, and not makers, of the law. If America be

entitled to her pound of human flesh, let her have it, and the execration of the civilised world at the same time, if it be so nominated in the bond. But let it not be said (even by slave-holders) that there are English statesmen of English judges,

Who palter with them in a double sense:
And keep the word of promise to the ear,
But break it to the hope.

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 62.)

CHAPTER II.

Of the Division Courts from their Institution to the Consolidation of the Public General Statutes, A. D., 1841 *to* 1859.

The Provinces of Upper Canada and Lower Canada having been united by an act of the Imperial Parliament, "the Province of Canada" was proclaimed upon and from the 10th of February, 1841. In the month of June in the same year, the Provincial Parliament assembled, and at an early period in the session, Mr. Attorney-General Draper, (now Chief Justice of the Common Pleas) introduced a bill to repeal "the laws in force in Upper Canada for the recovery of small debts, and to make other provision therefor." It was based on the recommendation in the report before spoken of, and with some trifling exceptions became law, the 4th & 5th Vic., cap. 53.

By this statute Courts of Request were abolished, and Division Courts established in their stead. Six divisions were to be laid out in each district by the magistrates in sessions; every division to constitute a court, with resident clerk and bailiff; periodical sittings to be held in each, and jurisdiction as to amount fixed at ten pounds.

So far the reformed system of local courts resembled the original; the added provisions, numerous and comprehensive, were in their details admirably adapted to the business transactions, and to the actual condition of things in the country. A particular examination here of the new provisions would be out of place, for the whole substance of the statute being embodied in the existing law, these provisions must be discussed at length under the several heads to which they relate, we may however, indicate the leading features in the act.

The courts were in each district to be presided over by a resident judge, a barrister of a certain standing, who as sole judge was empowered to decide the cases coming before him in a summary manner, and in the event of illness or absence could depute a barrister to act for him. When the sum claimed exceeded £2 10s., a jury could be called, at the instance of either party, to try the case, and the verdict of a majority was received.

The jurisdiction as to subject matter, and to parties, was enlarged. Clerks were to be paid by salary, the fees on proceedings being funded to meet the expenses of the courts, and if these proved insufficient the difference was to become chargeable on the Consolidated Revenue Fund of the Province. Every district judge was empowered to make rules for regulating the practice in his own courts, and a summary remedy was given against officers guilty of extortion or misconduct.

Thus "the old and valued principle of bringing justice home to every man's door," enunciated in the first page of our legal history was re-affirmed, and courts which with all their defects and abuses half a century's trial confirmed the necessity for, were continued, but placed on a sounder basis, and re-modeled to suit the requirements of the country.* And looking at the act (4 & 5 Vic., chap. 53) in the light of twenty years' experience, on two points only can substantial exception be taken to the enactment, viz., the majority verdict and the independent rule-making power, instead of one set of rules for the whole of Upper Canada† while at least one most valuable principle in the law, payment of clerks by salary, has been abandoned, contrary it is believed, to the interest of suitors and the general good.‡

The statute 4 & 5 Vic., chap. 53, was limited to four years; when this period drew to a close, the new tribunals working satisfactorily, there was no disposition to return to the old order of things, and by the 8th Vic., chap. 37, the Division Court law was made perpetual.

By this last act some changes were also made, the number of courts was limited to not less than three nor more than nine in each district; payment by fees was substituted for salary in the mode of remunerating clerks, and

* A similar system of local courts was established in England in 1846, just *five years after it was introduced in Upper Canada.*

† Both of these provisions were amended by the Legislature. With respect to rules it was probably considered that all the district judges would by common consent agree on one set, but that was not done, and although at a subsequent period the rules for one of the Counties, which had been approved of by all the judges of the superior courts, were at their instance, printed by order of the government, and the concurrence of all the county judges sought therein, all did not concur, and the evil of variations in the practice if mitigated was not quite got rid of till the year 1854, when a uniform practice was applied to the whole of Upper Canada, under the rules framed by a Board of county judges, appointed for the purpose.

‡ The injurious consequences of the fee system, the corruption and vexations attendant upon it, has been a matter of complaint from the earliest times. The payment of clerks of courts by salary, instead of fees, long since recommended by the English common law commissioners, is now universal throughout England. It was felt that fees was a bad mode of remuneration, the system giving a strong interest to the fee-gatherer in litigation—in the number and protraction of suits. And moreover that the general funds of the country ought to bear a large share of the expenses in the establishment of courts; and it seems obvious enough, that as the machinery of justice must at all events be kept up, to make such courts self-supporting, is to levy an income on the necessities of the humbler suitors. tors. The *Law Journal* of Dec., 1859, thus refers to the subject, "The fee system as applied to services by clerks of courts, is not without strong objections, and the plan of payment by salary instead of fees is certainly sounder in principle, for the general funds of the country ought to bear all the expenses of the establishment of courts of justice. Then why should a person seeking his rights be charged in his individual capacity when all the requisite legal machinery is in existence, and his claim creates no fresh public expense?"

unanimity was made necessary in the verdict of a jury. A few years afterwards the courts were enabled by statute to attach the personal property of absconding, removing, or concealed debtors, to answer claims to ten pounds against them; executors and administrators were specially authorised to sue, and rendered liable to suits upon causes of action within the jurisdiction (12 Vic. chap. 19) and this and the previous statute contained several provisions relative to procedure.

A measure was introduced by the Hon. J. S. Macdonald, in 1850, which resulted in the act 13 & 14 Vic. cap. 53. It consolidated the three statutes in force regulating the courts, and gave them new and greatly enlarged powers. These were, chiefly, an increased general jurisdiction to twenty-five pounds upon contracts, and ten pounds "in tort to personal chattels," a summary power to adjudicate upon claims made by third parties on property seized under process of the courts, an authority to examine judgment debtors with a view to the enforcement of such satisfaction as the debtor was enabled to give, and for the punishment of fraud —provisions for the revival of judgments in case of the death of the parties, for the removal of causes to the superior courts, for enabling a judgment to be made available in certain cases against the debtor's lands, for enlarging the remedy under writs of execution, and for further facilitating relief against officers and their sureties; all these in their original shape or in modified form, are continued to the present day.

Some of the provisions of this statute, the power to examine judgment creditors (the 91st clause) and the extensive range of executions, for instance, have been much objected to of late years, but on the whole the changes made by Mr. Macdonald's act continue to be regarded with favour by those who use the courts.

Under 4 & 5 Vic., the magistrates in Quarter Sessions had set off their several counties into Court Divisions. By this Act (of 1850), these divisions were preserved with their existing limits, but the continued power to declare and appoint divisions was exercised in several counties.

The act 16th Vic., cap. 177, again enlarged the jurisdiction as well as improved the procedure in many particulars, and remedied certain defects in the existing law, and besides contained several provisions conducive to substantial justice, and to cheapness in administration. It met the difficulty respecting claims by landlords for rent due, when tenant's goods seized on demised premises, providing for the interest of both landlord and execution creditor, and extended the law of interpleader to such claims. It facilitated the speedy determination by a jury of controverted facts; moreover, by this act two entirely new elements were incorporated with the local law courts. 1st. *The law of arbitration* was extended to the courts with all the advantages and without the technicalities of practice used in the superior courts. 2nd. The appointment of a Board of Judges was authorised, with power to make a uniform set of rules regulating the practice of the courts for use in all the counties in Upper Canada. The fears entertained respecting the original power to make rules (each judge for his own county) that different minds brought to bear on the same matter would without conference or intercommunication produce varied results, different codes of practice in the counties, proved to be correct, and in very few counties was procedure exactly the same. This evil was remedied under the enactment referred to, and the Board of Judges appointed,* framed general rules which, sanctioned by the judges of the superior courts, came into operation on 1st October, 1854, with a statutory obligation. They are still in force. This act, the work of Mr. Attorney-General Richards, aided largely the design of the courts to secure speedy, cheap, and substantial justice, combined with uniform and sound principles of administration. The statute 18 Vic., cap. 125, further enlarged the jurisdiction by enabling defendants to be summoned from any part of Upper Canada to the court division in which the cause of action arose, and this as of right and without any leave from the court.

And, in aid of this new jurisdiction, the act made provision for a judgment obtained in one county being enforced in another, for a writ of execution could not be executed out of the limits of the judicial district in which it issued.

Without referring to certain acts upon other subjects, which contained provisions affecting in some degree the powers of the courts, the next statute relating to the courts is the 22 Vic. cap. 33, which was introduced by Mr. Attorney-General J. A. Macdonald.

It was for "the Abolition of Imprisonment for Debt." The clauses of this statute which appertained to the Division Courts met objections which had been urged to the "Judgment Summons" clauses.

It was complained that these clauses had been greatly abused by creditors, and the power conferred by them used against debtors for the purpose of oppression and annoyance. To remedy this, Mr. J. A. Macdonald's measure provided that no party should be committed to gaol for default in attendance, unless twice summoned, or the Judge was satisfied that his non-attendance was wilful; and if it appeared that the debtor was improperly summoned, he was entitled to compensation for his trouble and attendance.

* The judges appointed were, Harrison, Malloch, Gowan, Campbell, (since dead) and O'Reilly, (since resigned). The rules were made the 28th of June, 1854, and approved by the judges of the superior courts on the 8th of July following.

A defendant once examined and discharged could not be again summoned, except the Judge was satisfied on affidavit that new ground existed for a further examination; and, as a general rule, the examination was to be in the Judge's Chambers and not in open court. Thus these provisions were guarded against the possibility of abuses in administration, and were strictly confined to their legitimate uses—the discovery of property withheld or concealed—the enforcement of such satisfaction as the debtor was able to give, and the punishment of fraud.

This brings us to the Consolidated Act 22 Vic. cap. 19, by the which the Division Courts are now regulated. Of this statute, it is sufficient to say here that it was substituted for the existing acts already noticed, which were all repealed, and that, without operating as a new law, it settled many doubtful points in the repealed acts it replaced, and the matter of these repealed acts it embodied in a revised and condensed form.

Such, in brief outline, is the statutory history of an important branch in the general system of local jurisprudence established in Upper Canada.

(*To be continued.*)

A FEW "VEXED QUESTIONS."

In the last number appeared a communication from Mr. Durand, under the above caption. We have heard from some of our correspondents in respect to them, and find, as Mr. Durand says, that a great difference of opinion prevails, particularly in reference to the first question.

According to our judgment, the giving a transcript of a judgment from the court in which it was obtained, does not do away with it as a judgment of that court. The effect would probably be held to be a suspension of the right to act on the judgment in the original court, till return made of the transcript. The terms of sec. 139 are to "*enter* the transcript in a book to be kept for the purpose," and the amount due *on the judgment* (*i. e.* in the original court) according to the certificate. The clause then goes on to say, "all proceedings may be taken for enforcing and collecting the judgment in such last mentioned court by the officers thereof, that could be had or taken for like purposes upon judgment recovered in any division court;" the effect of which seems to be that in the court to which the transcript sent, the same proceedings may be taken on the judgment *as if* it was a judgment of that court. It is obvious that there cannot be two or more judgments in force at the same time, and there is nothing to show that the proceeding in aid, by transcript, transfers the judgment. We think the return of *nulla bona* in the case put, would justify the action desired of the Toronto clerk. This is just one of the cases that ought to be settled by rule of the board of judges. On the whole we think Mr. Durand's view is the correct one.

2nd. Query? *Payment of money into court on a tender previously made.*

In the case put, we think that it is in the power of the Judge to grant an adjournment for the purpose of giving the notice. The words (sec. 88) "and all proceedings in the said action shall be stayed, unless," &c., by no means imply that the suit is necessarily at an end. The word "*stayed*" on the contrary seems to convey the idea that the proceedings are to remain in *statu quo* until further order. Indeed there is room to contend that an express order from the judge is necessary to give effect to the provision.

If we look at sec. 179, the same language occurs, "and thereupon any action in the superior courts, in respect to such claim, shall be stayed." &c. Would it not be necessary under this section to apply to a judge in Chambers to stay proceedings in the action?

The power to adjourn is rendered still more clear by sec. 86 of the statute which enacts that in case the judge thinks it conducive to the ends of justice, *he may adjourn* the hearing of any case in order to permit a necessary notice to be served or to enable a party to *enter more fully into his case, or for any other cause which the judge thinks reasonable*, which is to be done on such equitable terms as to the judge may seem meet.

3rd. Query? *As to dividing causes of action.*

The cases put would not be within sec. 59 of the act which provides that "a cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction," &c. There is no necessary connection between the note and the account, nor yet between the account and the action for damages, but the items of a running account could not be divided. *Grimbly* v. *Aykroyd*, 1 Ex. 479, and *Wickham* v. *Lee*, 12 Q. B., 521, are leading cases on the subject of splitting demands.

On the fourth subject referred to by Mr. Durand, we cannot supplement the suggestion he offers.

We shall be happy to hear from Mr. Durand on the other unsettled points in the Division Court law to which he refers.

To the Editors of the Law Journal.

GENTLEMEN,—You having wished for any useful suggestions relative to the Division Courts, I take the liberty of making some. I give known facts acquired from experience, and they are by no means exceptions. It is right and proper that plaintiffs should know what they have to meet on Court-day, whether a defence or not. As an illustration, A. sues B. on an account for goods sold and delivered by three different clerks, he brought those three witnesses on Court-day a distance of twelve miles. On the case being called, the defendant answered and said the claim was right, consequently judgment was given without calling the witnesses, and I allowed the costs of these witnesses on the plaintiff's affidavit that they were necessary, and came for no other purpose than to give evidence in the cause. Again, C. sues D. and D. told plaintiff he would not dispute the claim; on Court-day plaintiff brought no witnesses. On the cause being called, defendant appeared by an agent and denied the claim, consequently the plaintiff applied and got leave to put off the trial on payment of costs of day. On the cause being called on next Court, the plaintiff appeard with his witnesses prepared to prove his claim, but defendant did not appear and the plaintiff's witnesses were not required.

These are great evils and now for the remedy. I would require appearances to be filed with the clerk a given number of days after service, the same as in the County Court, and I venture to say there would be less litigation on Court-days, and a saving to suitors of thousands of dollars in a year. Really defendants come to Court, under the present system, without any intention of defending, and when they find the plaintiff has no witnesses, then they deny and apply for remuneration, and often get it. If defendants were compelled to make known their intentions in time, delay and expense would be avoided. I see no necessity of waiting until Court-day for judgment. Where there is no appearance, let the Clerk, in default of appearance, enter judgment at once, and not put the Court to the trouble of passing judgment in open Court, and defendants to the humility of hearing their names

proclaimed to the world as persons unable to pay. There seems no valid reason why there should not be uniformity in all our Courts.

Yours, &c.,

Samuel Whaley

Clerk 5th D. C., Co. Perth

[We published in our last a similar letter to the above, from another clerk in the same county, Perth.

There is nothing in the letter before us calling for an enlargement of the remarks already before our readers.

Had B. chosen to give a confession to the bailiff who served him, or afterwards to the clerk, there would have been no witness fees in the case.

It was scarcely prudent in C. to take D's. word. Had he obtained a written *admission* from D., there would have been no occasion for a postponement.

As to the "humility" point the defendant can always save his feelings by acknowledging the claim before an officer of the Court in the usual way.

We cannot agree which our correspondent in the opinion expressed at the close of his letter. It is practically impossible to secure uniformity of procedure between Courts of Record and Courts of Summary Jurisdiction.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—At the last Court of Quarter Sessions, some of our magistrates, I was told, were anxious to establish another Division Court in this county, which has now two or three too many. Their plan is, to take a portion of five townships, and from the five fractions make a whole;—a most absurd idea, every one admits. I fancy the project could only have been entertained by a few J. P.'s in the immediate neighbourhood, who thought they would like to be *near a court.* I am sure our worthy Judge, who is Chairman of the Board, would strongly oppose such a silly project. The five townships from which the new Division is to be taken are Houghton, Walsingham, Middleton, Windham and Charlottville. The aggregate number of suits in these five townships, for the last sittings, was *eighty-one,* making an average of sixteen suits for each court. Still, in the face of this paltry business, some magistrates are endeavoring to form a new Court out of these five divisions.

About two years ago, these wise men established another Division in the small township of Woodhouse, because there happened to be two villages in it. The result is, there are now three Divisions within seven miles. Many are now (when it is too late) acknowledging the absurdity of making the eighth Division, as the public interest did not require it. The result is, the business is split up among two sets of officers, who scarcely care for the emoluments, and feel ready to abandon their situations at any time. The fact is, as has been remarked by the *Law Journal,* great damage has been done to the usefulness of these Courts, by establishing too many Divisions, and of course the blame rests upon the magistrates, as they have the power. The harm is upon us, and perhaps cannot be undone. They will find it much easier to make new Divisions, than to lessen the number. The fact is, if they keep on dividing, and subdividing, and making new Courts, Division Court officers will have to "go a-begging."

Your remarks upon Mr. Durand's "vexed questions," are looked forward to with much interest.

What is your opinion of the late Exemption Act?—*i. e.,* respecting the sixty dollars worth of chattels *besides* the articles enumerated? How is that value to be established? Suppose the bailiff has an execution against A., who has a horse, can A. claim the horse under the sixty dollars claim? Or supposing the execution creditor orders the bailiff to sell said horse, which brings say seventy dollars, I apprehend sixty dollars would have to be returned to the debtor, and the overplus would apply on the debt. Again: suppose the horse only brought fifty dollars, would not the execution debtor have some cause for damages? The whole question is, how or in what way is the value of sixty dollars to be established? This seems to me rather a nice point.

Are not bailiffs entitled to ten cents each for notices of sale of property under executions?

Yours, very truly,

March, 21, 1861. Norfolk.

[The multiplication of Divisions has a positively pernicious effect, in our judgment, and was not designed by the Legislature. We have before us the copy of the forthcoming part of "*The Law and Practice of the Division Courts,*" in which this subject is fully handled; and as we could offer no remarks more full and appropriate, we refer our correspondent to the treatise in question.

We have before examined the subject of "Exemption," and can add nothing to what we then said. There is the dilemma our correspondent refers to, and it is one of those difficulties in practice not easy of solution.

We think bailiffs are entitled to ten cents each for notices (not exceeding three) of sale of property under execution.—Ed. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

(*Reported by* Christopher Robinson, Esq., *Barrister-at-Law.*)

Smith v. The Corporation of the Village of Collingwood.

School Teacher—Order on municipality for his salary—Acceptance of treasurer—Refusal to levy rate—Right of Action.

Held, that an action would not lie against a municipal corporation by a school teacher, upon an order made upon and accepted by the treasurer in the plaintiff's favor for his salary, the treasurer having no power to bind the corporation by such acceptance.

Held, also, that the teacher could not maintain an action against the corporation for refusing to levy a rate for his salary, upon an estimate furnished to them for that purpose by the trustees.

(H. T., 23 Vic.)

This was an action by the plaintiff, a school teacher, against the corporation, for not paying him his salary or allowance.

The declaration contained seven counts.

The first count was on an order made on the 10th of January, 1859, by the school trustees of Collingwood, by their chairman, on the treasurer of the town of Collingwood, to pay the plaintiff £17 13s. 5d., "which the defendants by the hands of their treasurer accepted."

The second count was on an order upon the treasurer by the school trustees, made by their chairman, on the 4th of July, 1859, in favor of the plaintiff, for £62 10s., which the defendants by their treasurer accepted.

The third count was on an order made by the school trustees on the 23rd of August, 1859, by their chairman, on the treasurer of Collingwood, to pay to the plaintiff $6 95, accepted in the same manner.

The fourth count was for money had and received, which was clearly not supported by the evidence, and on which therefore the defendants had a verdict.

The fifth count alleged that the defendant was a common school teacher in the town of Collingwood for twelve months: that the school trustees, on the 22nd March, 1858, laid before the defendants an estimate of the sum required for paying the plaintiff his salary as such teacher, in order that the same might be levied on the ratable inhabitants according to law: that it became thereupon the duty of the defendants to levy a rate in order to make such payment; but that the defendants, though they gave to the plaintiff an order on their treasurer to pay the plaintiff £17 13s. 5d., for the salary then due to him, would not provide the said sum, nor levy, nor impose, nor collect a rate for the payment of

the same, but neglected and refused so to do, whereby the plaintiff was deprived of his salary as such teacher.

In the sixth and seventh counts the plaintiff complained in the same manner of the defendants, for neglecting and refusing to impose or collect a rate for paying the sums due to the plaintiff, for which they had given the other two orders on their treasurer, which were declared on in the second and third counts.

The defendants pleaded to the first count, that they did not accept the order mentioned in that count; and payment.

To the second and third counts, that they did not accept.

To the fifth count, that they did provide the money, and collect and impose a rate.

To the sixth and seventh counts, the same plea.

And to the sixth count defendants also pleaded, that they did impose the rate, and delivered the roll for collecting it, and the other assessments for the town of Collingwood for the year 1859, but that the day fixed for the return of such collector's roll had not yet expired, and that they had not yet received the said sum for the school trustees.

Issue was joined on all the pleas.

There was a case tried at the same assizes, at Barrie, before Robinson, C. J., brought in the Court of Common Pleas, in which Munson, another school teacher, sued the same corporation of Collingwood upon similar causes of action, the declaration and the pleadings being substantially the same as in this case. And it was agreed that the evidence given in that case should be submitted to the jury as evidence given in the present case, in order to shew the grounds upon which the corporation was sought to be charged, and what they relied upon as their defence.*

The evidence shewed that the orders were in each case signed by the chairman of the board of school trustees, and were sealed with their seal, and that they were accepted by the treasurer under his signature merely as treasurer.

The clerk of the corporation produced and proved an estimate that had been furnished by the school trustees of the money that would be required to be raised for school purposes in 1858, which estimate included the plaintiff's salary. A by-law was afterwards passed to raise money for certain school purposes; to wit, for school house, library and apparatus. The money required for teachers' salaries in that year was raised by a rate imposed by resolution, and the whole money required for that year seemed to have been levied.

The corporation received in like manner from the school trustees an estimate of the money required for school purposes for 1859. That also included the teachers' salaries, including the plaintiff's. A by-law was introduced to raise that money by assessment, but it was not passed. It was read a second time on the 25th July, 1859, but was neither passed nor rejected; nothing was afterwards done upon it.

The clerk of the corporation explained that the salary of the plaintiff should have been paid: that the government contributed a portion of the school money, and that the school trustees had power to make up the deficiency by rate, and so also had the corporation of Collingwood. He swore that a small portion only of the taxes of 1858 had been collected; and that he thought, but was not sure, that enough of money had been collected on the roll generally to cover teachers' salaries.

The chairman of the board of school trustees, who was at the same time a member of the town council, swore that in 1858, which was the first year of the existence of the corporation, the municipal council paid people whom they employed to make and improve their streets by giving them orders on their treasurer: that these orders got into circulation, and many persons paid their taxes with them, so that there was not enough actually collected in money to pay the school teachers: that the government grant would in common course be received by the end of June in each year, and the residue of school moneys required for the year had to be raised by rate; but that for some reason which he was not aware of, the government grant for school purposes for Collingwood for the first half of 1859 had not yet been received when he gave his evidence.

It was objected in each case, on the part of the defendants, that there could be no action against the corporation upon their alleged acceptance of the orders, and that at any rate the acceptance to bind them must be under the corporate seal; and that the corporation was not liable to be sued upon such causes of action as were stated in the special counts.

The learned Chief Justice said, that as to the objections to the sufficiency of the several counts they should be taken upon demurrer, or might yet be urged in arrest of judgment, but could not be gone into at *nisi prius*, where the only matter to be considered was the application of the evidence to the different issues of fact that had been joined.

The jury found for the defendants on the fourth count, and for the plaintiff on the others, with £69 8s. 2d. damages.

R. A. Harrison obtained a rule *nisi* to arrest judgment on the six counts on which the plaintiff recovered; or for a new trial on the law and evidence, on the ground that the treasurer of the corporation was the only party liable on the orders, and not the defendants, who had not bound themselves under their seal, and who could not be made liable on the treasurer's acceptance of such orders; and because on the matters stated in the fifth, sixth, and seventh counts, there was no remedy by action. He cited *Quin* v. *The School Trustees of Seymour*, 7 U. C. Q. B. 180; Tapping on Mandamus, 93, 347.

McMichael shewed cause.

The statutes bearing on the question are referred to in the judgment.

Robinson, C. J.—The same points precisely being before the Court of Common Pleas and this court upon the same evidence, the judges have communicated together upon the points involved, and agree in the same conclusions, upon grounds which need not be gone into at length in each court. I will therefore only shortly state, that as regards the orders of the school trustees accepted by the treasurer of the corporation of Collingwood, they must be looked upon as given in pursuance of the statute 18 & 14 Vic., ch. 48, sec. 24, sub sec. 8, and sec. 26, which makes it the duty of the school trustees of incorporated villages to give orders to teachers and other school officers, and creditors, upon the treasurer of each incorporated village for the sums which shall be due them. It appeared to me at the trial, that if we could in consequence of this provision look upon the incorporated village as in the light of a trading corporation authorised to make notes, or draw and accept bills, it might be found that it would follow as a consequence that they might transact such business in the same manner as it would be transacted by individuals; that is through their proper officers, by whose signatures merely the corporation might for such purposes be held bound; and it would not be necessary that the corporate seal should be applied on such occasions. I ruled therefore for the time, that the acceptance by the treasurer of orders authorised by statute to be drawn upon him might be taken to be the acceptance of such orders for the corporation, and that if there was any thing in the school acts or the municipal acts which would affect the question, it would be open to the defendants to move in term on any verdict that might be given for the plaintiff. It was understood at the trial that as the cases were new in their nature, the question on which they must turn would be discussed in term in both courts, and in order to ascertain the amount for which the plaintiff might recover if found entitled to support any of the causes of action, a verdict was given for the amount which was shewn or rather omited to be due in each case. We have now to consider the two classes of counts, and the answers given so far as may be necessary.

As to the three counts upon the orders, we think that we cannot look upon the provision in the School Act under which they were given, and which I have recited, as meant to serve any other purpose than as a voucher from the school trustees, which should show the treasurer of the municipality that the person in whose favour it was given had a claim upon the school funds as a teacher, whose services and the amount due for them had been ascertained by the trustees.

The order when complied with would of course acquit the corporation as to so much of the school fund as the treasurer should have paid upon it; but I do not think that the acceptance of the order under the hand of the treasurer had the effect of giving a right of action to the trustees against the corporation, in the same

* See ante p. 15.

manner as a bank or other trading corporation would be liable upon a cheque or bill accepted by their cashier.

Whether the corporation were bound to pay an order drawn on their treasurer, and when, and under what circumstances, must depend upon something more than the fact of the treasurer having accepted their order. He has not power, I think, to bind the corporation by his personal acceptance to pay immediately, without regard to any other consideration but merely the fact of his having written "accepted" upon the order.

The statutes give no general power in terms to the treasurers of municipal corporations to bind the corporations by their acceptance, and we must find something in the statute from which such a power can be properly implied in any particular case before we can hold that it is given or implied in such case.

As to school moneys, we find they come in part from provincial funds, and in part from funds to be raised by assessments, and regard must be had to the fact whether the corporation is in funds to make any payment out of school moneys upon an order of school trustees at the time of such order being presented; and if they are not in funds, the right to demand payment nevertheless may depend upon questions which the treasurer has not the discretion to settle by his acceptance. This acceptance, I think, has no other effect than to mark the time and fact of the order being presented, which may be of consequence to the teacher as regards the order of payment under circumstances that may sometimes exist.

I think, therefore, that judgment should be arrested as regards the three first counts.

With respect to the last three counts, we find no instance of an action against a municipal corporation for not levying a rate for a public purpose, in which rate the individual bringing the action has no other interest than as one of a class who would have a claim to be paid out of such assessment if it were raised; and if an action on such a cause as is set out in the last three counts respectfully is not maintainable, that objection cannot be held to be cured by pleading over, for it is not only a substantial objection, but one that goes to the very root of the action. No authority has been cited in support of the declaration as regards these counts, and we ought not to decide in its favour except upon the clearest ground, when we consider that it cannot be truly said that the plaintiff's salary is unpaid, because the municipal corporation has not imposed and collected a rate for school purposes, for by the School Act the school trustees who contracted with the plaintiff to employ him and pay him, have express authority given to them to levy themselves whatever money might be necessary for enabling them to fulfil their contract.

I am of opinion that the rule must be made absolute for arresting the judgment on the last three counts, as well as on the first three.

Burns, J.—With respect to the first three counts, I think the plaintiff cannot maintain an action against the corporation, treating it as bound by the acceptance of the orders of the trustees. The effect of so holding would be treating the orders in the nature of bills of exchange. These orders were given in compliance with the 8th sub-section of section 24, of the school act, 1850, and with them in his hand the plaintiff was entitled to call on the treasurer for payment, but the treasurer could not bind the corporation by any acceptance he might write upon them. The liability to pay must depend upon something else than what the treasurer may choose to say about it.

Then with respect to the last three counts, charging the defendants with a breach of duty in not levying a rate in order to pay the orders, after some doubt and hesitation I have at last settled into the opinion that the plaintiff cannot maintain such an action. If it were shewn that the rate was levied and the money in hand, I have no doubt an action for breach of duty in not paying it would lie. The school trustees having done all that was required on their part, and given the teacher the requisite order to receive the amount due to him, would entitle the teacher to be paid if the money were there for that purpose, and it would be a breach of duty in the corporation not to pay. In that case the breach of duty is individually applicable to the teacher, the person who suffers by not being paid.

The charge in this case—namely not levying a rate—applies to a class of persons, and the question is whether there is such a breach of duty in such a matter to each individually as gives a right of action. The 21st section of the act enacts that this corporation, being a town, shall be liable to the same obligations as are enacted in respect of townships under the 18th section, and councils of counties under the 27th section. This section is very plain, that no teacher shall be obliged to wait for the collection of the rate, but the treasurer shall pay in anticipation of it; but still it shews that a rate is to be imposed for the purpose of providing the fund in time or to reimburse the corporation.

The corporation is to impose the rate at the request of the trustees, and it is asserted in this case that the trustees did request it to be done. I have met with no authority shewing that an action can be maintained for not complying such a request. The plaintiff is not a contractor with the defendants, but has contracted with another corporate body altogether, and therefore no obligation arises on the defendants beyond what grows out of the provisions of the school acts. These obligations are, I take it, in the first place to comply with the request of the school trustees and levy a rate, and when that has been done, then, secondly, the treasurer shall comply with the orders of the trustees by paying from any moneys in his hands.

The first of these obligations, I take it, must be enforced by mandamus, and *that* I think is the proper remedy, and not an action of this description. It would be very inconvenient if the corporation should be exposed to an action by every individual of a class of persons for a breach of duty, when it might be in the power of the corporation to shew that there existed something in the request of the trustees which might be illegal.

It is a pity the plaintiff has been advised to try an experimental action when the other remedy was so plain, and about which there there could be no doubt. The best consideration I can bestow upon it leads me to the conclusion this action is not sustainable.

McLean, J., concurred.

Rule absolute to arrest judgment.

CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-Law.*)

McGinnis v. The Corporation of Yorkville.

Action against a Municipal Corporation—Common Counts—Extra Work—Pleas.

A plea that the cause of action, if any, arose for and concerning a debt incurred and falling due during the preceding year to that in which action brought, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed, cannot be allowed on an application to plead several matters with other pleas, going to the merits of the cause of action. [April, 3rd 1861.

This was an action on the common counts for work and labor, materials, &c. *Jas. Paterson* obtained a summons calling on the plaintiff to show cause why defendants should not have leave to plead the following pleas:—

1. Never indebted.

2. That the work, &c., was for building a new Town Hall in Yorkville under special contract, setting out some of the terms and conditions, and averring that the defendants paid all plaintiff is entitled to under the contract for contract work, extra work, or otherwise.

3. A similar plea, setting out another condition, that the work should be completed on or before 15th August, 1860, under a penalty of £10 for every week during which it should be left incomplete beyond that day: that there were no weekly returns of extra work according to conditions, and that no extra work was in fact done; that the work was not completed until 31st Dec., 1860, being nineteen weeks after said 15th August, 1860, whereby plaintiff had forfeited £190, and that after deducting that sum defendants had paid in full for all contract work, extra work, or otherwise howsoever.

4. Plea setting out that the work was done under a contract under seal, setting out terms and conditions relative to extra work, conditions, &c., also a clause providing for a reference to William Hay, Architect, in case of difference: that defendants had paid contract price in full: that differences having arisen as to deductions and extra work, said William Hay took upon himself the burthen of the reference, and within proper time, according

to the agreement, made his award, finding a balance in favor of defendants.

5. Payment before action.

6. That before action the debt, if any, was attached by four several orders, issued by judgment creditors of the plaintiff, and served on defendents before this action, in one of which actions leave was given to judgment creditor to proceed against defendents by writ.

7. That the cause of action, if any, arose for and concerning a debt incurred and falling due during 1860, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed.

Mr. Paterson, as to the last plea, cited *Scott* v. *The Corporation of Peterborough*, 19 U. C. Q. B. 469.

D. McMichael shewed cause.

Robinson, C. J.—I allow the defendants leave to plead all the pleas with the exception of the last, and give leave to plaintiff to reply and demur to such of the pleas as he may see fit. I cannot allow the last plea in connection with the other pleas. I do not think that a plea of that kind should be allowed with pleas going to the merits. Where a contract is made by a municipal corporation with a person for the doing of any work for which a provision to raise money has been made by by-law, and the contractor in performance of the work under the contract does extra work, for which an action would lie on the common counts, but no action is brought till the year following that in which the work was done, the plea that no provision was made for extra work, though it might according to the facts be a good plea on the authority of *Scott* v. *The Corporation of Peterborough*, ought not, I think, to be allowed with other pleas going to the merits of the cause. I therefore decline to allow it with the other pleas mentioned in the abstract.

Carlisle v. Hoshel.

Plea in Abatement—Time—Setting aside.

Defendant executed in favour of Plaintiff a bond in the penal sum of £700, conditioned to pay £350 with interest, by instalments. Plaintiff sued on this bond, and obtained a verdict for the penalty, 1s. damages for detention, and £21 damages assessed on breaches assigned. After verdict, defendant paid the damages and costs. Instead of entering judgment for the penalty as a security for future breaches, plaintiff commenced a second action to recover another instalment, and interest. Defendant without intimating that he intended to plead in abatement, as a favour asked plaintiff for further time to plead, which was granted. Sixteen days after declaration defendant pleaded the pendency of the former action, and prayed judgment whether plaintiff ought a second time to implead him for the same cause of action, attaching to this plea an affidavit of its truth. Plea set aside with costs, and plaintiff allowed to sign judgment by default, unless defendant should pay costs and plead within four days.

(March 22nd, 1861.)

Plaintiff in this cause obtained a summons to set aside a plea in abatement with costs, and that plaintiff should be at liberty to sign judgment as for want of a plea, because the plea was pleaded after four days had expired from declaration and notice to plead served, and also pleaded contrary to good faith and intended only to embarrass and delay.

The action was on a bond in the penalty of £700, conditioned to pay £350, with interest, by instalments.

Plaintiff sued on this bond, and in November, 1860, obtained a verdict at the last Niagara Assizes, for the penalty, and 1s. damages for detaining, and £21, the damages on the breach that had then accrued.

After verdict, defendant paid damages and costs.

Judgment was not entered, in order to stand for further breaches to be suggested, if any should occur. Instead of that, plaintiff brought this new action on the bond to recover an instalment and interest.

Defendant asked for leave to plead (not intimating that he intended to plead in abatement) which plaintiff gave him (several days) and then sixteen days after declaration served, defendant found out what the fact was as to the former action, that there was no judgment entered, but a verdict apparently not set aside, and he pleaded the facts truly, avering the identity of the £700 (the penalty sued for) as the cause of action in both suits, and concluded by praying judgment whether plaintiff ought a second time to implead him for the same cause of action, and he attached to this plea an affidavit of its truth. He did not in his plea pray judgment of the writ and declaration, nor conclude with prayer that the writ and declaration be quashed.

James Paterson for plaintiff.

D. McMichael for defendant.

Robinson, C. J.—It would seem as if defendant's attorney had not decided in his own mind whether he was pleading in abatement or in bar, but he had no right at that late time to plead in abatement the pendency of another action. If we look on this as a plea in abatement, though it neither commences nor concludes as such, nor expressly avers that the first suit is pending, then it must be set aside as being pleaded too late, and the Court would not now support it, by any *ex post facto* indulgence in extending the time, because after obtaining time to plead as an accommodation, the defendant should not have pleaded in abatement. If he had asked the court for time, he would have been placed under the condition of pleading issuably.

We can not look on this as a plea in bar, for it is clearly no bar, (*Harley v. Greenwood*, 5 B. & Al., 101.) the first suit having gone no further than verdict, by which the debt of £700 on this bond is clearly not extinguished.

The plea must be set aside with costs. Let judgment by default be entered, unless defendant shall pay costs, and plead within four days.

Summons absolute.

ELECTION CASES.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*)

(Before the Honorable William Henry Draper, C. B., Chief Justice of the Common Pleas.)

Regina ex rel Tilt v. Cheyne.

Municipal Elections—Qualification of Candidates—Equitable estate.

Where defendant in November, 1858, conveyed the real estate, which formed his qualification, to his father for a consideration of £300, for which he took his father's notes payable at distant dates, and in February, 1860, purchased the property back, returning to his father all the notes, though the father did not reconvey the property to the son till 3rd October, 1860, yet the son was held to have had at the time of the assessment "an equitable estate" within the meaning of sec. 70 of the Municipal Institutions Act.

(March 9, 1861.)

In November, 1858, the defendant conveyed the real estate which formed his qualification to his father for a consideration of £300, for which he took his father's notes payable at distant dates.

The defendant called as a witness, explained the motives for this transaction, and asserted *bona fides*.

In February, 1860, he purchased the property back, and returned to his father all the notes, not one or any part of which had been paid. The first of them fell due a year from its date, and soon after it was due this resale took place.

At the time of the resale, and some time before, one Silverthorne, a brother-in-law of defendant, occupied part of the house, and Defendant had a bedroom in it furnished by himself which he occupied, boarding with Silverthorne, and this continued after the resale. Subsequently the defendant leased a room in the house to an Orange Lodge.

He received a conveyance from his father on 3rd October, 1860, and in January following was elected a Councillor for Ward number two of the Township of Toronto.

His election was moved against by relator on the alleged ground of want of qualification.

Robert A. Harrison, for relator.

D. McMichael, for defendant.

Draper, C. J.—I assume the *bona fides* of the dealing between father and son, and I see nothing to warrant the conclusion that the resale and conveyance was a mere scheme to give the defendant an apparent qualification to be elected. There is no reason to suppose that defendant entertained the idea of being a candidate at any time before 3rd October, 1860.

Then considering that defendant was a vendor with no part of his purchase money paid, holding only notes for it, the moment the agreement for resale was made, and these notes were actually

given back to the father, the father became in effect only a trustee for defendant, who had an immediate and perfect right to the conveyance of the legal estate. As between himself and his father and every other person who had not through the father acquired some right or charge upon the estate, the sale to the father might from that moment be deemed virtually rescinded.

The legal estate, however, was in the father still. But on these facts, I think, I am warranted in treating the defendant as having an "equitable estate" in the premises from the moment he returned the notes, which was equivalent to a payment by him of all the purchase money.

Lord St. Leonard (V. & P. 124, 18th ed.) says, "It would be difficult to refuse a specific performance where the purchaser has paid all the purchase money," and here we have the additional fact that the defendant was vendor to as well as purchaser from his father, and had a lien upon the estate for the whole of the original purchase money.

I have not overlooked the doctrine in equity, as stated by Lord Justice Knight Bruce, that "a parol contract for the sale of land, though all the money be paid without part performance (for the payment of the money is no part performance) cannot be carried into effect if the person sued chooses to avail himself of the defect." —*Hughes* v. *Morris*, 2 De G. M. & G. 356. Here both vendor and vendee swear the contract was complete and partly executed, by part performance beyond the return of the notes.

I think judgment should be given for the defendant with costs.

Judgment for defendant with costs.

(Before the Honorable Mr. Justice Burns.)

REGINA EX REL. GEORGE BENDER v. FRED. J. PRESTON.

Town of Clifton—Mayor—Qualification.

The Town of Clifton was incorporated by special Act of Parliament (19 & 20 Vic., cap. 63). It was subsequently by proclamation of the Governor General divided into three wards; thus entitling the Town to nine Councillors and a Mayor. At the time of the election in January last there were not more than seventeen persons in the Town qualified under sec. 70 of the Municipal Institutions Act to be elected Councillors, so that there was not in the language of sec. 72 "at least two persons qualified to be elected for each seat in the Council," though there were more than two persons qualified under sec. 70 to be elected Mayor,

Held, that the Mayor holds a seat in the Council.

Held also, that no greater qualification is required for Mayor than for a Councillor.

Held also, that the only qualification requisite for a person to be elected Councillor owing to the peculiar circumstances of the place, being that of an elector, a person elected Mayor, and possessing the last mentioned qualification, was sufficiently qualified under sec. 72 of the Act.

[March 24, 1861.]

This was a complaint against Frederick J. Preston as Mayor of the Town of Clifton, on the ground that he had not the required property qualification, according to the provisions of the 70th sect. of ch. 54 of the Cons. Acts, when he was elected.

It was conceded that if what appeared upon the Assessment Roll for the year 1860 should govern, then that Mr. Preston was not duly qualified to be elected Mayor at the last election, but it was contended on his behalf that the provisions of the 72nd sect., viz., that there should be at least two persons qualified to be elected for each seat in the Council, otherwise no qualification beyond the qualification of an elector, should be necessary, aided him.

It appeared that Mr. Preston was a properly qualified elector of Clifton, and the question was, whether the 72nd sect. applied to his case, and if so, in what manner.

The Town of Clifton was first incorporated by Act of Parliament 19 & 20 Vict., ch. 63, and was subsequently divided into three wards, each ward electing three Councillors, and now a Mayor is elected by the inhabitants generally.

The additional facts necessary to the determination of the question raised for adjudication, appear in the judgment of the Court.

Robert A. Harrison for relator.—Clifton is a Town incorporated by Act of Parliament (19 & 20 Vic. c. 63), having three wards, and consequently entitled to nine Councillors and a Mayor. The qualification of a person to be elected Mayor in a Town is freehold property to $80 per annum, or leasehold property to $160 per annum (Consol. Stat. U. C., cap. 54, s. 70). It is conceded that defendant had not this property qualification. He is not, therefore, entitled to hold the office unless sec. 72 suspends the operation of sec. 70 of the Municipal Act in regard to all Municipal offices in the Town of Clifton. By sec. 72 it is provided, that "in case in a Municipality there are not at least two persons qualified for each seat in the Council no qualification beyond the qualification of an elector shall be necessary in the persons to be elected." It is submitted that the word "Municipality," as used in this section, does not include a town but rather applies to rural Municipalities only (s. 75, 76, 78). Even if applicable to a town it is certainly by the interpretation clause of the Municipal Act restricted to towns "incorporated under the Act" (s. 424, sub. s. 1), which Clifton was not, having been incorporated by a different or special Act of Parliament (19 & 20 Vic. c. 63). But if the 72nd section is held to apply to the Town of Clifton, it is submitted that in its operation it is restricted to "Councillors" or "members of the Council," and that the Mayor is neither a Councillor nor a member of the Council, but only its chief executive officer, elected in a manner different from members of the Council (sec. 66 sub. sec. 2, 70, 101, 115, 118, 120, 132, 135. 143, 144, 145). Presume, however, for the sake of argument, that the office of Mayor of the Town of Clifton comes within the language of s. 72, are the facts such as to warrant the application of that enactment? There can only be one Mayor for the Town,—only one seat for Mayor,—and if there be at least two persons qualified for that seat the one elected should be duly qualified. Now it is shown that at the time of defendant's election there were more than two persons qualified for the seat. There were in the first place all residents of the County of Welland having property in the Town (s. 70), and in the second place, at least seventeen persons resident in the town itself.

Richardi, Q C.—I admit that defendant is not qualified under sec. 70, but contend that he is sufficiently qualified under sec. 72. The qualification of a Mayor in Towns is the same as that of a Councillor in Towns, (sec. 102,) and it is shown on affidavits that in the Town of Clifton, under sec. 72 of the Act, the only qualification necessary for a person to be elected a Councillor is the qualification of an elector. Defendant possesses the qualification of an elector. I urge that sec. 72 does apply to a Town such as Clifton, though incorporated by special Act of Parliament. It is by sec. 1 of the Municipal Act provided, that "the inhabitants of every County, City, Town, Village Township, &c., incorporated at the time this Act takes effect, shall continue to be a body corporate," &c. Clifton was incorporated at the time of the passing of this Act, and continued to be so under the Act as much as if incorporated under it. Then the question is, whether the Mayor of the Town of Clifton holds a seat within the meaning of sec. 72? I contend that he does, and on this point refer to secs. 147 and 149 of the Act. I also argue that the Mayor is a member of the Council. He is the head of it and must be a member of it.

Burns, J.—On looking over the various clauses of the Act, considering the powers and authority vested in the Mayor, the mode of his election, what is required for qualification, and his presiding over and voting with the members of the Council, I think his position is that of the chief seat in the Council.

It appears from the evidence that the whole number assessed on the Roll for Clifton for the year 1860 is as follows:—North Ward, 89; Centre Ward, 118; and South Ward, 53. The Town Clerk swears, that out of this number there are thirty-five persons only who are qualified in respect of property to be elected Mayor or Councillors. The 102nd section of the Act places them upon the same footing in respect to qualification.

Now in what manner is the 72nd sect. to be construed? Is it only to come into operation when the number is below two persons qualified to be elected for each seat as applied simply to qualification in respect of property, or after deducting all those who are disqualified to be elected from other causes? I apprehend the expression, "qualified to be elected," must be construed in the larger sense that is for the benefit and advantage of the whole body of electors, for if it should happen from some cause or other that all those who might be elected as respects property, yet were disqualified from interest or otherwise, the Town would have no Council if the inhabitants could not resort to the electors for members.

Of the thirty-five persons qualified in respect of property seven are disqualified on account of being at the time of the

election inn-keepers or saloon-keepers. Six others are non-residents of the County in which Clifton is situated. Three of the number have contracts with the Corporation, among which is the relator himself. One was in 1860, and still is, collector of the taxes. Two persons are not British subjects. This makes 19 persons out of 35 who are disqualified. Thus leaving only 16 who might be elected, and of these one it is said is not rated in his own right for a sufficient property qualification, and this would seem to be so upon looking at the Roll, and another, it is said, is security for the collector.

To exclude the electors from resorting to their own body in filling up the Council there should appear to be at least twenty persons properly qualified, and not disqualified, from whom they might select their Council. In the present instance the number from whom the electors might make a selection is below the standard. There is nothing in the Act to shew that the Legislature intended to put the seat or office of Mayor upon any different footing than that of Councillor, or to shew that the electors must exhaust the body of those qualified without being disqualified first, before going to their own body for members of the Council, and indeed it would have been unjust to have put matters upon such a footing, for in such a case some portion of the electors would be forced to elect, or suffer those to be elected, who might be distasteful to them. It is much better it should be thrown open.

The relator, it appears, was the candidate who opposed Mr. Preston, and he, it is true, is properly qualified in respect of his property. He asks in his statement that he should be seated instead of Preston. I could not do that under any circumstances, for it appears that the relator, together with his partner, has a contract with the Corporation to supply the market with water, and that disqualifies him from being a member of the Council.

I, however, see no sufficient reason for ordering a new election of Mayor, and probably at the end of the year the inhabitants will be as well satisfied with Mr. Preston as they would have been with any other person seated in his place.

My judgment is, that the summons be quashed with costs to the respondent.

Judgment for Defendant with costs.

(Before Mr. Justice Burns.)

REG. EX REL THOMAS M. BLASDELL v. JOHN ROCHESTER.

Municipal election—Qualification of candidates—Residence—Writ of Summons, by whom to be issued.

Held, that a person rated on the assessment roll of a City for the necessary property qualification, but at the time of the election a resident in an adjoining Township of the County in which territorially the city is situate, is not qualified to be elected a member of the Municipal Council of the City.

Held also, that a writ of summons in the nature of a quo warranto, signed by the Clerk of the Process, and under the process seal, though in fact issued by the Clerk of the Crown in the Court of Queen's Bench, is sufficiently issued by the Clerk of the Process within the meaning of Consol. Stat. U. C., cap. 54, sec. 123, sub. sec. 5.

[Feb. 24th, 1860.]

This writ of *quo warranto* was for the purpose of testing the right of John Rochester to be elected an Alderman for Victoria Ward, in the City of Ottawa, under the following circumstances:

John Rochester did not reside within the limits of the City but lived in the Township of Nepean, another Municipality adjoining Victoria Ward, of the City of Ottawa. He was assessed for property in the City of Ottawa, which was a sufficient property qualification, and he had a place of business within the City of Ottawa where he attended daily. His trade occupation was that of a tanner, which business was carried on where he resided in the Township of Nepean, and he was also assessed upon the roll of the Township for the property situated there.

The Relator was a candidate at the Municipal election for 1860, and complained that Rochester was not qualified by reason of his residence in another Municipality, to be elected a member of the Council of Ottawa.

McBride, for relator.

Jackson, for defendant.

BURNS, J.—This proceeding brings up a very important question as to the meaning of the last Municipal Institutions' Act, and the proper construction to give to it.

The defendant contends that the effect of the 70 sect. of 22 Vic. ch. 99, repeated in the Consolidated Acts, page 539, is to render persons who live in the County in which the Municipality is situated for which he may be elected eligible, provided he be rated on the assessment roll of that Municipality in respect of property sufficient to qualify.

In this case there is no doubt that by the Territorial Divisions' Act the City of Ottawa is for some purposes part of the County of Carleton, and that defendant resides in the County of Carleton. If there were nothing else to be considered than simply these facts it might be contended, under the language of section 70, that the defendant is right, and that he may be an Alderman of the City of Ottawa though he does not reside within its limits, but resides in the same county within which it is situate. Section 73 enacts, who shall be disqualified to be elected, and non-residents are not there enumerated, so that section so far upholds defendant's views. Then section 74 provides for those who may claim exemption from serving, and nothing is said about non-residents.

But it is a principle in the government of every municipal corporation that it has a right to the service of all its members in those offices to which they are capable of being elected, and from which they may not claim exemption. In the present case the defendant sought the office, and the office was not forced upon him, but if he be qualified to ask for it he must be also qualified to perform the duties of it if elected against his will. I apprehend the principle in respect to qualification applies to the one case as well as the other, and I see nothing in the 70th sect. which can imply that a person might be at liberty to elect whether he will consider himself qualified or disqualified on the ground of non-residence, as may suit either his convenience or his inclination. The 183rd sect. of the Statute enacts, that every qualified person duly elected who refuses the office shall be subject to be fined not more than $80 nor less than $8. I see nothing which would exempt the defendant from being subject to this penalty if he be qualified to be elected, as he contends, in case he were elected and refused to take the office. But the mere penalty would not be all. There is nothing in the Act to shew that the Legislature intended that the payment of the penalty would excuse the non-acceptance of office, or that it is to be in lieu of doing the duty. It is clearly laid down in *The King* v. *Bower*, 1 B. & C. 585, that it is an offence at Common Law to refuse to serve an office when duly elected. I refer also to *The King* v. *The Cor. of Bedford*, 1 East. 79, to shew, that if the defendant in this case was qualified to be elected he might on refusal to serve have been indicted for his refusal. *The King* v. *Woodrow*, 2 T. R. 731, also strongly supports this view. I cannot imagine the Legislature ever contemplated that a person appearing upon the assessment roll of one Municipality in respect of property which would qualify him yet if he lived in another Municipality twenty miles distant would be liable to be treated as qualified notwithstanding, and be subject to be fined and indicted because he did not accept the office to which he was elected.

There is nothing in my opinion from which to draw any inference that the Legislature intended that a person might be qualified to accept office and yet at the same time not be subject to the consequences in case of refusal. We must therefore come to the conclusion, that the meaning of the 70th section is something different from what the defendant contends in this case. I confess it is not easy to see what was meant. Possibly it may have been thought the expression would provide for cases of doubtful domicil, or such cases as it may be said that a man may have two domicils, though I do not suppose the Legislature meant that in this case the defendant could at the same time be a member of the Council of Ottawa and of the Township of Nepean. So far as I can see from the facts, there is nothing which would or could have prevented the defendant from being elected for the Township of Nepean, and of being subject to the penalties for not taking the office if he had been elected there.

The Court of Queen's Bench in *Reg. ex. rel Taylor* v. *Caesar*, 11 U. C. Q. B. 461, determined that a person could not have two domicils for the purpose of voting, and I see nothing which warrants a person having two domicils for the purpose of qualification to be elected either seeking the office or having it forced upon him.

The conclusion I have arrived at is, that whatever the Legislature did mean they did not mean that a person who was living in a distinct municipality from another where he may be rated for property, also might be forced in the latter municipality to accept office at the risk of penalties, and if that be a correct construction, and I think it is, then it follows that such person is not a qualified person liable to be elected, and if that be so, then the only remaining question is, whether he may be elected with his own consent against the wish of any individual who complains of it. I do not think he may. Though the defendant may be rated on the Roll of the City of Ottawa, yet that does not constitute him a member of that Corporation. The 1st section of the Act shews that it is only the inhabitants of the City of Ottawa which compose the Corporation, and it appears to me any one of the corporators has a right to complain that a stranger, one who is not a corporator, has been chosen to fill the office of Alderman.

We know that in cities and large towns there are many persons who have their places of business within the limits of the city or town but yet do not reside there, and very probably the Legislature intended to render such persons eligible to the corporate offices mentioned, but that object should have been accomplished either by putting it upon the footing of a voluntary choice by the electors, combined with the will of the elected, to accept, or else have distinctly said that such persons are members of the Corporation, and leave no reason to doubt their being liable to the penalties if they refused to serve if elected against their will. It is in this respect the Act is defective, and we must give it a construction which will render the whole Act consistent, and apply to every case.

Besides this view of the subject, it is to be observed that the Territorial Divisions' Act, chap. 3, of the Con. Sta. Acts, U. C., declares that for municipal purposes, the City of Ottawa shall be a county, and that by the Municipal Institutions' Act it is clear a person resident in one county, is not eligible to be elected for a corporate office in another county. This, of itself, would seem to dispose of the question in this case.

The defendant raised an objection, that the Writ in this case was not properly issued, because it appears to be marked in the margin of it as having issued from the office of the Clerk of the Crown in the Court of Queen's Bench, whereas the 5th sub. sec. of sect. 128 of the Con. Act, ch. 54, says, that the Writ shall be issued by the Clerk of the Process. The Writ is properly signed by the Clerk of the Process, and is under the process seal, and I think that it is issued within the meaning of the Act of Parliament. I must set aside the election of the defendant, and the judgment must be, that the Corporation proceed to another election. I give no costs however, as the language of the Legislature is very well calculated to lead people astray.

Judgment for Relator without costs.

(Before his Honor the Judge of the County of Carleton.)

THE QUEEN, ON THE RELATION OF THOMAS M. BLASDELL, AGAINST JOHN ROCHESTER.

Municipal Election—Candidates for City Council—Qualification—Residence.

Held, that under sec. 70 of the Municipal Act, a person, to be qualified to be elected a member of a City Council, must not only possess the property qualification required, but be a resident within the city limits.

Held also, that a person whose family resided without the city limits, and with whom for weeks continuously he lived, could not, although occasionally boarding with an inhabitant of the city, be deemed a resident of the city.

Quære: Have the aldermen of a city, as *ex officio* justices of the peace, any jurisdiction beyond the city limits?

[May, 1860.]

In March last the defendant, John Rochester, came forward as a candidate for the office of alderman for one of the wards of the city of Ottawa, and was declared duly elected.

The relator, who was the opposing candidate, applied for and obtained a writ of *quo warranto* to remove the defendant, on the ground that he was not at the time of his election a resident of the city, and also on the ground that he was not a British subject.

The latter ground was abandoned; so that the question for decision was, whether the defendant had a right to sit as an alderman, he not being at the time of his election a resident within the limits of the city, although in all other respects duly qualified. It was admitted that the defendant resided and carried on his business without the limits of the city, but within the county of Carleton, of which the city of Ottawa, for certain purposes, forms a part.

A few weeks previous to this application, the same question, and between the same parties, was brought before a learned judge of Queen's Bench (Mr. Justice Burns), under the same form of process, and for the same cause, who declared the defendant not duly qualified to be elected an alderman.*

The only difference between that case and this was, that after the first election, and before the one contested on this application, the defendant contracted with an inhabitant of the city of Ottawa, to board with him at fifteen shillings a week, and had paid him for a few weeks board at that rate. It was admitted, however, that he did not board with him continuously, but very frequently lived with his family without the city limits, and at one time for eight or ten days uninterruptedly.

Lewis, for the defendant, did not rely upon such an arrangement as in itself sufficient to establish the fact of a residence so as to qualify his client to be elected, but contended broadly that the defendant being a resident within the territorial limits of the county of Carleton, within which the city of Ottawa is situate, was duly qualified.

ARMSTRONG, Co. J.—The learned judge of the Queen's Bench decided that the defendant was not qualified, and with that decision I most fully agree.

The 70th section of the Municipal Act declares that the persons qualified to be mayors, members of a council, or police trustees, are such residents of the county within which the municipality or police village is situated, as are not disqualified under this act, and have at the time of the election property, &c., rated on the assessment roll of such municipality or police village, of certain value.

Now, in the Territorial Division Act, page 18 of Consolidated Statutes of Upper Canada, it is enacted that for municipal purposes the cities of Toronto, Hamilton, Kingston, London and Ottawa, *shall not* form parts of the counties of York, Wentworth, Frontenac, Middlesex and Carleton, within the limits whereof they are respectively situated, but shall, for municipal purposes, be counties of themselves.

If, therefore, the city of Ottawa forms no part of the county of Carleton for municipal purposes, I cannot understand how the defendant is a resident of such county, when it is admitted he lives without its limits.

The word "mayor," used in the 70th section of the Municipal Act, is not confined to the head of a city council alone; it applies equally to the head of a town council, and as no town is declared to be a county in itself for municipal purposes, the mayors of towns, or members of a council, or police trustees, must necessarily be residents of the county within which such municipalities are situated, if they reside within the county at all, and which they must do to qualify them for election, as declared by the 70th section.

There are many clauses in the Municipal Act which speak of cities as distinct from towns, although towns are all referred to as parts of the counties in which they are situated. For instance, the 154th section directs the clerks of townships, villages and towns to make certain statistical returns to the clerk of the county within which they are situated, to be by such clerk transmitted to the provincial secretary;—the clerks of cities are required to transmit similar returns to the secretary direct; so far showing that cities are separated from counties within which they are situated.

Mr. Lewis lays some stress upon the 361st and following sections of the act, as to the authority which mayors and heads of councils have as justices of the peace. I do not think it is by any means clear that mayors and aldermen of cities are *ex officio* justices of the peace beyond the limits of the cities they represent.

The 361st section says, "every city, *and town separated*, shall be a county of itself for municipal purposes, and such judicial purposes as are herein specially provided for in the case of all cities, but for no other."

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* See preceding page.

The 366th section authorizes the Governor to appoint justices of the peace for a *town*, with jurisdiction over *all* the county in which the town is situated; and if, as is contended, the city of Ottawa is part of the county of Carleton because the mayor and aldermen have jurisdiction as justices of the peace over the whole county of Carleton, it is not easy to understand why the legislature should have declared, by the 364th section, that so soon as a town becomes a city, commissions of the peace for such town shall cease.

It appears to me more than probable that if the point be ever brought up in any of our superior courts, it will be found that mayors and aldermen of cities have no jurisdiction as justices of the peace beyond the limits of their cities; for although it was intended to give the inhabitants of cities the power of electing their own magistrates for certain judicial purposes within their cities, I am by no means certain that such elected justices of the peace have any greater jurisdiction beyond their respective cities, than justices of counties have beyond their counties.

The 366th section makes a distinction between justices of the peace for a county in which a city lies, and justices for the city, by saying that warrants of county justices shall require to be backed or endorsed before being executed in a city, in the same manner as is required by law when to be executed in a separate county, showing that for certain judicial purposes a city forms a separate county in itself.

It is true, there is no express provision for backing the warrants of a mayor or alderman, when to be executed out of the city or in another jurisdiction; but I think it very possible that the 24th section of the act, respecting the duties of justices of the peace out of sessions (p. 1048 Con. Stats. U. C.), applies to their warrants as well as to those of other justices, and that therefore it was not necessary to provide for them, supposing cities to be separate counties, as I think they are.

The 367th section says, that the mayor of any city may call out the posse to enforce the law *within his municipality*, under the same circumstances as would justify the sheriff of a county in doing the same act within his county.

However, these clauses are not very material or necessary to the decision of the present case, which turns altogether upon the point, whether the defendant is entitled to act as an alderman of the city of Ottawa, he not being at the time of his election a resident within the limits of the city, although a resident of the township of Nepean, part of the county of Carleton, which, for certain purposes, includes the city of Ottawa. That portion of the Territorial Act first referred to is, in my opinion, of itself sufficient to settle the question. It beyond a doubt cuts off the city of Ottawa from the rest of the county of Carleton, for municipal and certain judicial purposes. The election of an alderman is clearly one of these municipal purposes; and as the defendant was not, in my opinion, a resident within the municipality at the time of his election, the election must be declared null and void.

I regret that he did not, after the decision of Mr. Justice Burns, abstain from placing himself in his present position. The consequence is, that he must in this instance pay the relator his costs.

My judgment, therefore, is, that John Rochester be removed from the office of alderman for Victoria ward of the city of Ottawa; that a new writ for the election of an alderman in his stead do issue; and that he pay the relator his costs.

Judgment for relator with costs.

(Before His Honor the County Judge of Waterloo.)

THE QUEEN, ON THE RELATION OF GAVIN HUME V. MORRIS C. LUTZ AND SAMUEL RICHARDSON.

Municipal Act—Towns—Election of Reeve & Deputy Reeve—Equality—Casting vote.

Held, that the mayor of a town, as the member present who was assessed for the highest amount on the last revised assessment roll, had no power to give a second and casting vote at the election of reeve and deputy reeve of the town.

[March, 1861.]

The town council of the town of Galt met in the town hall on Monday, the 21st January last, for the purpose of electing a reeve and deputy reeve for the town.

Morris C. Lutz received seven votes, including the mayor's vote, for the office of reeve, and a like number of votes was given for James Kay, also a candidate for the office of reeve.

There being an equality of votes, the mayor, as the member present who was assessed for the highest amount on the last revised assessment roll, gave a second and casting vote for Mr. Lutz, who was thereupon declared the duly elected reeve of the town for the present year.

At the same meeting of the council, Samuel Richardson received seven votes, including the mayor's, for the office of deputy reeve, and the like number of votes was given for James Young, also a candidate for the office of deputy reeve.

There being an equality of votes, the mayor, as the member present highest on the assessment roll, gave a second and casting vote for Mr. Richardson, who was thereupon declared the duly elected deputy reeve of the town of Galt for the present year.

It was contended by the relator, that the mayor, as the member present who was assessed for the highest amount on the last revised assessment roll, had no power to give a second and casting vote for the parties, and that their election was therefore invalid.

John Miller, for relator; *S. B. Freeman, Q.C.*, for defendants.

MILLER, Co. J.—I adjudge and determine, first, that the relator had, at the time of making his complaint, an interest in the election to the said offices of reeve and deputy reeve respectively, as a voter at the said election, and also at said election gave his vote in favor of the election of James Kay for the office of reeve, and of James Young for the office of deputy reeve of the town of Galt, and as a councillor duly elected to represent ward No. 5 in said town of Galt for the present year; secondly, that the mayor, as the member present who was assessed for the highest amount on the last revised assessment roll, had no power by law to give a second and casting vote for the said Morris C. Lutz and Samuel Richardson; thirdly, that the 134th section of the Municipal Act, on which the defendants have relied as authorizing the proceedings taken at their election, is no authority for them, for the 147th section of the same act says that *any* question at *any* meeting of the council on which there shall be an equality of votes, shall be deemed to be negatived;—there having been an equality of legal votes for the candidates proposed for the reeveship and deputy reeveship, I have no doubt this section must apply to the proceedings, and that the motions should have been considered as negatived;—and, fourthly, I determine that the defendants pay the relator's costs, to be taxed.

I refer to *Reg. ex rel. Pollard* v. *Prosser*, 2 U. C. Prac. R. 330.

ASSESSMENT CASES.

IN THE MATTER OF THE APPEAL OF MR. HATT.

Assessment Act—Steamboat—Personal property—Where assessable.

Held, that the personal property of a partnership must be assessed against it at its usual place of business.

Held also, that a steamboat is personal property within the meaning of the act, and properly assessable at one of the two places between which in summer it plied, and at which in winter it was laid up.

(July 1, 1859.)

ARMSTRONG, Co. J.—In the matter of the assessment of the steamer Phœnix, Mr. Hatt appeals against the decision of the Court of Revision of this city, for assessing the whole property in this municipality.

The Steamer is owned by several persons, of whom Mr. Hatt is one, and he is the proprietor of one fourth of the vessel, and has his residence here—the other proprietors reside out of this Province. The Steamer runs between this and Grenville, in Lower Canada, and in the Winter is laid up at this place—and is assessed against Mr. Hatt, who objects to being assessed for the whole value of the boat, he being the proprietor of but one fourth part of her. The vessel is not assessed in any other municipality.

The 10th section of the Assessment Act of 1853,* enacts that the personal property of any partnership shall be assessed against it at the usual place of business of such partnership, and each partner in his individual capacity shall not be assessable for his *share of the personal property* of any partnership *which has already been as-*

* Consolidated Statutes of Upper Canada, cap. 55, sec. 36, *et seq.*

sessed, and if a partnership has more than one place of business, each branch as far as may be, shall be assessed in the locality where it is situated for that portion of the personal property of the partnership which belongs to that particular branch, and if this cannot be done, the partnership may elect at which of its places of business it will be assessed for the whole personal property, and shall be required to produce a certificate at each of the other places of business of the amount of personal property assessed against it elsewhere.

The Steamboat being personal property liable to assessment, not assessed elsewhere, she being in this municipality, and one of the partners or joint proprietors being resident here, (although I think it matters not whether he resides here or not, if the partnership have a place of business here, which it may be presumed they have), the Steamboat is properly assessed against them. If assessed elsewhere, a certificate to that effect may relieve them. The steamer, I take it, is not assessed against Mr. Hatt as an individual, but against Messrs. Hatt & Co., at least it should be so. This is a description of personal property which can only be assessed as, a whole, and although the boat plies between this and Grenville, I do not understand that its business is of a nature consisting of several branches, within the meaning of the statute, so that I think it is properly assessed in this place.

I sustain the decision of the Court of Revision and order that the appellant do pay the costs.

In the Matter of the Appeal between the Gas Company and the City of Ottawa.

Assessment—Gas Company—Pipes—Realty or Personalty.

Held that the pipes of a gas company laid throughout and under the streets of a city cannot be deemed "land" but rather personal property within the meaning of the Assessment Act.

(July 11, 1859.)

Armstrong, Co. J.—The Gas Company of the city of Ottawa appealed from the decision of the Court of Revision, on the ground that the pipes conveying the gas from the establishment are valued with and as part of their land. The valuation set upon the whole is £6,000; and it appears by the testimony of Mr. Coumens, one of the assessors, that in this amount is included a sum of £2,000 as the value of the pipes carried through the city; and it was admitted that the Company are over assessed to the amount of £2,000, if the pipes be not assessable as part of the land or real estate.

The 9th section of the Assessment Act of 1853 enacts, that the real estate of all incorporation companies shall be assessed in the township, village or wards (the last word, I suppose, applies to towns and cities) where the same shall be, in the same manner as the real estate of individuals; and their personal property shall not be assessed against them in their corporate capacity, but each shareholder in any incorporated company shall be assessed for the value of the stock in shares held by him as part of his personal property, except when such stock is specially exempted by this act.

It is the *real estate*, which includes the land of the Gas Company, that is liable to be assessed, but the Court of Revision contend that every foot of Gas pipe in the city forms part of the lot of land owned by the Company, and on which their works are erected; and their counsel contends that because certain things are called by law fixtures and pass by conveyance with the land, or in other words, are considered attached to the freehold, that therefore all such things constitute real estate or land, however remote from the visible land, if the articles can only be called fixtures.

Land, in its legal signification, is of an indefinite extent upwards as well as downwards; upwards, so that no man may erect a building to overhang another's ground; and downwards, so as to include whatever is in a direct line between the surface of the land and the centre of the earth. (See Blackstone's Commentaries.) Another very learned writer says, "Land is a word of very extensive signification, and comprehends all things of a permanent, substantial nature, not only gardens, arable grounds, meadows, pastures, moors, *waters*, *rivers*, marshes, furze, heath, but also messuages, that is, houses, lofts or places where houses once stood, mills, castles, &c.; in short, any ground, soil or earth whatsoever, with all buildings thereon;" and concludes by saying, as Blackstone does, that "land includes not only the face of the earth, but everything under it or over it."

The 3rd section of the assessment act declares, "land," as used in the statute, shall be held to include all buildings or other things erected upon, or *affixed* to, the land, and all machinery or other things so *fixed to any building* as to form *in law*, part of the *realty*.

By what mode of reasoning the numerous links or pieces of Gas pipe, which are spread over a large city—many of them perhaps miles distant from the visible land upon which the Gas Works are erected—can be so affixed to the same land as to form, in law, part of the realty, I am at a loss to comprehend. I think the clear meaning of the clause of the statute is, that such things as are recognized by law to be fixtures shall be valued as part of the land and nothing more, and I do not think that such portions of the Gas pipes of the company, as are beyond the boundaries of their works, and placed either in the streets or on the lands of other men, are portions of the realty. If the company were to sell the fee simple of the lot on which their works are erected to an individual, for general purposes, I do not think the purchaser would be allowed to tear up streets, and grounds, and gardens of parties without the permission of the city authorities, or the owners of the grounds in order to remove or otherwise interfere with the pipes laid down under the streets or gardens of private parties, which he might expect to do if the pipes were either actually or in law a part of his land.

I rather incline to the idea that the pipes of a Gas Company are more the personal property of the Company than the real property. Every man's stock or shares in the company are valued and liable to assessment. Now as it is to a great extent, by means of the pipes, value is given to the stock or shares, in valuing the one the value of the other is included—but looking at the case in its more simple light, namely, whether the pipes are so affixed to the land as to form part of the realty, which the law requires, to sustain the position of the Court of Revision, I must decide that they are not, and therefore order the assessment roll to be amended, by reducing the assessment of the Gas Company to £4,000, and that the city pay the costs.

COUNTY COURT CASES.

McInnes v. Haight.

Assignment—Filing within five days—Relation to time of execution.

Where an assignment of goods and chattels for the general benefit of creditors is filed within the five days allowed by Consol. Stat. U. C. cap. 45, sec. 4, the filing has relation to the time of the actual execution of the instrument, so as to prevent the operation of a *fi. fa.*, against the goods and chattels of the assignor, placed in the hands of the sheriff between the time of execution and time of filing.

(April 1, 1860.)

On the 28th August, 1860, one John Stephen, being indebted to the plaintiff and other creditors, executed an assignment in trust to the plaintiff, for the benefit of all his creditors generally, without priority, &c. The instrument was executed at Hamilton, in the county of Wentworth. The goods were at St. Thomas, in the county of Elgin. The plaintiff's clerk was despatched to St. Thomas on the evening of the same day, to take charge of the goods. He reached that place on the morning of the 29th, and took possession.

The defendant had a judgment in this court against Stephen, and issued execution on the 14th July, 1860; but it was not placed in the sheriff's hands until the 29th August, the day after the bill of sale was executed. The sheriff seized under that execution; and the plaintiff, as trustee under the assignment, claimed the goods, and forbade their seizure or sale by the sheriff, and threatened that officer with an action; upon which he applied for and obtained the usual interpleader order.

It is unnecessary to recapitulate the evidence given at the trial, which took place at the December sittings of the County Court. The learned judge charged the jury, that if an immediate delivery of the goods did not accompany the sale, followed by an actual and continued change of possession, the sale must be by writing duly registered, accompanied by the affidavits required by sec. 4 Consol. Stat. U. C. cap. 45, p. 452; that if registered within

five days, it would take precedence of the execution, and protect the goods against all other claims; that the sheriff could only seize the goods of John Stephen under the execution, and not those which had been his, but of which he had divested himself of all title; that the question was, whose were the goods that the sheriff seized under Haight's execution—they had undoubtedly been John Stephen's property, but had that property been changed—that he (the judge) thought the property might be so changed if, upon a valid and good consideration, to carry out an honest purpose, as where the debtor transfers or makes a sale of his goods to pay his debts, provided it be done in a way that no badge of fraud, such as the law declares shall be a fraud, attaches to the transaction, and provided the sale and delivery be completed before the sheriff receives the execution in his hands to satisfy a judgment of some *bona fide* creditor, or provided a bill of sale be registered within five days of the execution of the instrument, as required by the 4th section of the statute.

The jury found the bill of sale registered within five days of its date and execution (that is, within three days), and found a verdict for the plaintiff.

Stanton, for the defendant, objected to the judge's charge, and in January term moved for a new trial, the charge being, as he contended, contrary to law, and cited *Feehan* v. *Bank of Toronto*, 10 U.C. C.P. 32.

Abbott, contra, cited *Feehan* v. *Bank of Toronto*, 19 U.C. Q.B. 474; *Shaw* v. *Gault*, 10 U.C. C.P. 286.

Hughes, Co. J.—Although I knew, at the time of the trial of this cause, of the existence of the decisions in appeal in the several suits of *Feehan* v. *Bank of Toronto*, by the Courts of Queen's Bench and Common pleas respectively, and *Shaw* v. *Gault et al.*, then referred to in a digest of recent decisions in the July number of the *Upper Canada Law Journal*, I did not possess the advantage of having read them as they now appear fully reported in 19 U. C. Q. B. 474, 10 U. C. C. P. 32, and 10 U. C. C. P. 286; and now, finding that the two superior courts differ so widely upon the point which most materially affects this case, I feel that I occupy delicate ground when I express a decision upon that about which the judges of the superior Courts of Upper Canada are not agreed.

Were it not that I find no analagous decisions of the superior courts in England or Ireland referred to either in the arguments of counsel or in the judgments of the superior courts here, and that I have, after much trouble and anxiety, succeeded in finding cases which I think bear very strongly by analogy upon the question at issue, I should not have presumed to say anything further than simply to give my judgment upon the authority of one or other of the cases referred to in the argument before me, and allow the court above in appeal finally to set the matter at rest as between the parties; although no doubt the question would still remain open between the courts above, until settled by the Court of Error and Appeal.

I told the jury, in effect, at the trial, that I considered the title to goods, since the statute, passed by the bill of sale or assignment, in the same way that it used to do before there were any statutes passed or in force requiring the registry of such instruments under certain circumstances; that the delivery of the instrument completed the title, and does so still, but that such title is now liable to be absolutely annulled or avoided as against the creditors of the bargainee or assignee, and as against subsequent purchasers, &c., or morgagees in good faith, where there is not an immediate delivery accompanying the sale, followed by an actual and continued change of possession, *i. e.*, by the non-fulfilment of the condition created by the statute, which I looked upon in the light of a condition subsequent.

Mr. Fisher, in his work on the Law of Mortgage, page 20, with reference to the Imperial statutes 17 & 18 Vic. cap. 36 (the English Bills of Sale Act), and 17 & 18 Vic. cap. 55 (the Irish Bills of Sale Act), which, like our Provincial statute, have for their object the guarding against private and secret bills of sale, says, "The act, therefore, appears simply to make registration necessary in cases which were already within the statute of Elizabeth and the authority of Twyne's case. Nor does it affect bills of sale of property of which possession is delivered, but only of such as remains in the possession of the maker of the bill; and whereas before the statute the question in ascertaining the validity of the bill of sale was, whether the transaction were *bona fide*, or made with an intention to defeat the creditors of the assignor, the question now is, whether the instrument has been registered. Then apparent possession of itself raised a presumption of fraud, which might be determined by a jury; but even this was not a sufficient safeguard, and now apparent possession raises no presumption of fraud if the instrument be registered; but if it be not, the apparent possession will not merely raise a presumption of fraud, but will invalidate the transaction as against the persons mentioned in the act."

It has been laid down by Mr. Baron Parke (now Lord Wensleydale), in construing the Imperial statute 2 & 3 Vic. cap. 29, s. 1, that "the sound rule of construction with respect to acts of parliament is, that the words are to be read in their ordinary and usual grammatical sense, unless that mode of construction leads to manifest inconvenience, or is repugnant to the plain intention of the legislature."

Lord Chief Justice Campbell said in the case of *England* v. *Blackwell*, (30 L. T. Reports 148): "When looking for the meaning of the words of a particular act of parliament, you must see what was the purpose of the legislature in the act, and how that is to be obtained."

Lord Chief Justice Denman said "It is undoubtedly true that the court will always put such a construction on the words of an act of parliament as will carry out the object of the Legislature; but if the act of parliament uses words which do not carry out the supposed intentions of the Legislature the Court cannot add them." (14 L. J. N. S. 220; Q. B.)

Now, I take the object of this act to be to guard against private or secret bills of sale, and the plain meaning of the words of the 4th section to be that sales of goods coming within the purview of that section shall be, first, in writing; secondly, the property shall be well described; thirdly, an affidavit of a witness to its execution; fourthly, an affidavit of the bargainee or his agent of the *bona fides* of the transaction; fifthly, a registry within five days from its execution; and, failing a writing, the sale shall be void; failing a proper description, the sale shall be void; failing an affidavit of a witness, it shall be void; failing the affidavit of the bargainee or his agents of the *bona fides* of the sale, it shall be void; or failing a registry within five days, it shall be void. When I say void, I mean as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith. The necessity for registry cannot be here taken absolutely without the qualifying words, "within five days."

As I construe the words of this section—and I think that the construction does not overstep the intention of the legislature, as gathered from the whole scope of the act, any more than does the construction which has been put upon the words "immediate delivery" by the Court of Common Pleas, in *Haight* v. *Munro* (9 U. C. C. P. 466), which were held to mean, in the same act, "delivery as quickly as the nature of the case admits of, and an absence of delay on the part of the purchaser to obtain possession;" for surely if the time a purchaser may take to gain immediate possession under one section of the statute is to be understood in a qualified sense, and to be governed by the individual circumstances of each case, the words "within five days," the time within which a mortgagee is expressly allowed to register, may be understood in the common and ordinary sense by which the words are made use of. The word "otherwise," in the 4th section, I take to mean, "if these things are not all done," the sale shall be void, &c.; and I take the converse to be plainly implied, *i. e.*, "if these things are all done," the sale shall not be void as against the creditors of the bargainor and as against subsequent purchasers, &c. I do not think it would be at all overstraining the intention of the Imperial and Provincial legislatures to hold, that a bill of sale of goods executed in England or Ireland, not accompanied by immediate delivery, shall hold good for twenty-one days without registry, and that a similar instrument executed in Upper Canada shall, under similar circumstances, hold good without registry for five days as against creditors, &c. I cannot think the legislature intended to put an obstruction or difficulty in the way

of persons finding it necessary to execute or take mortgages on chattels or assignments for the benefit of creditors, by the passing of the statute which has been so much discussed, but merely to regulate them in so far that their *bona fides* should be secured, or sworn to at all events, and their notoriety made public by registry within a specified time. Were it the intention to require their registry before they should have any efficacy against creditors and subsequent purchasers, &c., in good faith, I think such intention would, in the concise and simple language now used in our acts of parliament, have been more plainly expressed, and probably language similar to that of the Imperial statute 3 & 4 Wm. IV. cap. 55, secs. 34 & 35, which provides that no bill of sale shall be valid and effectual till registered, would have been employed, and that a proviso would have been inserted that it should not be valid if not registered within five days from its execution; thus conferring validity on the bill of sale on its registration, and if not registered within five days making it invalid.

I must say I think the legislature had no intention to restrain the making of such instruments; indeed I should think it especially otherwise, as applicable to assignments like that which is the subject of this interpleader, or to deeds of composition with creditors; for it not unfrequently happens that a large body of creditors are willing to take what an honest and unfortunate debtor may have to give up to them in liquidation of their debts, which, when properly disposed of by ordinary fair means, may go largely to satisfy their claims, and that some rapacious and unprincipled creditor, determined to get his last penny at any sacrifice, watches and takes his opportunity of advantage, and puts an execution in the sheriff's hands, to have everything seized and sold at an enormous sacrifice, to the detriment of every one but himself; and the holding that a bill of sale or assignment like the present takes no effect by relation would have a tendency to invalidate a great number of such instruments, that are not executed on the exact spot where they are required to be registered.

In this case the assignment was registered within five days, that is, within three days, and I think all that the statute required to be done was done in order to make and continue it a legal transfer or sale of the goods in the store, but not so of the household furniture. If the five days had not been specified in the statute, the instrument would have to be registered within a reasonable time, which, if done to the satisfaction of the court and jury, I think the transfer and title would still relate to the execution and date of the instrument; but I regard the specific five days set forth in the statute as inserted to prevent litigation and uncertainty, and to place the matter beyond the doubts that parties might entertain by the variety of circumstances that would encompass each particular case, and the still greater uncertainties that might exist of satisfying the minds of jurors as to what is reasonable and what unreasonable.

I think there is an analogy between the assignment in question here, and the bill of sale of a ship, under the Imperial statute (now repealed) 34 Geo. III. cap. 68, which, in sec. 16, required, in the case of a ship absent from port, that the bill of sale should be registered, and that the endorsement should be made on the certificate of registry within ten days after return, with a provision making void the bill of sale on failure of compliance with these requisites.

Moss v. *Charnock* (2 East, 399) was a decided case, expressly under the statute last referred to, and would, had it not been overruled, have been to my mind a decisive authority against a title under a bill of sale or mortgage of chattels registered within five days, as our act requires, being construed to have relation back to the day of its date, because the court held that that statute was to be construed as enacting that no bill of sale or other such instrument shall be allowed to have any operation or effect until the requisites imposed on the parties to the sale are complied with, and not allowing any relation to hold good so as to make the conveyance effectual from any antecedent time. It is to be observed, however, that that decision did not proceed upon the 16th section of the statute, which required the endorsement on the certificate of registry to be made within ten days after the ship's return to port—because the endorsement was not made within ten days after the ship's return—but because an unreasonable time had elapsed between the date of the execution of the bill of sale and its registry.

I find the subsequent cases—*Palmer* v. *Moxon* (2 M. & S. 43), *Dixon* v. *Ewart* (3 Meriv. 322), *Mestaer* v. *Gillespie* (11 Ves. 637), and *Hubbard* v. *Johnson* (3 Taunt. 208)—so materially qualify the decision of *Moss* v. *Charnock*, as to overrule it for all purposes of the question now before me.

In *Dixon* v. *Ewart*, Lord Eldon, acting upon the opinions of Dallas, C. J., and Abbott, J., held, "that a transfer of a ship at sea, if all the requisites of the registry acts have been fully complied with at the time of the transfer, vests the property in the vendee, subject only to be divested by the neglect of the vendor to make the endorsement on the certificate of registry within ten days after the return of the ship into port; and that if a bankruptcy intervenes before the arrival of the ship, the endorsement being only an act of duty on the part of the vendor, and passing no interest, may be performed by the bankrupt himself."

Bayley, J., said, in *Palmer* v. *Moxon*: "The case of *Moss* v. *Charnock* was, I think, rightly decided, under the circumstances; for there the bill of sale was executed on the 23rd August, and the requisites of the statute were not complied with until the 5th December; so that there was gross delay. Expressions used in that case have been pressed upon us, which would certainly militate against the present decision; but these expressions appear, upon consideration, to have gone further than what was necessary, or than the law warrants. The true construction of the act seems to be this, that the bill of sale shall be holden to transfer the property from the time of its execution, but shall be liable to become void *ex post facto*, that is if the party does not comply with the requisitions of the statute within a reasonable time; upon the failure of which, the statute makes the sale null and void."

Dampier, J., in the same case, said: "The efficient act is the bill of sale, which is to be void if the requisites of the statute are not complied with afterwards. That falls precisely within the definition of a condition subsequent."

The same view of *Moss* v. *Charnock*, in the more recent case of *Boyson* v. *Gibson* (4 C. B. 122), although that was a decision under an entirely different statute (3 & 4 Wm. IV. c. 55), which requires a registry before a bill of sale can have any force or effect whatever. The court, in disposing of that case (p. 145), said: "A review of the cases of *Palmer* v. *Moxon* and *Dixon* v. *Ewart*, which were cited for the plaintiffs, and of the statute on which those cases were decided, will be found to confirm the opinion we have formed on the statute 3 & 4 Wm. IV." And again, at page 146, speaking of 34 Geo. III. cap. 68: "When the registration and endorsement had been made, the bill of sale was taken out of the operation of this avoiding clause, and stood on the same ground as it would have done if there had been no such clause in the act, *i. e.*, as a bill of sale, operating from its execution according to its terms; and in conformity with this view, in *Palmer* v. *Moxon* and *Ewart* v. *Dixon*, it was held that under 34 Geo. III. cap. 68, the interest passed by the bill of sale on its execution, and that the performance of the requisites as to registration and endorsement was a condition subsequent, and failure to perform it defeating the interest which had vested by the bill of sale immediately on its execution. That this is the true construction of the act 34 Geo. III. cap. 68, we think is not to be disputed. But it is to be observed that the cases cited overruled the doctrine as to the construction of that act, on which the Court of King's Bench, in the case of *Moss* v. *Charnock* (2 East, 399), proceeded, and speaks of the decision as a somewhat forced construction, in which the words of the enactment are made to give way to the presumed intention of the act."

I have diligently searched through the authorities within my reach for decisions under the recent Imperial Statutes known as the English Bills of Sale Act (17 & 18 Vic., cap. 36), and the Irish Bills of Sale Act (17 & 18 Vic., cap. 55), which, although more comprehensive than our Provincial Act, are like it in their provisions, and the same in character, I have found only one, which I think quite decisive upon the question, and bears out the view I entertain upon it. *Marples* v. *Hartley* was an interpleader issue decided last month by the Court of Queen's Bench in England:—The plaintiff lent one Shemwell £45, upon the security of a bill of sale of household furniture and stock, dated 27th June, 1860. A

few days afterwards, the plaintiff instructed the Sheriff to take possession under the bill of sale, which he did on the 2nd July, and was in possession when an execution issued at the suit of the defendant. That execution was tested the 3rd July, but delivered to the Sheriff on the 5th. Seizure was made under it on the 6th. An interpleader order was dated the 16th: at the trial it was objected that the bill of sale was not registered. A verdict was taken for the plaintiff, with leave reserved to the defendant to enter a verdict for him. It was held that the assignee, under the bill of sale, had twenty-one days allowed to register his title, and the rule was discharged (3 L. T. Reports, N. S. 774). During the argument Whightman, J., said there was no non-compliance with the Act of Parliament on the 6th July. Cockburn, C. J., said to the defendant's counsel, "You want the apparent possession to be in the maker *after the twenty-one days*, and you also want *the lapse of the twenty-one days*. You must combine the two, and we are to see whether the plaintiff had not a good title on the 6th July." In delivering the judgment of the Court Cockburn, C. J., said—"I think this is very clear, the assignee, under the bills of sale, *has twenty-one days allowed him by the Act of Parliament to register his title*, and when he removes the goods he need not register. *Here he had the remainder of the twenty-one days unexpired, either to register or remove.*"

I therefore order that the verdict shall stand, and that the defendant's rule be discharged with costs, and that judgment be entered for the plaintiff, upon the points reserved.

Rule accordingly.

GENERAL CORRESPONDENCE.

Assessment Law—Towns and Villages—Statute Labour.

To the Editors of the Law Journal.

Gentlemen:—You would confer a favour by replying to the following queries, which relate to matters of general interest.

1. In incorporated towns and villages, are any inhabitants liable to a tax for statute labour, except those whose other taxes do not amount to two dollars?

2. Are the lands of non-residents, in incorporated towns and villages, liable to a tax for statute labour?

3. How and by whom are the names of "the other male inhabitants," (Con. Stat. U. C., cap. 55, sec. 79) who are not on the assessment roll, but who are liable to a tax of two dollars for statute labour, to be ascertained and inserted on the collector's roll, as required by sec. 86 of the same chapter?

M. N.

[1. The right of the council of an incorporated town or village to impose statute labour, except on those whose taxes did not amount to two dollars, was under the assessment act of 1853, very doubtful. The doubt, however, was in 1858 removed by the statute 22 Vic., chap. 99, sec. 409. By the last mentioned enactment the powers of township, town, and village councils in respect to the assessment and imposition of statute labour were declared to be the same. Upon reading sections 82, 83, and 84, of the present assessment act, it will be found that no change in the law in this particular is contemplated.

2. The answer to No. 1, is also an answer to this inquiry.

3. As the clerk is required by sec. 89 of the act to make out the collector's roll on which he is "to set down the name of every person assessed, &c.," and we can find no provision allowing him to set down on the roll the names of persons *not* assessed, such as those contemplated by the first part of sec. 79, it is difficult for us to say how the names of such last mentioned persons can, under sec. 86, legally appear "upon the collector's roll." Perhaps, however, some of our readers who are practically acquainted with this branch of the law will be good enough to throw some light on the point for the information of our correspondent.—Eds. L. J.]

Deadly weapons—Power of Justices of the Peace.

To the Editors of the Law Journal.

Chatham, March 7th, 1861.

Gentlemen,—A question of considerable importance to rural magistrates has recently come under the consideration of Justices here, viz.—Has not a magistrate power to summarily try and punish a person guilty of carrying weapons contrary to 22 Vic., cap. 91, s. 9 (Canada)? Or is that power vested in *police* magistrates of *cities* alone? If the magistrate has not authority to summarily convict, how should he dispose of the case, as frequently the expense and inconvenience of sending one to be tried by the nearest police magistrate of a city, or recorder, (pursuant to 22 Vic. cap. 105, Canada) is very great. In such instances would it be the duty of the magistrate to send the case to the quarter sessions, assuming the accused would desire to be summarily tried? By answering the above queries through your valuable journal, you will confer a favor I believe on Canadian Magistrates generally.

Yours truly,

A. J. P.

[We are of opinion as follows:—

1. That no Justice of the Peace out of sessions other than a Recorder or Police Magistrate, has power, with or without consent, summarily to try a person accused of carrying deadly weapons contrary to the provisions of Consolidated statute of Canada, cap. 91, s. 9.

2.—That if any person is charged before any Justice of the Peace out of Sessions with any such offence, and in the opinion of such Justice the same may be proper to be disposed of by a Recorder or Police Magistrate, the Justice may, if he see fit, remand the accused for further examination before the Recorder of the nearest City or before the nearest Police Magistrate. (Consolidated statute Canada, cap. 105, s. 18.)

3. That instead of adopting the last mentioned course, the Justice may, if he see fit, remand the accused to the next Court of Quarter Sessions; but as this is a point yet undetermined by judicial authority, our opinion is not given free from doubt. (See Dickenson's Quarter Sessions 4 Ed. p. 129.)—Eds. L. J.]

Judgment—Registry—Fi. fa.

To the Editors of the Law Journal.

Feb. 20th, 1858.—A. registers a certificate of judgment against the lands of B.

Feb. 27th, 1858.—B. sells by deed of bargain and sale to C. In about two and a-half years after registry of judgment, A. issues *fi. fa.* lands against the lands of B.

The certificate of judgment runs out before *fi. fa.*

The lands of C. were sold March 5th, 1861.

Does the *fi. fa.* keep alive the certificate of judgment of A. and preclude certificates registered immediately after his from taking effect?

Please answer through Journal.

A SUBSCRIBER AT ST. MARY'S.

[Our answer is in the negative. In the case put we do not discover any immediate relation between A.'s certificate of judgment registered July 20th, 1858, and his *fi. fa.* lands issued two and a-half years afterwards, so as to cut out intermediate judgments against the lands of B. The ordinary remedy of a judgment creditor who relies upon the registry of a certificate of his judgment as a charge upon the lands of defendant is not by *fi. fa.*, but by bill in equity, and in that court judgments are claimed and taken to be valid and effectual according to the priority of registered certificates.—EDS. L. J.]

Municipal Institutions' Act—Overseer of Highways—Councillor.

TO THE EDITORS OF THE LAW JOURNAL.

Walkerton, March 25th, 1861.

Gentlemen,—Please to give your opinion on the following in your next number, and oblige your obedient servant.

According to chapter 99, section 73 of 22nd Vic., can a councillor of a municipality act as overseer of highways in the municipality, and hold the office of councillor at the same time.

I am yours, &c.,

A SUBSCRIBER.

[The two offices appear to us to be incompatible, and such is the decision of the County Judge of Simcoe, in *Reg. ex rel. Richmond* v. *Tegart*, which will be reported in our next number.—EDS. L. J.]

Exemption Act—Effect thereof.

TO THE EDITORS OF THE LAW JOURNAL.

Norwood, C. W., March 1st, 1861.

Gentlemen:—Can the chattles now exempt by law from seizure under execution, be seized and sold under a landlord's warrant, or a collector's warrant for taxes. Your answer in next *Law Journal* will much oblige.

Yours truly,

J. FOLEY, *C. D. C.*

[Yes. The exemption is only "from seizure under any writ issued out of any court whatever," (See 23 Vic. cap. 25, sec. 4) the object of which is to exempt from seizure under writs of execution. The remedies of a landlord by distress for rent, or of a collector of taxes by distress for unpaid taxes are not at all affected by the act; they remain as if the act had never been passed.—EDS. L. J.]

REVIEWS.

THE NORTH BRITISH REVIEW for February, opens with a paper of interest upon India, wherein is fully described the system pursued towards that country by the different political schools of England. There is perhaps no more difficult subject in the science of politics than the system of rule, suitable for the millions whom the British Government controls in India, and particularly worthy of consideration is this subject at a time when, as now, peace is restored in that late unhappy land. A review of the Autobiography of Lord Dundonald makes the reader intimate with some stirring events in the life of that nobleman, and affords a glance at important scenes in the history of his country. The writer of Modern Necromancy reviews with the proneness to ridicule natural, but not therefore the most proper, the developments of spiritualism, with the scantiness of result which must always attend such investigations. Articles upon the Political Press, Hessey's Bampton Lecture, Lord Palmerston and our Foreign Policy, &c. &c., make up the number.

THE ECLECTIC MAGAZINE for March, appears embellished as usual with two fine engravings, the portrait of Lord John Russell and Shakspeare before Sir Thomas Lucy. We are made acquainted with the Middle Ages of England by a paper as readable as such an one must be, upon such a subject. Two papers upon Geographical subjects inform the reader of the opening up of new lands in the East to civilization, and of the wanderings of brave men in the Northern climes. The life and times of William Pitt will be read by all who look with due regard upon the acts of one of the most remarkable men who ever swayed the fortunes of a great people. The Magazine concludes with other selections of varied interest.

THE ECLECTIC MAGAZINE for April, has a portrait of Don Pedro II., of Brazil, and a historic print of Lord Russell taking leave of his family. "Modern Thought" opens the number with one of the best articles upon the subject of the philosophical disunion which is now extending so widely in England. Tennyson's philosophy is a graceful review of the style and spirit of the Poet Laureate of England.

THE CHRISTIAN EXAMINER reviews Dr. Thompson's plea for Eternal Punishment from the stand point of the writer and with an ability very different in the eyes of different readers. Müller's History of Vedic Literature carries us far back in the ages of the Indian religions, and renders plain the time and character of the literature of that early period. The Emancipation in Russia, and other papers, fill the number.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

MORGAN JELLETT, the younger, Esquire, Attorney-at-Law.—(Gazetted March 9, 1861.)
THOMAS HENRY BULL, of Toronto, Esquire, Attorney-at-Law.
THOMAS DEACON, of Perth, Esquire, Attorney-at-Law.
JOSEPH BANE, of Toronto, Esquire, Attorney-at-Law.
HENRY CAFFIN WINDEAT WETHEY, of Brockville, Esq., Attorney-at-Law.
EDWARD S. CALLETT, of London, Esquire, Attorney-at-Law.
SALTER J. VANKOUGHNET, of Toronto, Esquire, Attorney-at-Law.
JOHN ANDERSON ARDAGH, of Toronto, Esquire, Attorney-at-Law.
THOMAS F. GRAYDON, of St. Catharines, Attorney-at-Law.—(Gazetted March 23, 1861.)
CHARLES FREDERICK GOODHUE, of London, Esquire, Barrister-at-Law.

CORONERS.

JAMES B. LEWIS, Esquire, Associate County of Welland.—(Gazetted March 9, 1861.)
JOHN W. WALDEN, Esquire, M.D., Associate, County of Waterloo.
AUGUSTUS A. YEOMANS, Esquire, M.D., Associate, County of Hastings. (Gazetted 9, 1861.)
ALFRED NASH, Esquire, Associate County of Lambton.—(Gazetted March 23, 1861.)

TO CORRESPONDENTS.

"SAMUEL WHALEY"—"NORFOLK"—Under "Division Courts."

"M. N."—"A. J. P."—"A SUBSCRIBER AT ST. MARY'S"—"A SUBSCRIBER"—"J. FOLEY"—Under "General Correspondence."

"A SUFFERING ONE."—Not aware that you are a member of the legal profession, and if not, you are sailing under false colors, so far as your first communication is concerned.

"OTTAWA."—Additional enclosures received; will be published in next number.

"R. B. W."—Judgment received. Please send names of counsel. Judgment will be published in next number.

DIARY FOR MAY.

1. Wednesday ... Last day for notice to Counties of apportionment of Grammar School moneys.
4. Saturday ..... Chancery Hearing Term ends. Articles, &c., to be left with Secretary Law Society.
5. SUNDAY ..... *Rogation Sunday.*
9. Thursday ..... *Ascension Day.*
12. SUNDAY ..... *Sunday after Ascension Day.*
14. Tuesday ..... Last day for service of writ County Court.
19. SUNDAY ..... *Whit Sunday.*
20. Monday ..... EASTER TERM begins.
24. Friday ..... Paper Day, Q. B. Queen's Birthday.
25. Saturday ..... Paper Day, C. P. Last day to declare for County Court.
26. SUNDAY ..... *Trinity Sunday.*
27. Monday ..... Paper Day, Q. B.
28. Tuesday ..... Paper Day, C. P.
29. Wednesday ..... Paper Day, Q. B.
30. Thursday ..... Paper Day, C. P.
31. Friday ..... Last day for Court of Revision finally to revise Assessment Rolls and for Co. Councils to revise Township Roll.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

MAY, 1861.

NOTICE.

The proprietors of the LAW JOURNAL *have at length determined to take legal proceedings for the recovery of unpaid subscriptions. All accounts amounting to $20 and upwards, will be, without further notice, placed in suit on the 1st July next. Subscribers concerned, who desire to avoid law costs, are therefore required to pay their dues before the day indicated, or abide the consequences of neglect.*

LAWYERS AND LAW STUDENTS.

It is said of the poet, "*Nascitur non fit.*" This cannot be said of the lawyer; with him it is rather "*Fit non nascitur.*" His life must be one of patient industry. A knowledge of law can only be acquired by study, and success is only attained by earnest and continued application.

There are men visionary enough to suppose that a man has only to "hang out his shingle," to become a lawyer. These theorists, while ridiculing apprenticeships of every kind, ignore all the teachings of experience.

The men who have risen to eminence in the legal profession, are those who in early life were "good students." The boy is the parent of the man. Give us the student who loves labor because of a healthy thirst for knowledge, and you give us the germ of the successful lawyer.

It is certainly a fact that some men are better qualified by nature for the profession than others. The gift of language is an essential talent for the advocate. This is a gift not equally conferred upon all, nature to some being lavish, and to others niggard. But a man may be a brilliant advocate, and yet not be a lawyer. Of this history furnishes us with many examples. To be a lawyer is to know law, and we repeat that a knowledge of law is only acquired by hard work.

Our Legislature, in its wisdom, has established the system of attorney and apprentice, or lawyer and student. A certain number of years' service under articles, is regarded as a preliminary qualification to admission as an attorney. But what a misnomer is it in the case of some students, to say that they are *serving* under articles or *studying* their profession!

Articles of clerkship constitute a solemn compact between the attorney and his clerk. Each contracts to do something for the other. The obligations are reciprocal. The undertakings are mutual. A contract is made, and should be performed in spirit and in fact.

The student contracts, among other things, from time to time, and at all times during the term of clerkship, to conduct himself "with all due diligence, honesty and propriety." The attorney contracts, "by the best ways and means he may or can, and to the utmost of his skill and knowledge, the student to teach and instruct, or cause to be taught and instructed, in the practice or profession of an attorney or solicitor."

It is to be feared that with too many these undertakings are idle forms. A letter from a law student, in other columns, reminds us of the fact.

Students who pass a few hours daily in an office, flatter themselves that they are performing their part of the obligation. Attorneys who daily give a few hurried commands to students, suppose they are performing all that is required of them. Both are mistaken. The error is mutual; the fault is equal; and the result is the contrary of what both must have or should have contemplated at the time of the execution of the articles of clerkship.

It is a mistake for the student to suppose that he does any favor to his master by working hard in his office. The one who does so, does no more than his duty. The reward may not be immediate, but it is certain in the course of time. A student placed in an office where hard work is expected of him, is exceedingly fortunate. If he knew what is for his own good, he would never murmur. On the contrary, he would rejoice that he was compelled to learn his profession by dint of hard work. What is expected of him is "true diligence." He is not to deem himself privileged from work because he receives no pay. His pay is the knowledge which he acquires—more preci-

ous than gold or silver, more desirable than either, and in general the source of both.

The attorney, on the other hand, is not to look upon his students as pieces of furniture in his office. He is not to consider that he has four clerks, in whom he is not to concern himself any more than in his office chairs. A responsibility—a great responsibility, rests upon him. By his teaching, by his conduct, by his example, his student will shape his course. Each student is, as it were, a talent entrusted to his keeping. It is for him to improve the talent, and not to bury it in a napkin. He contracts not merely to teach and instruct the student, but to do so "to the utmost of his skill and knowledge.

Much responsibility rests upon the parent. It is his duty to train the child in the way he should go, and when he is old he will not forget it. How often has a son cursed his father for neglect in youth! Youth is the season of improvement; then it is that the mind receives impressions for good or for bad, and woe to the parent who from indifference allows his child to receive wrong impressions. His child then lives only to be a monument of reproach. The responsibility of the master to the student is of the same description as that of the parent to the child. Like master, like man. An earnest master produces an earnest student, just as the listless master begets the listless student. The master who feels the full weight of his responsibility is seldom unmindful of his duty to students. It may be that pressure of professional engagements prevents the daily lecture; but there are a thousand opportunities of imparting instruction even in the largest practice—in truth the larger the practice the greater the opportunities of instruction. Take nothing for granted. Consider the capacity of the student; consider his experience. Explain everything that needs explanation. Let him take nothing for granted. Let him ask for advice when in doubt, and remember the advice when received. Encourage inquisitiveness; take pleasure in responding to enquiries; invite inquiries instead of discouraging them.

Between the master and student, as remarked by our correspondent, there is real sympathy. If the master is indifferent as to the success of the student, the student is as to the master. If the master is anxious for the welfare of the student, and loses no opportunity of evincing it, the student reciprocates by a willingness to serve.

Besides, every attorney should take a pride in his students. The college is proud of its *alumni*. It swells with pride as they rise to fortune and to fame. While themselves shining lights, they reflect lustre on their *alma mater*. Why should not each lawyer take a pride in his students, and feel that each student who leaves him will be either a credit or a discredit? Why not then do everything possible to produce the creditable student? If this feeling of pride in students were more general, the complaints of students would be less frequent.

A word to our correspondent. He appreciates his real position. We hope he is satisfied with the office in which his lot is cast. Let him continue to feel as he writes, and his fondest expectations will be realized. He adopted as a profession one of the first in the Province—a profession which is not merely one of the best for a man of the required talents, but a profession which is the stepping-stone to place and power. Considered in itself, it is noble; considered as a channel to position and power, it is still more noble. It is surely a noble calling to defend the innocent, and to punish the wrong-doer—to be the oracle of those who are in doubt, and the guide of those who need advice. A lawyer is powerful for good or for bad, and it should be the aim of every lawyer to be powerful for good The profession is universally admitted, humanly speaking, to have more influence and more weight in every civilized community, than any other profession or calling among men.

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "The Editors of the Law Journal, Toronto."

FOOT-NOTE OMITTED IN FIRST COLUMN OF PAGE 94.

Owing to a practical difficulty, the following was omitted in the last number, but is now inserted, and should be read as a note to corresponding subject on first column of page 94:

A great deal was said in the public prints about the "iniquity" of this provision, the "cruel and oppressive powers" it conferred; that it authorised "imprisonment for debt" merely—the "punishment of debtors who by misfortune became unable to pay," &c. &c. If such occurred, the evil was not in the law, but in the way it was administered, and that surely cannot be charged against Mr. McDonald. The provision did not sanction imprisonment for debt; and the following extract from a published exposition of the law by Judge Gowan, in March 1851, immediately after the passing of the act, will show how it was from the first understood:

"The new provision (the 91st clause) will be a death-blow to fraudulent practices, and will also be some check on persons about to contract debts, who have no reasonable certainty of being able to discharge them afterwards.

"The powers given are, for the discovery of the property withheld or concealed, and for the enforcement of such satisfaction as the debtor may be able to give, and for the punishment of fraud.

"*This last is by no means to be understood as imprisonment for the debt due.* Under the statute, a debtor cannot be imprisoned at the pleasure of the creditor merely, without public examination by the court, to ascertain if grounds for it exist, in the deceitfulness, extravagance or fraud of a debtor. The man willing to give up his property to his creditors, ready to submit his affairs to inspection, and who has acted honestly in a transaction, although he may be unable to meet his engagements, has nothing to fear from the operation of this law. It is the party who has been guilty of fraud in contracting the debt, or by not afterwards applying the means in his power toward liquidating it, or in secreting or covering his effects from his creditors, upon whom the law looks as a criminal, and surrounds with danger."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 95.)

The dispensation of civil justice, from the first divided between the superior courts and tribunals of limited jurisdiction, has by a gradual but steady current of legislation been forced into local channels, enlarging the old and opening new, every day bringing our plan of judicature nearer to that in the Saxon time, when not only every county and shire in England, but even smaller districts, had a local court competent to deal with civil suits to a large, probably an unlimited extent.

The increase in the jurisdiction and powers of our inferior courts has indeed more than kept pace with our growth in prosperity and population;* and little reflection is necessary to discover that the length of time they have been established, their accessibility and simple forms, and the extent to which the business transactions of the great body of the people have been moulded in accordance with the system, have given the existing courts an enduring hold in the country.

In that view, an attempt is made to place the law regulating the Division Courts in systematic form before those for whose benefit it was designed and upon whom it operates. And first, of the Courts.

Chapter III.

Of the Courts.

The Division Courts system, established in the year 1841, was in full operation when, in 1859, the public general statutes of the country were revised and consolidated.

Upper Canada then stood parted into thirty-one judicial districts, each composed of a single county, or of two or three counties united, for judicial and other purposes. As before mentioned, all the counties had been subdivided for court purposes, each division forming the territorial limits of a court; every judicial district in the country having its own separate establishment of Division Courts, distinguished by numbers and supplied with the proper officers. General rules concerning procedure had been framed; and approved under the law, these rules had like force as if contained in an act of parliament, and applied to all the courts.

The local Judge presided over all the Division Courts, as well as over the Courts of Record, in his judicial district.

On the 5th December, 1859, the Consolidated Statutes of Upper Canada came into force, and the several statutes for which they were substituted stood repealed. In respect to the then existing Division Courts, cap. 19 of these Consolidated Statutes is substituted for the acts relating to them, which were all repealed, and is a revised consolidation of the law as contained in the acts so repealed.*

The body of consolidated statutes were not designed to operate as new laws, and a general enactment provided, in comprehensive terms, that the general repeal should not affect matters done, existing or pending at the time.—(Con. Stat. U. C. cap. 1, secs. 6, 7, 8.)

But special provision is made respecting the Division Courts, preserving the establishment as it existed when the consolidated statutes came into operation, with the procedure then in force and for completing proceedings pending in the courts. By section 2, it is enacted that,

> The Division Courts, and the limits and extent thereof existing at the time this act takes effect, shall continue until altered by law; all proceedings heretofore duly had shall remain valid; and all suits and proceedings heretofore commenced shall be continued and completed under this act; and all rules and orders made under the provisions of any former Division Courts act, and in force when this act takes effect, shall continue in force, subject to the provisions of this act.

Section 70 of the act † provides that,

> All rules and forms legally made and approved under the former Upper Canada Division Court acts, and in force when this act takes effect, shall, as far as applicable, remain in force until otherwise ordered.

And section 218 enacts as follows:

> All proceedings commenced before this act takes effect shall be valid to all intents and purposes, and may be continued, executed and enforced, under this act, against all persons liable thereto, in the same manner as if the same had been commenced under the authority of this act.

Upon these sections it may be remarked, that the court divisions existing on the 5th December, 1859, as to number, limits and extent, will continue, with the sanction of an act of parliament for their existence, unless *duly* altered under the 8th or 14th section of the act; and any alterations made will be of course subject to the restrictions in the act, and void if they are not complied with.

The general rules and orders in force when the act took effect, are those of the 28th June, 1854, and approved on the 8th July of the same year; and they too stand upon a

* To secure the truly good and excellent in matters of legal concern, even if difficult of attainment, was the aspiration of times that are past. The spirit of our day and country hankereth after cheap law, off-hand law, all sorts of law, at men's doors, even if the article be inferior in quality and occasionally unsound. Be it admitted that where the claim in contest is small, it will not bear the expense of scientific and deliberate investigation,—with the aids available in the Superior Courts, therefore, leave such to be dealt with by the Inferior Tribunals, where the successful litigant will not be a loser in the end. But let it not be supposed that, because the Division Courts are able to deal satisfactorily with cases under their present pecuniary limit, that the jurisdiction may with advantage be further increased. To gorge these courts with business would be to impair their value to the humble suitor and in the end lead to their abolition.

* In the consolidation some slight alterations were made by the Legislature, to free provisions from obscurity, to complete their full intent, and to reconcile conflicting enactments.

† To avoid repetition, 22 Vic. cap. 19 (the Division Court Act), will in general be found referred to as "the act;" and where the number of a section only is given it must be understood to mean a section of this act, unless otherwise indicated.

statutory foundation, and are to be continued in use in the courts until otherwise ordered, under the 62nd and subsequent sections of the act.

Thus moulded under the authority of several statutes, and recast in the Consolidated Act, cap. 19, the law regulating the Division Courts presents itself for consideration.

While the courts existing on the 5th March, 1859, are supported by the statute, as just mentioned, they may nevertheless be altered, and new courts formed. As provided for in the act, there must be at least three, and cannot be more than twelve Division Courts in every county or union of counties—in every judicial district, as it may be termed—(sec. 3)—and these are called into existence upon an order of the Court of Quarter Sessions, determining the number and designating the local limits of each. The mode of forming and appointing court divisions is prescribed in sec. 8, which enacts that,

> The justices of the peace in each county, in general quarter sessions assembled, may, subject to the restrictions in this act contained, appoint and from time to time alter the number, limits and extent of every division, and shall number the divisions, beginning at number one; but a less number of justices shall not alter or rescind any resolution or order made by a greater number at any previous session.

Justices of the peace, in altering old divisions or forming new, can act only in *general quarter sessions*. It would not be competent for justices, however numerous, to meet in *special* sessions, and appoint or alter the court limits; but a general quarter sessions may of course be adjourned to a time anterior to the first day of the next general quarter sessions, for the purpose of acting under this clause.

The power conferred is to be exercised by the magistrates assembled *in* sessions; in other words, the business is an act of the court, and must, it is presumed, be done in open court, and recorded as provided for in sec. 15.

In the exercise of this duty, a large discretion has been given to magistrates, as ministers of the law and custodians of the public interests; and the Legislature evidently contemplated open, deliberate action, at periods when the courts are most numerously attended.

If the appointment or alteration of divisions is to be made at a general adjourned sessions, public notice should be given of the business to be transacted at the court.

The justices are restricted as to the number of divisions. Section 3 enacts that "there shall not be less than three, nor more than twelve Division Courts in each county or union of counties; of which there shall be one Division Court in each city and county town."

This provision, to some extent, gives a clue to justices in the exercise of the power vested in them. In the small and least populous counties, it may be assumed, the Legislature indicated that three divisions would be sufficient; while in large and populous counties, as many as twelve *might* be required.

Under the law of 1841, the number of courts in every judicial district was the same, arbitrarily prescribed, irrespective of surrounding circumstances. The present law gives scope for an adjustment of court divisions, according to the actual state of things in a locality. Population and extent seem obviously guiding principles by which magistrates should regulate their discretion in determining the number of court divisions to be established in each judicial division.* The latter part of this section relates rather to the place of holding a court than to anything in connection with forming divisions.

(*To be continued.*)

AMENDMENTS IN THE DIVISION COURT LAW.

We have already multiplied observations on the working of the "91st clause," as it has been called, and endeavored to show how unfounded are the objections raised against it; that the jurisdiction it confers does not enable a creditor to imprison his debtor for the debt, but gives authority to punish the fraudulent debtor for fraud committed; that if the power has been abused, the fault was chargeable against the administration of the law, and not against the system. It is easy to make general charges and complaints; but we have not seen sufficient proof of their truth, and it ought to be sufficient to give them a general denial.

But we have not confined ourselves to this, but have laid before the public statistics of the business from a number of counties, disproving the allegations made, and showing affirmatively the value of the provision. The information we gave was from persons well qualified to furnish it—from clerks of the courts, who spoke literally "by the book"—and we have pleasure in adding the testimony of a practi-

* While "population and extent" are to have their due weight in appointing Court Divisions, the following are suggested as considerations not less important in the exercise of a sound discretion. The divisions ought, as a general rule, to be of such size that the great body of suitors may be able to come to and return from the court within twenty-four hours. An object of the Division Court system is, to bring cheap justice to the people's doors, as it were; and if the courts be so situate as to involve an absence of two or three days in resorting to them, the expenses are of course greatly increased. The divisions ought to be as nearly uniform in size as circumstances will permit; but there will be great practical difficulty in accomplishing this in a new country, where, from various causes, the settlements are scattered and unequal. But no separate division should be formed where the probable amount of legitimate business is not likely to afford a reasonable remuneration to officers from the authorised fees. The multiplication of such divisions would be a great evil in any community. Divisions should be so appointed as to include, if possible, some town, village, or place of business resort, where a court may be conveniently held. This greatly contributes to the public convenience. In fixing the number of divisions in a county, a wise discretion must be exercised, uninfluenced by the pressure of selfish aspirants for little offices, or the clamour of particular localities. The public *general* good—the efficiency of the courts—should be the prevailing consideration. In the *largest* and *best settled* counties, *no more than twelve divisions can be appointed*. In most counties, six divisions will afford all the court accommodation that is required. The splitting up a county into a number of divisions encourages discord, and has a most pernicious effect.

tioner of considerable experience to the same purport. Mr. Durand, we think, handles the subject in the subjoined letter with great fairness. The public voice has not been heard through any of its legitimate channels, in favor of a repeal of the law; and if the law was such an intolerable grievance as represented, it is scarcely possible to suppose people would not have petitioned generally for its repeal.

In respect to the payment of jurors, we are of the same opinion as our correspondent. The remuneration to jurors is absurdly low at present, and should be increased. The only exception we would make is in the case of a jury called by the court from those present, who are there on their own business, and upon whom the duty of serving entails no additional outlay; but to bring a man ten or fifteen miles from home, and compel him to serve as a juror for ten cents, is a serious grievance.

In respect to appeals, as suggested, we entertain serious doubts. The appeal system has become a perfect nuisance in the State of New York, and we fear, if introduced here, it would be offering a premium to the longest purse. The subject, however, is not unworthy of discussion, and we should like to hear from some of our regular correspondents on the point.

We agree in the third suggestion. A bill was introduced last session, to effect the proposed improvement. The measure has not been brought forward this year, and we fear that it is too late in the season to hope for its passing now.

The fourth proposition is *just;* but there is little use in moving on it; for the Legislature would not, if we may judge from the votes on "homestead" and "exemption" law, entertain it.

Fifth. While agreeing in principle with these remarks, we cannot think the proposed remedy practicable. It might answer in a city, but would be of little use in rural divisions. At all events, the plan would not be workable under the present state of the law, requiring a party to be twice summoned; and to be effectual, the whole system would require to be remodeled.

The sixth and seventh suggestions are of value, and commend themselves to favorable consideration with all who are interested in the efficiency of the Division Courts.

AMENDMENTS TO THE DIVISION COURT LAWS.

To the Editors of the Law Journal.

Toronto, April 16, 1860.

GENTLEMEN,—Your prompt and courteous insertion of my letter on the subject of "Some vexed questions in Division Court practice, and the importance to the public of the efficient maintenance and improvement of the Division Court laws," induce me to again trouble you with a few thoughts on the same subject. There are three subjects on which I thought of addressing you on this occasion, but I will postpone two of them for some other occasion, choosing at present the more urgent, whilst the Legislature is in session. I had thought, at your invitation, so kindly given, to have again referred to some other vexed questions in your May number, but will defer such article until your June issue. The third subject is one of very general importance to all of our counties, and that is, a uniformity of decisions among the judges of Division Courts, in carrying out the law in such courts. The conflict of decisions or varying constructions of Division Court judges in Canada of Division Court laws, when fully known, is very strange and embarrassing to those who go before them in different counties. I defer my remarks on this subject, and confine them to attempts now being made in the Legislature to injure the efficiency of these Courts, adding some remarks on amendments which I think should be at once made to the Division Court law.

There are certain members of the Legislature, who appear to be very anxious to do away with the power to orally examine debtors, and of imprisonment, in cases of fraud or contempt, for not appearing. A leading and very influential newspaper (the *Globe*) has taken a very strong stand against this part of the Division Court law. Now, I may perhaps venture to say, without being charged with egotism, that few persons in Canada have had better opportunities than I have had, for over ten years past, of fully knowing the effects of the working of the Division Court laws, and especially of this objectionable one. Personal acquaintance with many of the judges, and their procedure in various counties, fully authorizes me to say that this power of oral examination and imprisonment is never knowingly abused; and in probably ninety cases out of a hundred, it causes the dishonest to act justly towards his creditors. In a few cases the contumacious may be sent to jail, either because they wilfully will not appear to give an account of their property, or because they manifestly equivocate and conceal the facts as to their property. In numberless cases again, after an examination, acting honestly, they are discharged, the payment of the costs by the creditor, and of the debtor's day expense, being a sufficient punishment to them. Great numbers of cases have occurred within my experience, where, without this remedy, men really able to pay their debts would have entirely escaped. It is a law quite as favorable to the poor man as to the rich. It is a fact, too, that the public do not want its repeal. No petition has been, to my knowledge, sent in for its repeal, and no grand jury or municipality has petitioned for it.

The members in question, and the newspaper in question, act not in accordance with sound public opinion, but in all probability take their opinions from a few complainants, who have deservedly come within the wholesome power aforesaid.

I would ask here, why is there not a movement made to petition against this hasty and needless legislation?

The *amendments* to which I would refer as needed in the Division Court law are these (I cannot say that you or others will agree with me):

1st. I think jurors summoned should be paid higher fees—certainly as much as 1s. 3d. each, if not 2s. 6d. At present the juror must travel ten miles, lose his day, pay his tavern bill, and travel back, all for 6d. perhaps, just to gratify some neighbour who wanted a jury. Why, if he calls a jury, should he not pay reasonable remuneration?

2nd. I think, in all cases of contract for any sum over £5, involving special points of law or peculiar facts, and in all cases of tort or damages of a similar kind over £2 10s., the the party choosing it should have the right to an appeal (in the same way as in convictions before justices) to the county courts, where a jury may be called. The objection, I know, urged, is the expense and delay; but the appellant, if he loses, has to pay the expense, and would be careful not to do so in trifling cases. He would also be obliged to give security, and do so within a very few days. Another objection is, that the appeal lies to the same judge; but a trial in

the County Court, before twelve jurors, and conducted by legal men, is a very different thing from a hasty country trial. The right to appeal is a very wholesome one.

3rd. I think creditors in those Courts should have the right to garnishee debts on filing an affidavit, as in the County Courts.

4th. I think that in all sums over £5, lands should be made liable, as in cases now over £10.

5th. I think that judges should have power to examine debtors orally upon any day in chambers, upon say five days' notice, or less time, and, in certain cases of fraud or apprehension, proved by affidavit, of the intention to leave the country by the debtor, should have power to detain for a limited period. Many a debtor, to my knowledge, has walked away with his pockets full, and fled the country; and his poor creditor, the amount being under £25, could not detain him. Why should the poor man lose his £5 or £10, and the rich man have the power to arrest for £26? Is not the ground of arrest fraud?—and that affects small as well as large debts.

6th. The law should explicitly define the duty of out county clerks and bailiffs as to the transmission of money collected on transcripts to the head office.

7th. The law should allow witnesses to be examined on commissions in outward counties, and in foreign countries. This provision would save much expense and delay.

I will not further enlarge this already too long letter, but will remark that many, if not all the above amendments are embraced in the American laws applying to courts similar to our Division Courts, and work well.

I am, &c.,

Charles Durand, *Barrister.*

Owen Sound, April 18th, 1861.

To the Editors of the Law Journal.

Gentlemen,—In your remarks on subsec. 6 of sec. 4 of the "Act to exempt certain articles from seizure in satisfaction of debts," you observe that "the wording is somewhat vague, and may lead to difficulty." I must confess that, noting the brevity of the subsection, and the simplicity of its phraseology, I did not arrive at a like conclusion; and still less did I suspect that any man's (lawyer's) obtusity would be such as to lead to such a case as I have now to lay before you, and to ask your opinion on.

On the 27th of December last, I received two executions against a certain defendant, and thereunder I seized and sold a small boat. The defendant came to these parts in the early part of its settlement, and at once established himself as a wood-turner. Burnt out, he removed into this town, took advantage of a small water privilege, erected a mill thereon, stocked it with lathe, patent taps, and other machinery necessary to the manufacture of patent bedsteads, spinning wheels, and general wood-turnery; put up a signboard designating himself as "turner and wheelwright," advertised himself as such in the newspaper, has always been assessed as a turner; indeed his apparent and actual occupation, by which he has procured his livelihood, has always been the manufacture of patent bedsteads, spinning wheels, and turning for the cabinet-makers and general public. But now comes the "rub." Living near the water, he has sometimes, as lately, owned a boat, and, as others, his neighbours, have done, he has occasionally, in their season, caught a few herrings or the like—seldom more than has been immediately used in his own family; and on this flimsy pretext, his legal adviser claims the boat to be exempt from seizure, on the ground that the defendant is a "fisherman."

Now, I would like your opinion, first, as to whether, under such circumstances, an officer may not fairly take exception to any more complicate proceedings being taken against him than those provided by sec. 185 of the Division Courts Act. The view I have heretofore taken of that section is, that the Legislature, perceiving how very obnoxious officers would be to such imputations as the above, considerately made the investigation of them as prompt and inexpensive as possible; and I conceive that, on the same ground, a defendant may object to an action being brought against him in a superior court for a cause cognizable in a division court, and that I may object to a formal suit in the above stated case. And can any tortuous definitions be permitted to the very simple words essential in the above cause—such as "ordinarily" meaning usually, commonly; "used" as meaning employed, occupied; "occupation" as meaning principal business of one's life, the business which a man follows to procure a living; and "fisherman" as meaning one whose *occupation* is to catch fish?

I take it for granted, although the statute speaks of "the debtor's occupation," that the chattels *ordinarily used* in the debtor's occupation should be considered as protected from seizure under certain circumstances. For example: suppose the debtor to be a bricklayer; as he could not follow that occupation in winter, he might occupy himself at that time in some other way—say teaming. I know of at least one instance of this kind. Now, here, I think, that when the debtor is *following* either of these occupations, the chattels used therein would be exempt from seizure; whilst those belonging to the other occupation would be liable to attachment. Please say if, in your opinion, I am right herein.

Some time before your notice of the Act, I had, in answer to some of my county colleagues (clerks and bailiffs), expressed the thought that the subsection in question exempted the team to the extent provided ($60), as being chattels; but I go further. Thus: suppose a teamster debtor to have a span of horses, worth respectively fifty dollars and fifty pounds, and that he has nothing else. Now, exercising his right of selection, he takes the fifty-dollar horse on account of his sixty dollars. Here my conclusion is, that as such chattels are *exempt from seizure* "to the value of sixty dollars," the officer could not lawfully seize the remaining horse. And here again I would enquire if you think I am right?

Lastly, although by subsection 3, one stove, &c., *only* are exempted, my view is, that in the case of a tavern or boarding-house keeper, sixty dollars' worth more of the like kind of goods would be exempt, as being "chattels ordinarily used in the debtor's occupation."

I believe that an article by you, embracing the above points, would be gratefully received by many besides

Your most obliged,

Paul Dunn.

P. S.—As I take the Division Courts to have been established for the benefit of the "unfortunate creditors," and not for the creation of incomes for the officers of said courts, I consider "Norfolk's" argument, about officers having to "go a-begging," as being very inappropriate. It would be much better, I think, to point out to all whom it may concern, the utter unlikelihood that a staff of proper men can be retained as officers of said courts by the present small emolument, whether that smallness arises from the minute subdivision of the business, as "Norfolk" complains, or from the (to the Legislature) discreditably low tariff of fees, as I would suggest. He is also, to my mind, very wrong in supposing that the officer may lawfully sell debtor's goods, horse, or anything else *exempted*, whether "A" does or does not "claim," and then return debtor sixty dollars. The very fact of the officer returning debtor sixty dollars, is proof that he (the officer) has *sold* what he had no right even to *seize;* for "to the value of sixty dollars," such chattels are *exempt from seizure*—at least this is my view; but of course I write that I may have an opportunity of expressing my gratitude for correction, if wrong.

P. D.

[At present we can only say we think that no judge would hold that the boat was not liable to seizure. Mr. Dunn has reasoned out the point fairly enough.—Eds. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*)

REGINA V. MOYLAN.

Libel—Pleading.

A plea to an information for libel under the Consol. Stats. U. C. ch. 103, sec. 9 must allege the truth of *all* the matters charged; and

Held, upon the information and plea set out below, that the plea in this case was clearly insufficient in that respect.

(E. T. 23 Vic.)

This was a criminal information, charging that John Hillyard Cameron, one of her Majesty's counsel learned in the law in Upper Canada, Grand Master of the Loyal Orange Association of British North America, had been duly appointed and was acting as Crown prosecutor for and on behalf of our lady the Queen, at the court of Oyer and Terminer and general gaol delivery, then being held in the city of Toronto, in and for the united counties of York and Peel, and as such Crown prosecutor had at the said court prosecuted and conducted a certain indictment against one Robert Moore for the murder of his wife, upon which the said Moore had been arraigned and pleaded "not guilty," and upon his trial therefor had been found guilty, by the jury empanelled on his said trial, of manslaughter: that James G. Moylan, of Toronto, aforesaid, contriving and intending to injure and aggrieve the said John Hillyard Cameron, and to cause it to be believed that he had acted corruptly in his conduct of the said trial as such Crown prosecutor as aforesaid, and that he had wilfully perverted the course of justice, and had prevented the conviction of the said Moore for the crime of murder on the said trial, falsely, wickedly, unlawfully, and maliciously, to wit, on the 4th of November, 1859, did compose, print and publish, and did cause and procure to be composed, printed and published, in a certain public newspaper called *The Canadian Freeman*, a certain false, wicked and malicious libel, of and concerning the said John Hillyard Cameron, and of and concerning him as such Crown prosecutor at the said court, upon the said trial of the said Moore as aforesaid, which said false, wicked, and malicious libel was to the tenor and effect following: that is say,—(Those parts of the libel that seem immaterial to the pleadings are omitted.)

"How Orange Law Officials discharge their duty!!!"

"Messrs. J. H. Cameron and R. Dempsey screening a wife murderer!!!"

"More than once have we had occasion to express our utter want of confidence in the manner in which criminal law is administered, so long as the secret grip and pass-word, and infamous oath of infamous secret societies exert their polluting influence over the officers of justice, from the judge on the bench and the prosecuting Crown counsel down to the meanest subaltern about the law court. Repeated instances could be adduced to prove that trial by jury in this city is a mere farce when an Orangeman is implicated, either as plaintiff or defendant. * * *

"One of the most glaring instances perhaps on record of this gross perversion of justice and malfeasance on the part of law officers, happened in this very city, and during the present sitting of the court of assize. The facts recorded by our contemporary the *York Herald*, if investigated and established before the proper tribunal, are sufficient to call forth an expression of general horror, and stamp with the seal of infamy the character of the base bad men who have betrayed the trust confided to them, and made use of their position to vitiate justice, and shield from condign punishment the worst of malefactors.

"We allude to the case of Robert Moore, who, &c., &c., (stating the principal facts of the case.) Such are in brief the main features of the case. Now for the after-plot. It appears that Moore is an Orangeman, the principal witness against him a Catholic. Every effort has been made by members of the Orange order, not only to procure a light verdict, but if possible to clear the criminal altogether. The article which we extract from the *Herald*, a journal published in the place where the murder was committed, and therefore supposed to be ripe on all the details connected with the crime, will shew to what extent Messrs. Cameron and Dempsey, the Crown counsel and county attorney, conspired to defeat the ends of justice.

"We gave a report in full of the coroner's inquest, since which time several additional facts have come to light, which we supposed would of course be elicited at the assizes when Moore was brought to his trial, more especially as the witnesses were subpœnaed; but great was the astonishment and indignation of every one present, when they found that these witnesses were not examined. * * * * * * *

"So much for the value of the evidence given in Moore's favour. But after all this is not so bad as the fact that seven material witnesses were not examined at all, although they had the subpœnas in their pockets. We unhesitatingly affirm that had these persons been put upon their oath, and sworn what we have heard them state, that their narration of the vile and fiend-like acts of cruelty of the prisoner to his wife, would have horrified anybody only to hear. Why, we ask, was not the woman who attended Mrs. Moore in eight confinements put upon her oath? What was the county attorney, R. Dempsey, Esq., about? He subpœnaed her—why not then hear her evidence? It makes one shudder only to listen to what she relates. Why was not Mrs. Burns and several others also examined? * * * *

"No wonder that crime increases when so little effort is made to convict the guilty; for actually, with the witnesses before them, so indifferent are our law officers to the majesty of the law, they are too indolent to have them put in the box. We have heard before that law and justice are at a low ebb in Canada, but never before did we feel its truth as now. All through this part the indignation is extreme against such a mock trial as that of Moore has proved to be. * * * * * * * *

"Have we not here the strongest and most damning proof of the total disregard for the oath which Messrs. Cameron and Dempsey took when entering office, to perform their duties faithfully and impartially? But why speak of oaths? Does not their extra-judicial oath of Orangeism set aside and render nugatory every other oath? Did not Mr. J. H. Cameron, after the last parliamentary election, constitute himself the legal champion of Orangeism, and pledge himself to help every brother Orangeman through any difficulty in which he might entangled? The case of Moore, the wife-murderer, has afforded the grand master and Queen's counsel a most excellent and laudable opportunity to give an earnest of his intention to redeem his promise. Here, though there was no necessity to call into requisition his legal lore and affected declamation, Mr. Cameron more effectually assisted his brother in trouble by withholding such evidence as must have forced even an Orange jury to render a verdict of murder. If there be a shred of morality or religion left in the country, if the public be not content to see the very fountains of justice polluted, if we be not altogether dead to the disgrace and ignominy which must necessarily attach to our system of criminal legislation, if we have any reverence for the sanctity of the law, if we value the safety of human life, it is high time to put an end to such nefarious proceedings. The facts connected with Moore's case are so glaring and flagrant that we cannot conceive how the Crown counsel and county attorney can escape prosecution and punishment. If the *Herald* speaks truth there cannot be a shadow of a doubt upon the mind of any unprejudiced man, that they have disgracefully participated in defeating the ends of justice. Is there no law, we ask to reach these men? Can such an outrage be inflicted upon civilized society with impunity? Is the worst of murderers, because a wife-murderer, to be shielded from adequate punishment because of his being an Orangeman? That Cameron and Dempsey have been guilty of complicity with the friends of Moore, is evident from the statements of the *Herald*. Such being the case, we call upon our contemporary, and the other respectable parties at Richmond Hill, who are cognizant of the facts referred to in the *Herald*, to impeach before the competent and proper tribunal those unjust, unscrupulous, and perjured law officers."—To the great damage and scandal of the said John Hillyard Cameron, to the evil example of all others in like cases offending, and against the peace of our said lady the Queen, her Crown and dignity."

PLEA.—That it is true, that upon the said trial of the said Robert Moore, in the said information mentioned, the said John Hillyard

Cameron neglected and omitted to call to give evidence on behalf of the Crown the following, among other witnesses who were subpœnaed on behalf of our lady the Queen, and present in the said Court at the said trial ready to be examined if they had been called on, and who could have given important testimony against the said Moore relating to the matter in issue between our said Lady the Queen and the said Robert Moore, on the said trial: to wit, Nancy Burns, Mrs. Hughes, Mrs. Arksey, Mrs. Williams, William Harrison, and James M. Jenkins; and the said James G. Moylan further saith, that before and at the time of the publication of the matters in the said information mentioned the said Robert Moore was an Orangeman, or member of the secret society denominated the Loyal Orange Association of British North America, of which the said John Hillyard Cameron is the leader or head, denominated, as in said information set forth, Grand Master: that the society then was, and is, a political religious society, the members whereof were and are united by secret oaths and ties to aid and assist each other as brothers, and are hostile in spirit and feeling to the professors of the Roman Catholic religion and church, of which church a large portion of the subjects of Her Majesty in this province are members, and are entitled to the protection of the laws of the land, and interested in the due administration thereof equally with the rest of Her Majesty's loyal subjects; and the said James G. Moylan further saith, that before and at the time of the said trial of the said Robert Moore, and of the said publication in the said information mentioned, the said James G. Moylan was, and still is a Catholic, and editor of a public newspaper or journal published in the City of Toronto called the *Canadian Freeman*, being the paper in the said information mentioned: that as such editor he had became aware of frequent instances in which justice in this province had failed in its due course, where a member or members of the said secret association, of which the said John Hillyard Cameron is so the head or grand master, had been tried for criminal offences or outrages upon Roman Catholics, by reason of brother Orangemen having been upon the jury by whom such offences were tried; and the said James G. Moylan further saith, that before and at the time of the said trial, and of the said publication, there was, and still is, a distrust among Catholics generally that they were and are not secure in their lives, liberties and properties, and will not receive impartial justice in the courts of the province when members of the said secret association were or are interested against them. by reason of the influence possessed by the members of the said Orange association in Her Majesty's courts of justice, through and by means of their oaths and ties of fellowship and secret signs, and their hostility to Roman Catholics. That the Roman Catholics of this province, constituting a very large portion of the inhabitants thereof, cannot place confidence in the administration of justice when it is placed in the hands of leaders of the said association; and by intrusting the prosecution of criminals, or persons accused of crime, to members of the said association great discredit is brought upon the administration of justice, and a feeling of insecurity pervades a large portion of Her Majesty's subjects. And the said James G. Moylan further says, that for the well-being of the province it is absolutely essential that all classes of Her Majesty's subjects should have confidence in the administration of the laws, and that such confidence cannot exist where the conduct of criminal prosecutions is entrusted to members of the said society; and that he, the said James G. Moylan, being fully of this belief, and having read the statement from the *York Herald* mentioned in the said information respecting the said trial of the said Robert Moore, and believing the same to be true, and that there had been a miscarriage of justice in the case of the said Robert Moore, published the said matters in the said information set forth, with the view to the public discussion of the propriety and right of the government of this province to place in the hands of a leader of an oath-bound secret political association the conduct and management of criminal prosecutions, and the consequent power of adducing or withholding evidence at pleasure, and without any personal feeling against the said John Hillyard Cameron. By reason whereof it was for the public benefit that said matters so charged in the said information should be published.

Demurrer to this plea, as insufficient.

Eccles, Q. C., for the demurrer, cited Consol. Stats. U. C. ch. 108, sec. 9.

M. C. Cameron, contra, cited *Clarke* v. *Taylor*, 2 Bing. N. C. 654.

ROBINSON, C. J., delivered the judgment of the court.

The statute on which this plea is framed, Consol. Stats. U. C., ch. 108, has made a change in the law of libel, which may prove of great advantage to the publishers of newspapers or other public journals, in cases where they have stated certain facts, however injurious to the character of an individual which they may know to have occurred, or which they find stated upon such authority that they are satisfied they can venture to rely upon being able to prove their truth if it should be questioned.

In such cases, where the public have an interest in the matter to which they have resolved to give further publicity, and where they do not give with their article any injurious comments evidently dictated by malice and in a spirit of exaggeration the statute affords them a fair degree of protection by enabling them to plead by way of justification "*the truth of the matters charged*," which was formerly no defence against a criminal prosecution, and to plead also, as a part of such defence, that it was for the public benefit that such matter should be published.

The defendant is allowed to plead this in addition to the plea of "not guilty," and if the special plea is pleaded in a manner conformable to the statute, then it will be for the jury upon the trial, if they find that the defendant has published the alleged article, and that it is a libel, to find also whether the matters—that is, all the matters—charged in the libel are true, and whether it was for the public benefit that it should be published.

This special plea has not yet been submitted to a jury, because on the part of the prosecutor it is denied to be such a plea as the statute requires or admits, and it is contended that if what is stated in it were proved to be true it would not constitute a defence under the statute.

All that the plea asserts as a justification, so far we mean, as the truth of the charges are concerned, is, that the prosecutor, John Hillyard Cameron, "neglected and omitted to call as evidence on the part of the Crown the following, among other witnesses who were subpœnaed on behalf of the Crown, and were present in court at the trial of Moore, to be examined if they had been called, and who would have given important testimony against the said Moore relating to the matters in issue (enumerating six witnesses): that the defendant having read the article in the "Herald," *and believing the same to be true, and that there had been a miscarriage of justice in Moore's case* published the matters in the information set forth with the view to the public discussion of the propriety and right, of the government to place in the hands of a leader of an oath-bound secret political association the conduct and management of criminal prosecutions, and consequent power of adducing or withholding evidence at pleasure, and without any personal feeling against the said John Hillyard Cameron—*by reason whereof*, the defendant alleges, it was for the public benefit *that the said matters* so charged in the said information should be published."

It is the plain intention of the statute, and in the case of *Regina* v. *Newman* (1 E. & B. 568) it is laid down, that a plea under the statute must affirm the truth of all the charges, and not merely that some of them are true, or that the defendant believed them or some of them to be true. Now in this case the plea only affirms that John Hillyard Cameron neglected or omitted to call certain witnesses who had been subpœnaed and were in attendance. It does not affirm that it was true, as the article published asserts, that John Hillyard Cameron betrayed the trust confided to him, and made use of his position to vitiate justice, and shield from condign punishment the worst of malefactors; or that there was a plot to screen the offender by withholding evidence; or that Messrs Cameron and Dempsey conspired to defeat the ends of justice; or that from the indifference and indolence of the the law officials the witnesses were not called; or that John Hillyard Cameron acted in disregard of his oath of office to perform his duties faithfully and impartially; or that he had pledged himself to help every brother Orangeman through any difficulty; or that he effectually assisted his brother Orangeman in trouble, by withholding such evidence as must have forced any jury to render a verdict of "murder;" or that he had been guilty of nefarious proceedings to which an end must be put if the public be not content to see the very fountains of justice polluted; or that John Hillyard Cameron and Dempsey

had been guilty of complicity with the friends of the person indicted for murder; or that they are unjust, unscrupulous, and perjured law officers.

If the fact alone of the witnesses alluded to not having been called justified in reason the inference that all these injurious charges and allegations were true, then the defendant could have ventured to rely upon proving the one as sufficient to establish the truth of all the rest, and so might have taken upon himself at his peril to affirm that all the injurious charges and imputations built upon it were true, but he has not done so in the plea, as it was necessary he should to make the plea what the statute requires, namely, a plea setting up as a defence "the truth of the matters charged."

We think this plea comes far short of what the statute intends in this respect, and is therefore insufficient.

As to the other part of the plea, no doubt it would be a legitimate subject for public discussion in a candid and temperate manner, whether it is or would be proper and expedient in the government to commit the conduct of public prosecutions to a prominent member of the Orange Society, and its probable effect upon the due administration of justice is no doubt a matter that it may well be held to be for the public benefit should be argued and commented upon as freely as any other matter of public interest: that is, with no other reserve than the law makes necessary for the public peace, and for the protection of individuals against injurious charges upon their character for which there is no sufficient foundation in truth.

It is one thing to argue that a public officer or an individual must from his position and circumstances be inevitably exposed to the suspicion of acting from unworthy motives, and another thing to affirm that he has yielded to the supposed temptation, and has already abused the trust reposed in him. It is but reasonable that the person who takes upon him to affirm the latter, or to republish what others have stated to the same effect, should be held bound to prove the truth of such statements when he is called to account for having given publicity to them—that is, where he means to rely upon the truth as his defence; and the statute expressly enacts (in the 10th section) that without a plea asserting "the truth of the matters charged"—that is, not of a part of the libellous charges, but of the whole—the truth of the matters shall in no case be enquired into, nor whether it was for the public benefit that such matters should have been published.

Our judgment is against the defendant on the demurrer.

Judgment for the Plaintiff on demurrer.

COMMON PLEAS.

(Reported by E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*

The Corporation of the Township of Beverley v. Barlow et al.

Bond—Pleading—Period of appointment of Treasurer of a Township under 12 Vic., cap. 81—Right to impose further taxes without vitiating.

The plaintiffs declare on a bond to "the Beverley Municipal Council" (there being no such corporation in existence). The defendants do not deny the making of the bond, but plead over. On demurrer to the plea and objections to the declaration:

Held that by not pleading "*non est factum*" the defendants were debarred from taking the objection to the form of the bond as pleaded.

2nd. That the appointment of a treasurer under 12 Vic., cap. 81, is an appointment, till removed, and not only for a year, and that a plea not averring the office (for the breach in the performance of the duties of which the action was brought) to have been an annual one, at the time of the taking the bond was bad.

3rd. That the imposition of additional taxes to those assessed at the time of the security, and the increase of the risk thereby, did not vitiate a bond given for the general performance of duties and payment of all moneys.

(E. T. 23 Vic.)

Declaration on a joint and several bond, whereby defendants jointly and severally agreed and covenanted to pay plaintiffs, by the name of the Beverley Municipal Council, £800; if default should be made in the condition following, viz: if Heman Gates Barlow, who had been chosen treasurer of the plaintiffs, by reason whereof he should, and did receive into his hands divers sums of money, notes, chattels, and other things, the property of the plaintiffs, upon request should give to plaintiffs a true and just account of all such sums of money, &c., as should come into his hands or possession as treasurer, and should pay and deliver over to his successor, &c., all such sums of money as should be in his hands due by him to the plaintiffs, then, &c. Averment that the condition was not kept, but default was wholly made in the condition of the bond, whereby defendant became liable to pay the said sum to plaintiffs.

Pleas 1.—That the condition of the bond was kept and performed. 2nd. That the bond was made on the 28th February, 1853, and the appointment of the said Barlow, as treasurer was an annual appointment for the year 1853, and terminated at the end of the municipal year, and that Barlow as treasurer for that year, did make and give to plaintiffs a true and just account, &c., as treasurer during the currency of his appointment for the year 1853, and did pay all sums, &c., as were in his hands, and due to plaintiffs during his appointment as treasurer for the year 1853.

The plaintiffs took issue on both pleas, and demurred to the second, because the bond was not limited in its effect as pretended in the plea.

The defendant excepted to the declaration—that it is asserted therein that the defendant covenanted with the plaintiffs by the name of the Beverley Municipal Council, and sought to set up a bond entered into by that name, whereas there is not, nor ever was a corporation known as the Beverley Municipal Council, and the statute requires bonds for the faithful discharge of a treasurer's duties to be taken in the name of the corporation.

At the trial in November last, before Sir J. B. Robinson, C. J., at Hamilton, it was shown that from 1850 to 1853, Barlow was annually appointed treasurer,

On 21st February, 1853, a by-law in the following words was passed:

"Whereas it is expedient and necessary to appoint under the new act. 12 Vic., ch. 81, being an act to establish township councils in Canada West: we, the Municipality of the Township of Beverley, do hereby appoint the township officers under the above mentioned authority. Be it therefore enacted by the Township Council of Beverley that the different persons appointed to the different township offices within the corporation of the township of Beverley, do hold their respective offices for the present year."

By a by-law passed 6th June, 1853, they voted the salaries of the township officers for that year. The treasurer was named in this by-law. Barlow continued to be treasurer without any new appointment after 1853. Evidence was given of the amount of Barlow's default, the taking of the accounts was referred to an arbitrator, and the following questions were reserved for the court:

1s. Was the liability of the defendants as sureties limited to the deficiency of Barlow for 1853, or did it extend during the whole time of his filling the office of treasurer?

2nd. Assuming that the liability of the defendants as sureties, was otherwise co-extensive in duration with the time for which Barlow remained in office, were the sureties liable for any moneys received by Barlow under 16 Vic., ch. 184, and 18 Vic., ch. 2, or either of them?

3rd. Assuming that the defendants were only liable for the deficiency of Barlow for the year 1853, would the fact that in 1854 the balance in his hands was reduced below the sum due at the end of that year, relieve the sureties *pro tanto* if the balance in his hands at the time of action brought exceeded the amount in his hands at the end of the year 1853?

S. Richards, Q.C., for the plaintiff. Demurrer and special case.

As to the declaration, it must be taken on these pleadings the bond in question was made to the plaintiffs; though by the name of the Beverley Municipal Council. Grant on Corporations 51; *The Mayor and Burgesses of Lynne Regis*, 10 Co. 122 B.; *Re Barclay and The Municipality of Darlington*, 11 U. C. Q. B, 470; *Fisher* v. *The Municipal Council of Vaughan.* 10 U. C. Q. B., 492: *Re Hawkins* v. *The Municipality of Huron, Perth and Bruce*, 2 U. C. C. P., 72; *Farrell* v. *The Town Council of London*, 12 U. C. Q. B. 343; 18 & 14 Vic., ch. 67, sec. 60. This is merely directory. *Judd* v. *Read*, 6 U. C. C. P., 362; *The Brantford Building Society* v. *Clement*, 9 U. C. Q. B., 389; *Webster* v. *Macklem*, 4 U. C. C. P. 266; *Cole* v. *Green*, 6 M. & Gr. 872; *Reg.* v. *Leicester*, 7 B. & C. 6; *Reg.* v. *Birmingham*, 8 B. & C. 29; *Kitson* v. *Banks*, 4 E. & B. 854; though the bond is general, the objection that the office is annual may be raised on the pleading, *Mayor of Berwick* v. *Oswald*, 3 E. & B. 653; *Curling* v. *Chalklen*, 3 M. & S. 502, shows that

the appointment being created under an act of parliament, reference may be made to the act to see if plea be good, and on the face of the statute the defendant cannot allege the office was annual, *Mayor of Birmingham* v. *Wright*, 16 Q. B., 6.3; 12 Vic., ch. 81, and 171, 173.

The 2nd plea is put in issue. See by the by-laws put in to show the appointment was made for a year only, and renewed each year. Three by-laws. The expression is "township officers," that may refer to such officers as by statute are to be annually appointed.

These by-laws cannot vary the statute. The treasurer by sec. 173, must have held his office until removed, and the by-laws were superfluous and had really no operation. Sec. 81 of 12 Vic., ch. 81, as to passing of by-laws.

2nd. If the office of treasurer comes within these provisions. The continuing a man in the office is not a removal and re-appointment, and there is no by-law subsequent to that for 1853. *Bamford* v. *Ilea*, 8 Exch. 380; *Frank* v. *Edwards*, 8 Exch. 214; *Mayor of Berwick* v. *Oswald*, 8 E. & B. 653; *Mayor of Clifton* v. *Silly*, 7 E. & B. 97.

Then the defendants deny liability for certain moneys received by the treasurer under statute 16 Vic., ch. 184, and 18 Vic. ch. 2, as to effect of office being varied (*Pybus* v. *Gibb*, 6 E. & B. 902), but here no variance by adding certain moneys which were to come to his hands, 12 Vic., ch. 81, sec. 172.

Anderson on same side. *Thompson* v. *McLean*, 17 U.C.Q.B. 495, is the case on which defendants will rely; it is to be distinguished by the fact of the 172 sec. 12 Vic., ch. 81. *Pybus* v. *Gibb*, 6 E. & B. 902, also suggests a further distinction. If plaintiff had replied instead of demurring, we could only have replied the statute which is matter of law, not of fact—to be submitted to a jury.

Irving contra. The cases as to by-laws cited are not applicable. Insists that law requires the security to be to the corporation, and it must be by its corporate name.

Plea good. Though council may appoint for a year definitely if they please—that will be an appointment during pleasure—and the plea avers the office was terminated.

Oswald v. *The Mayor of Berwick*, and the latter case is altogether in defendants' favour.

Mayor of Cambridge v. *Dennis*, 27 L. J. Q. B. 474.

Barlow, the treasurer, at the end of 1853, owed £198; subsequently he paid up, so that he only owed £70 or £80. Afterwards he again increased his debt. Defendants may take advantage of his payment, but cannot be liable for increase by subsequent liabilities; the bond only extends to the year 1853.

DRAPER, C. J.—The defendants have not denied the bond declared upon. At the date of that bond, 28th of February, 1853, by the 2nd section of 12 Vic. ch. 81, all the corporate powers possessed by the plaintiffs, were to be exercised by, through, and in the name of the Municipality of the Township of Beverley. Their present corporate name is given by Con. Stat. U. C., ch. 54, sec. 4.

The question would have assumed a different shape if *non est factum* had been pleaded, and we must have determined whether the bond would not be valid, notwithstanding the error of the name, in accordance with the principles of many old cases which are collected in Com. Dig., title Capacity B. 5, Bacon Abr., Corporation C.

But by pleading over it was admitted that the defendants made this bond to the plaintiffs by the name of the Beverley Municipal Council, and I think they cannot return to this objection on a demurrer to their plea, even if it were available, which at present I am not prepared to decide. It is on the record, and if it be error they are not prevented from taking advantage of it.

Then as to the Plea, it asserts that the appointment of Barlow as treasurer, "was an annual appointment;" that his appointment as treasurer *terminated* at the end of the municipal year, 1853, and that during the currency of that year he did account, &c., and did pay over, &c., all moneys, &c., due by him to plaintiffs, during the currency of his appointment as treasurer for the year 1853, and according to *Kitson* v. *Julian*, (4 E. & B. 854) the allegation in the plea that the appointment was for one year and no longer being admitted by the demurrer, it had the same effect as if the same period of appointment had been recited in the condition of the bond, and brought the case within the principle of *Lord Arlington* v. *Merricke*, in a note to which the cases down to 1845 are referred to, 3 Wm. Saund. 415b, note A. That however was a case in which, apart from the record, the court could have no knowledge of the duration of the appointment, whether it was for one year or more. But by 12 Vic. ch. 81, sec. 171, it is made the duty of municipal councils of townships to appoint a treasurer who shall hold office during their pleasure; and by section 173 of the same act, the treasurer as well as other officers, with regard to whose period of service no other provision is made by the act, shall hold their offices until removed therefrom by the municipal council for the time being. The case then seems to me to fall within the decision of *Curling* v. *Chalklen*, 3 M. & S. 502, where a plea very similar was held to be bad for two reasons: 1st, that it should have been averred that it was an annual office at the time the bond was made. 2nd, that the appointment was under an act of parliament which, so far from limiting it to one year, provides expressly for its longer continuance. Here the words of the condition are general, extending over any period during which Barlow should hold office; the public statute law is in direct contradiction to the assertion in the plea that the appointment is annual, and there is no averment of any special appointment differing in terms from the provisions of the statute, nor any thing in the condition qualifying the liability by any special appointment, if there was one, which on the demurrer we have no notice of.

I think therefore, this plea is bad. This determination renders it useless to consider the 1st and 3rd questions submitted by the special case.

As to the second question, which strictly speaking, on this record, and after our judgment on the demurrer, arises, if at all, only as to the amount of damages, I cannot say I have entertained any serious doubt. Nothing can be more general than the language of the condition that Barlow shall make and give "a true and just account of all such sums of money, notes, chattels, and other things that have or may come into his hands or possession as treasurer aforesaid, and shall pay or deliver over to his successors in office or any other persons duly authorised to receive the same, all such balance or sums of money, notes, chattels, and other things as shall be in his hands, and due by himself to the said Beverley Municipal Council."

The objection is: 1s. That by 16 Vic., ch. 184, the municipal councils were authorised to impose duties on pedlers and hawkers, and to require them to take out licenses; to require auctioneers, persons selling liquors by retail, in places other than houses of public entertainment, (as to which the councils had already the same power,) and persons keeping billiard tables for hire or gain, to take out licenses, paying for them such sums as the councils should by by-law determine, which sums should be collected and received by such municipal officers as the councils should appoint to receive the same. That large sums would consequently come into the treasurer's hands, thereby increasing the risk of the defendants as his sureties, and altering the nature of his office by adding to the extent of his duties.

2nd. That under the 18 Vic., ch. 2, moneys arising from the sale of clergy reserves, remaining unexpended and unappropriated under the 2nd, 3rd, and 4th sections of the act, are, by the 5th section, to be apportioned among the several "*county and city municipalities*" in proportion to their population, and the portion coming to each municipality shall be paid over by the Receiver-General to the treasurer, chamberlain, or other officer having the legal custody of the moneys of each municipality, and shall make part of the general funds of the municipality.

As to the first, I do not see how the question arises; for it no where appears that any by-laws imposing such duties or license fees have been passed, or that the treasurer has by any by-law been appointed to receive the same, without which either we must hold that by the conferring on township councils additional means and power to increase their revenue, although unexercised, the character of the office of treasurer is altered and the risk of the sureties increased, or we must overrule the objection. The latter, in my opinion, is the proper course.

Then as to the second, the township municipalities are not referred to in the 5 section of the above clergy reserve act. The

act however is amended by 19 & 20 Vic., ch. 16, which directs the apportionment of the unexpended and unappropriated moneys to be made among the several cities, towns, incorporated villages, and township municipalities in Upper Canada, commencing with the balance on 31st of December, 1855. Whether any such payments were made to Barlow during the terms for which it is sought to make these defendants responsible, does not appear.

But on a more general ground, I am of opinion, and I believe my brothers fully concur with me, that the creation of additional sources of revenue can no more be treated as altering the nature of the office, or the duties of the treasurer, or the risk of the sureties, than the increase of rates and assessments levied upon subject matters within the power and authority of the council at the time the sureties entered into their obligation, could be held to have such an effect. I cannot conceive that such was the intention of the parties apart from the bond, and neither the bond or condition contain any thing to lead to such a conclusion. There is no undertaking expressed or implied that the municipal revenues shall remain *in statu quo* as to their sources, any more than there is as to their amount; the increase of the latter must certainly have, in the very nature of things, been expected. So long as the duties to be performed by the treasurer as to receiving and paying out *all* moneys of the municipality, so long I consider the liability of his sureties as to such receipts and payments is unaffected.

I think, therefore, the sureties are liable for every deficiency arising on receipts from these two sources, as well as from any other, which is not contested.

The plaintiffs are, in my opinion, entitled to the *postea*.

Per cur.—*Postea* to plaintiffs.

See *Mayor of Cambridge* v. *Dennis*, 5 Jur. N. S. 265; *Barclay* v. *Municipal Council of Darlington*, 11 U. C. Q. B. 470; *Fisher* v. *Municipal Council of Vaughan*, 10 U. C. Q. B. 492; *Hawkins* v. *Municipal Council of Huron, &c.*, 2. U. C. C. P. 72; *Farrell* v. *Mayor and Town Council of London*, 12 U. C. Q. B. 343; *Wilkes* v. *Clement*, 9 U. C. Q B. 339; *Cole* v. *Green*, 6 M. & G. 872; *Judd* v. *Read*, 6 U. C. C. P. 362; *Webster* v. *Macklem*, 4 U. C. C. P. 266; *R.* v. *Justices of Leicester*, 7 B, & C. 7; *R.* v. *Birmingham*, 8 B. & C. 29; *Kitson* v. *Julian*, 4 E. & B. 854; *Mayor of Berwick* v. *Oswald*, 3 E. & B. 653; *Curling* v. *Chalklen*, 3 M. & S. 502; *Frank* v. *Edwards*, 8 Exch. 214; *Holland* v. *Lea*, 9 Exch. 430.

Craig v. Rankin et al.

School rates—Collection of—Trustees.

A general school meeting having passed a resolution, "That the expenses of the school section be paid by a voluntary subscription and the balance to be raised from a tax to be levied upon the parents and guardians of those *sending children* to the shool." The school Trustees, after the failure of the voluntary subscription, levied a general rate, upon which this replevin arose, the plaintiff contending that he was not liable as not being a guardian or parent of a child attending the school.

Held, that the trustees had no authority to tax parents or guardians of those sending children, or to alter or annul the resolution, and that the 10th sub-section of the act authorised the levy as made.

Replevin by John Craig against Hugh Rankin, Reuben Spooner, Patrick Daly, and James Swift, for a cow, value £5.

Pleas 1st.—That defendants did not take.

2. Cognizance by defendant Swift, that the the other defendants were school trustees of school section number 14, in the township of Kingston, and that the plaintiff was liable to be rated for school purposes in said section; that a rate was imposed by said trustees, and plaintiff was thereby rated for the sum of ——. That a list or warrant was delivered by said trustees, to defendant Swift, who was collector of said school section, that defendant Swift demanded amount of rate from plaintiff, which he refused to pay, wherefore defendant Swift took said goods as a distress for said rate.

3rd. Avowry by the other defendants, Rankin, Spooner, and Daly, as trustees of said school section, setting out same facts as in the cognizance of defendant Swift.

Replication.—1st. Joins issue on defendants' pleas. 2nd. As to cognizance of defendant Swift, that plaintiff was not the occupier of property in school section No. 14, nor liable to be rated as in the cognizance mentioned.

3rd. As to cognizance of defendant Swift, that before assessing said rate, to wit, on the 18th of June, 1858, at the annual meeting of said school section it was decided that the expenses of said school section should be provided by a voluntary subscription; that a large amount, to wit, £50, was subscribed, which the trustees should have collected before imposing said rate, but that said trustees did not collect said subscription, but unlawfully, &c., made said rate and delivered said list and warrant to defendant Swift to collect same.

4th. As to avowry of defendants Rankin, Spooner and Daly, same as to defendant Swift.

Rejoinder by defendant Swift.—1. Joins issue on plaintiff's plea to cognizance of the defendant Swift.

2nd. Joins issue on plaintiff's second plea to cognizance of defendant Swift.

3rd. Also, as to said second plea to defendant Swift's cognizance. That said resolution was in the following words: "Resolved that the expenses of the school section be paid by voluntary subscription, and the balance be raised from a tax to be levied upon the parents and the guardians of those sending children to the school." That the only amount subscribed under said resolution was £2 2s. 6d., and was wholly insufficient to defray the expenses of the school, and could not be collected, wherefore the amount provided by said resolution by any proceedings that could legally be taken thereunder being insufficient to defray expences of school, said rate was duly made and imposed to defray balance and amount due, or to become due for expenses of the school section.

4th. Defendants Rankin, Spooner and Daly join issue on plaintig's plea to the avowry.

5th. Defendants Rankin and others, also as to said plea rejoin same facts as defendant Swift.

Surrejoinder by plaintiff—1. Joins issue to replication to said plea to defendants Swift's cognizance.

2. As to the said replication, also says that he the plaintiff was not nor is a parent or guardian of a child or children sent to said school, and that the rate could not be legally imposed on him.

3., Joins issue on replication of defendant Rankin and others to plointiff's second plea to avowry of Rankin and others.

4. As to said replication, same as to Swift's replication.

Demmurrer by defendant Swift to surrejoinder on the following grounds: that the said surrejoinder admits the fact stated in the replication to which it professes to be an answer, but shews no sufficient answer thereto; that the rate required to pay the expenses of the school section could only be levied and collected of the freeholders and householders of the section, and that the plaintiff being a freeholder or householder of the section was liable to said rates, and that he was not exempt from such rate by reason of his not being the parent or guardian of a child or children sent to or attending the school of said section; that the mode of raising the balance of the expenses of the school section provided by the resolution set forth in said replication is unreasonable and illegal, and the trustees could not legally carry out the said resolution, and what was provided by said resolution was insufficient to defray the expenses of the school section, and the trustees were therefore justified in levying the amount by rate on all the freeholders and householders of the section.

Demurrer by defendants Rankin and others to surrejoinder, the same grounds as demurrer of defendant Swift.

Richards, Q.C., for defendants, referred to *McMillan* v. *Rankin*, 19 Q. B. U. C. 356.

No counsel appeared for plaintiff.

Draper, C. J.—A similiar question in a suit brought by one McMillan against these same defendants, upon similar pleadings, was decided last term by the Court of Queen's Bench on demurrer in favour of the defendants.

I quite agree in that conclusion, and I have had more trouble in reading the pleadings in this demurrer book than in making up my mind upon the question raised.

The rejoinder is no answer to the replication. By section 27, of Consolidated Statutes U. C., sub-section 1, (division C.,) the secretary and treasurer is to receive and account for all school moneys collected by rate bill, subscription, or otherwise from the inhabitants of the school section; by sub-section 2, they may appoint a collector to collect the rates imposed by them on the inhabitants of their school section or the sums which the inhabitants have subscribed, and such collector shall, by virtue of a

warrant signed by a majority of the trustees, have the same power in collecting the school rate or subscription and shall proceed in the same manner as ordinary collectors of county and township rates and assessments. The 10 sub-section of the same section authorises the trustees to provide for the salaries of the teachers and all other expenses of the school in such manner as may be desired by a majority of the freeholders and householders of the section at the annual, or a special school meeting, and to employ all lawful means to collect the sums required for such salaries and expenses, and *if the sums* thus *provided be insufficient to defray* all the expenses of the school the trustees may assess and cause to be collected an additional rate in order to pay the balance. The 125th section of the same act declares that all the school expenses of each section shall be provided for by all or any of the three following methods: 1st. Voluntary subscription. 2nd. Rate bill for each pupil attending the school. 3rd. Rate upon property. The replication to the plaintiff's second plea to the cognizance of one defendant, and the avowry of the other three, sets forth the only resolution passed at the annual school meeting of the section in question in these words, "Resolved, that the expenses of the school section be paid by voluntary subscription, and the balance be raised from a tax to be levied upon the *parents and guardians of those sending children to the school.*" It avers the total insufficiency of the voluntary subscription or otherwise under the said resolution for the required purposes, and that even that sum was not paid and could not be collected, wherefore the rate and assessment in the cognizance and avowry respectively mentioned was duly made and imposed by the school trustees in order to pay the balance of the school expenses. The plaintiff rejoins that he was not the parent or guardian of a child sent to or attending the school, and that a tax could not lawfully be levied upon him for the balance of the said expenses, according to the terms of the said resolution. He thus admits this was the only resolution passed, and admits also the total failure of the voluntary subscription, and relies upon a matter which, whatever, may have been intended, certainly is not expressed in the resolution. He treats the resolution as providing for the school expenses by two out of the three methods mentioned in the 125th section, namely voluntary subscription, and rate bill imposed on each pupil attending the school, and sets up as an answer that he is not a parent or guardian of any child sent to the school, meaning thereby that the resolution of the annual meeting authorises a rate or tax upon such parents or guardians and on no one else to make up any deficiency in the voluntary subscription. But the resolution provides for a tax on the parents or guardians of those sending children, not of the children sent to the school; and the trustees had no authority by law to tax such parties or amend this absurd resolution, and therefore they had to resort to the authority given in the 10th sub-section of section 27, already set out, in the event of the sums provided at the annual school meeting being insufficient. This is what they rely upon in the replication, and what the rejoinder attempts to, but does not, meet.

I think the defendants entitled to judgment on this demurrer.

Judgment accordingly.

JOSEPH KRAEMER v. JOSEPH GLISS.

Married Women—Effect of Consol. Stat. U. C. cap. 73—Action.

Held, that the Consol. Stat. U. C. cap. 73, intituled "An Act respecting certain separate rights of property of married women," does not alter the disability of a married woman to contract; and that, since the statute, a married woman is no more enabled to bind herself by contract than she was before that statute.

Held also, that the objects of the statute are—1. To protect a married woman in the right to her separate property free from the debts and contracts of the husband. 2. To secure her earnings to herself, under certain circumstances. 3. To enable her creditors to obtain satisfaction out of her separate property for debts incurred *dum sola*. 4. To release the husband from liability for such debts, though he must be joined in the action against her if he be a resident of the Province.

Held also, that the provisions necessary for these purposes being departures from the common law, so far as necessary to give the provisions full effect the common law must be held to be superseded by them, but that the common law cannot be held to be infringed any further than really necessary for obtaining the full measure of relief the act was intended to give.

Held also, that for a conversion of the wife's separate personal property during coverture, the husband may sue without joining his wife as a co-plaintiff.

(Michaelmas Term, 1860.)

The declaration stated in the first count that defendant wrongfully deprived plaintiff of the use and possession of his goods enumerating them, and in the second count—that defendant converted to his own use the plaintiff's goods and chattels.

The pleas were:—1st. Not guilty. 2nd. Goods not plaintiffs.

The case was tried at Berlin, in November, 1860, before Hagarty, J.

The goods were seized in August last, by direction of the defendant on the plaintiff's premises under two executions issued out of the Division Court, in suits, in one of which the defendant was plaintiff, and Barthold Frochly and Dorothea Kraemar, were defendants. Dorothea Kraemar was plaintiff's wife and Frochly is her son-in-law. By the sale more than enough to satisfy these two executions was made and the residue was applied in satisfaction of another execution against Frochly who lived in the same house with plaintiff and his wife. This was because that the bailiff assumed that part of the property seized and for which this action was brought belonged to Frochly, and the bailiff swore that sometimes he would claim the property and sometimes Mrs. Kraemar. It appeared that she had been a widow and plaintiff used to live as a servant with her and afterwards in January, 1860, married her. The plaintiff was present at the sale but said nothing. Frochly swore that the oxen which were seized and sold belonged to the plaintiff before he married the widow, and that the notes sued upon in the Division Court were made after the marriage, and in the absence of plaintiff. That plaintiff got the yoke of oxen from the widow a year before he married her for his wages for the preceding year. Frochly had lived with the widow several years—he worked the cleared land on the farm on shares. The plaintiff was clearing more land for himself and his wife. Excepting the oxen, Frochly swore, the rest of the property in question had belonged to the widow, but that he understood that after marriage she gave it all up to the plaintiff. The notes sued upon were given in lieu of others which became due in the preceding fall. He explained that the threshing machine, waggon and sleigh were hired to him and therefore he claimed them when an execution came against her; if an execution came against himself, he told what was hers and what was his own.

On the defence it was sworn that the defendant's son and not the defendant directed the seizure; that it was the son who bought and not the defendant—though the things, the price of which were endorsed on the execution, as costs, and so accepted by defendant, which things the defendant sold for the son's benefit as part of the son's "share of inheritance" from defendant. The defendant it was however stated by the son was at the sale and bought a whipple-tree—another witness swore he had purchased the oxen before the bailiff's sale from the plaintiff both from him and his wife after their marriage, giving two notes he held against her for the prices. No time was fixed when he was to take them, and he allowed them to be worked on their farm. He said he thought he could have them when he liked but that he only took them as security for the debt though he was willing to have taken them in payment. There were writings showing the nature of the transaction not produced.

The jury was asked to say whether the defendant directed the seizure, and whether the oxen were the plaintiff's own property, and the learned judge asked them if they found both these points in the plaintiff's favour to assess damages for the taking the oxen separately. He ruled that as the evidence stood the defendant could *not* set up the claim of the the third party to the ownership as an answer to plaintiff. For the defendant it was contended that the wife must be joined with the husband as a plaintiff: and it was agreed that he should have leave to move on this point; and the learned judge directed that the plaintiff might sue alone.

The jury found for the defendant, but valued the oxen at $65.

Thos. Miller in Michaelmas Term obtained a rule *nisi* for a new trial on the law and evidence, and because the verdict was contrary to the learned judge's charge.

M. C. Cameron, shewed cause. He referred to the Con. Stat. of U. C. cap. 73, secs. 14 and 18, *Finch* v. *Hooke*, Salk. 7, *Milnes et al* v. *Milnes*, 3 T. R. 627, *Birch* v. *Leake*, 2 D. & L. 88.

Harrison, R. A. contra.

DRAPER, C. J.—There is no doubt of the general principle that marriage operates as an absolute gift in law to the husband of all the goods and chattels and personal property of the wife.

This action is not brought for the conversion of the goods of the wife before her marriage to the plaintiff, and therefore the cases of *Milnes* v *Milnes*, to which may be added *Morgan* v. *Cubitt* 3 Exch. 612 and *Dalton* v. *Midland Co.*, 3 C. B. 474, do not apply, *Ayling* v. *Whicher*, 6 A. & E. 259, *Caine* v. *Birch*, 7 M. & W. 183, and *Bird* v. *Peagram*, 13 C. B. 649, all are in the husband's favour. Unless the provincial statute makes a difference I think there is no doubt the plaintiff has a right to recover.

The 1st section of that act declares that every women married since 4th May, 1859, shall and may have hold and enjoy all her real and personal property (if there be no marriage contract or settlement) "free from the debts and obligations of her husband, and from his control or disposition without her consent in as full a manner as if she continued sole and unmarried."

The 2nd section applies to the case of women married before 4th May, 1859, makes a similar provision as to real estate not on that day taken possession of by the husband, by himself or his tenants and as to personal property not then reduced into the possession of her husband.

The 14th section enacts that every woman having separate property, real or personal, not settled by any antenuptial, shall be liable upon any separate contract made or debt incurred by her before marriage, if married after 4th May, 1859, to the extent and value of such separate property in the same manner as if she were sole and unmarried.

Section 16 enables every married woman after 14th May, 1859, by devise or bequest executed in the presence of two or more witnesses to dispose of her separate property, real or personal, whether acquired before or after marriage among her children, issue of any marriage and failing any issue then to her husband or as she shall fit in the same manner as if she was unmarried.

Section 18 provides that in any action, &c., by or against a married woman, upon any contract made or debt incurred by her before her marriage, her husband shall be made a party if residing within the province; but if absent therefrom, the action shall proceed against her alone.

This statute does not alter the power of a married woman to make a contract. She is not enabled to bind herself while a feme covert more than she could before it was passed. It appears on the evidence that the plaintiff's wife was sued without her husband being joined on a promissory note made by her after marriage. Such fact in my opinion if proved before the judge entitled her to have the action dismissed as against herself. The note was as against her void. If she had been sued on a contract made before the marriage, her husband should have been joined. Her marriage being proved, would have been a bar to the maintenance of the action against herself, inasmuch as her husband resided in the province.

It may be questioned whether on the present pleadings, it was open to the defendant to set up the proceedings in the Division Court as a defence. The point was not taken however for the plaintiff. But if this defence was not available then the defendant appears to have seized property out of the possession of the plaintiff; for *prima facie* this property, if it were all the wife's, was in the *possession* of the husband, and possession alone would enable him to bring this action against a wrong doer.

As to the yoke of oxen the verdict certainly appears to be against the evidence. They were not the wife's at the time of the marriage: and if in fact they were mortgaged to a third party, or even sold, neither of which was legally proved, the defendant shewed no right to take them, unless they were the wife's, and therefore so far the verdict is wrong.

Still a new trial ought not to be granted if the plaintiff cannot maintain the action without joining his wife, unless indeed on the ground that the oxen were no part of her separate property; and if granted on that ground we ought, I apprehend, to say whether if on the second trial it should appear these as well as the rest of the property seized was hers under the Statute the plaintiff alone can maintain the action.

Assuming for the argument's sake that the defendant is a wrong doer as to the separate property, and that the husband can recover the full value in this action, could the wife under any circumstances maintain another action for the same injury after his death pleading her coverture in answer to the statute of limitations if that were set up in bar of the claim? The statute does not allow her to sue alone. Even for a cause of action accruing to herself before coverture the husband must be joined. The 18th section expressly requires her husband to be sued with her if it necessarily prevents the husband suing for such wrong with joining her. The primary objects of this act seem to be: first—resident in the province, though the reason formerly existing, namely, his liability to pay her debts no longer exists under the statute. She does not appear to have any means given her of compelling him to bring an action for injury to her separate estate; and yet it could not have been intended to put every wrong to her separate chattel property on the footing of *choses in action*, belonging to her, which, unless reduced into possession by the husband survived to her, or if it does, I do not then see that protects a married woman in the right to her separate property free from the debts and control of her husband, second—to secure her earnings to herself under certain circumstances, third—to enable her creditors to obtain satisfaction out of her separate property, for debts incurred *dum sola*; and lastly—to relieve the husband from liability for such debts though he must be joined in the action against her if he be resident in the province. Every provision for these purposes is a departure from the common law and so far as is necessary to give these provisions full effect we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the act was intended to give. I do not perceive that any of these provisions either in letter or spirit requires us to hold that chattel property which belonged to the wife before marriage is not by the marriage placed in the hands and under the protection of the husband, though no longer subject to his debts or to his disposal. And if he has the right to the possession, although the right of property is to the extent set forth in the act preserved to the wife, I do not see why he may not sue alone for any injury or wrong inflicted on any part of that property.

I think there should be a new trial without costs.

ROBERT JARVIS HAMILTON AND MILTON DAVIS v. SAMUEL F. HOLCOMB, JOHN MCPHERSON, AND SAMUEL CRANE.

Action on a bill of exchange—Several defendants—Judgment—Ca. Sa.—Arrest and discharge of one defendant—Its effect.

Held, in an action against the drawers and acceptors of a bill of exchange, in which plaintiffs, the holders, recovered a judgment against all the defendants under the Consolidated Statutes of Upper Canada, cap. 42, that the entry of judgment did not create one new and joint liability against all the defendants. *Quære*, as to the effect of plaintiffs issuing a *Ca. Sa.* against all the defendants, under which one of the acceptors was arrested, bailed to the limits charged in execution, and subsequently discharged from custody?

(Hilary Term, 1861.)

On the 7th January last, Burns, J., made an order in this cause, after hearing parties on affidavits, that the writ of *fieri facias* issued in this cause, and directed to the Sheriff of the United Counties of York and Peel, dated the 5th July, 1860, against the goods and chattels of the defendants, and all proceedings had thereon should be set aside, and a memorandum of satisfaction be entered as to the judgment signed in this cause on the 12th January, 1858, for £506 11*s.* 8*d.* damages, and £19 7*s.* 6*d.* costs.*

Mr. Harrison, in Hilary Term, moved against this order in the alternative, either to set it aside altogether, or to set aside so much of it as directs a memorandum of satisfaction to be entered.

Galt, Q. C., showed cause.

DRAPER, C. J.—It appears by the affidavits, that the defendant Holcomb, together with his partner, one Henderson, drew a bill of exchange upon the other defendants, McPherson and Crane, and that the plaintiffs as holders of this bill obtained a judgment against all the defendants, whom they sued in one action under the provisions of the statute of Upper Canada. About the 1st July, 1858, a *ca. sa.* was issued in the cause, on which the Sheriff of Frontenac, Lennox, and Addington arrested the defendant McPherson, who gave bail to the limits. The defendants McPherson and Crane, had, on the 2nd January, 1858, executed a deed of assignment of all their real and personal estate, in trust for the benefit of all creditors who should execute the same. The plain-

* See p. 40 *ante*.

tiffs, by their duly authorised attorney, executed this assignment on or about the 20th July, 1858, and their attorneys in the action signed and sent to the Sheriff, an authority dated the 3rd July, 1858, for McPherson's discharge, and the Sheriff discharged him accordingly. On the 5th July, 1860, the plaintiffs sued out a writ of *fieri facias* against the goods of all three defendants, directed to the Sheriff of York and Peel, endorsed to levy £525 19s. 2d., with interest from 12th January, 1858, £3 for writs, and his own fees; under which the Sheriff levied upon the goods of the defendant Holcomb. The plaintiff Hamilton made an affidavit, that when McPherson was discharged from custody, it was upon the agreement that such discharge should not affect the debt in this suit, or any other remedies on the judgment in any way.

The principal difficulty I have felt in this case is, as to the effect of our statute (Con. Stat. U. C. ch. 42, secs. 23, 24, 25, 26, 31, 32, 35) by which the holder of any bill of exchange or promisory note is enabled, and in one sense, obliged to include drawers, makers, acceptors, and endorsers in one action, for if he bring several suits, there shall be collected the costs taxed in one suit only, at the election of the plaintiff, and in the other suits the actual disbursements only. By forms given for declaring, the plaintiff, after stating his cause of action against all the parties sued, very much in the old form, concludes: "by reason whereof the said defendants became jointly and severaly liable to pay the plaintiffs," &c.

The 23rd section expressly enables the plaintiff to proceed to judgment and execution in the same manner as though the defendants were joint contractors, while the 25th provides that judgment may be rendered for the plaintiff against some one or more of the defendandts, and in favour of some one or more of the defendants against the plaintiffs, according as the rights and liabilities of the respective parties may appear, and when judgment is rendered in favour of any defendant, he shall recover costs in the same manner as if judgment had been rendered for all of them. There is no special provision in the statute as to pleading, except with regard to set off; but the practice has uniformly been for each defendant to plead such matters as may constitute his defence, without regard to the others. Making, drawing, accepting, endorsing, as well as presentment or notice of dishonour, may be all put in issue according to the situation of the party pleading. And the 26th section enacts that the rights and responsibilities of the several parties to a bill or note, as between each other, shall remain the same as if the act had not been passed, saving only the rights of the plaintiff so far as they may have been determined by the judgment. And one defendant is entitled to the testimomny of any co-defendant as a witness, if he would have been entitled to his testimony had such co-defendant not been a party to the suit, or individually named in the record.

Taking the foregoing clauses together, I should have agreed readily to the conclusion of my brother Burns, that the moment judgment is entered it becomes one judgment creating one new and joint liability against all the defendants; but the 32nd section provides that any person so sued may set off against the plaintiff any payment, claim or demand, whether joint or several, which in its nature or circumstances arises out of or is connected with the bill or note sued on or the consideration thereof, just as if each defendant had been separately sued; and if the jury, after allowing any set off, find any balance in plaintiff's favour, they must state in their verdict the amount which they allow each defendant as a set off. I suppose the object is, that the verdict may thus enable the defendants to ascertain their rights and liabilities as between themselves; and that the plaintiff will still have a general verdict against all the defendants for the balance, and enter judgment accordingly.

Then the next question is whether the taking one of several defendants, against whom a judgment has been recovered in execution upon a *Ca. Sa.*, and afterwards discharging him out of custody, operates in effect as a satisfaction of the judgment as regards all the others, though the plaintiff has received nothing.

Upon this point I still entertain considerable doubt. It appears by the affidavit, that McPherson was admitted to the benefit of the gaol limits; and the Consolidated Statutes of Upper Canada, ch. 24, sec. 37, provide that the party at whose suit a debtor is charged in execution, may, when the debtor has taken the benefit of the limits, sue out a *fi. fa.* against his lands or goods notwithstanding the debtor is charged in execution, and the execution of the *fi. fa.* is not to be stayed, but shall be continued although the debtor be re-committed to close custody. Now if a creditor having his debtor in execution on the limits, obtain satisfaction through a *fi. fa.* against lands or goods, the debtor must *ipso facto* be discharged; and if lands or goods amply sufficient to pay the debt were taken in execution, I cannot believe that by the creditor thereupon consenting to the debtor's immediately leaving the limits, the right to complete the execution would be affected. I find nothing in the act to justify such a conclusion, and it appears to me contrary to reason, and I have great difficulty in drawing a tenable distinction between such a case and the case of an execution against the goods of one defendant where another defendant is a prisoner on the limits. The difference created by our peculiar enactment, in this respect, may take this case out of the principle of the English cases, the dicta in which are not altogether consistent (see *Herring* v. *Dorrell*, 4 Jur. N.S. 800, and the casest here cited). So long, at least, as McPherson was a prisoner on the limits, I strongly incline to the opinion that it could not be held that his custody prevented a *fi. fa.* against the goods of co-defendants, if as to them the *Ca. Sa.* was returned *non sunt inventi.*

There is, however, another ground on which I incline to think the dicision of my brother Burns may be upheld.

The defendant Holcomb has only become liable jointly with the other defendants, by reason of his being sued with them under our statute. Originally he was drawer of the bill, of which McPherson and Crane were acceptors. If the plaintiffs had brought a separate action against the acceptors (and but for our statute they must have done so), and, recovering judgment, had taken McPherson in execution and then discharged him, they could not, as I think, have maintained a subsequent action against Holcomb (see *Hayling* v. *Marshall*, 2 W. Bl. 1235; the marginal note is wrong as pointed out by Lord Eldon in *English* v. *Darley*, 2 B. & P. 62; *Michael* v. *Meyers*, 7 Jur. 1156; 6 M. & Gr. 702, in which previous cases are cited): and in my opinion, as at present advised, the Court are warranted in affording the defendant Holcomb relief upon this ground, notwithstanding the judgment recovered against him, and the 26th section of the act will, I think, uphold this conclusion. The plaintiffs have discharged a party against whom Holcomb would have a remedy over, and thereby, I think, have discharged him.

But as this view is not perfectly clear, and the point itself is new, my brothers think it would be better not to dispose of it on this motion, but that the order should be varied by setting aside the *fi. fa.*, and rescinding so much as relates to the entry of satisfaction. The plaintiffs may then, if so advised, bring an action on the judgment and the question be carried into Appeal.

I concur with them in making the rule absolute in this form, without costs.

CHANCERY.

(*Reported by* THOMAS HODGINS, Esq., M.A., *Barrister-at-Law.*)

ATTORNEY-GENERAL V. DANIELL.

Crown debt—Recognizance—Lien on real estate—Registration—Notice.

One M. gave a recognizance to the Crown, with two sureties, D. and McK. The recognizance was estreated, but had not been registered under the Crown Debts Act. N., the cognizor, about the same time, gave to D., one of his sureties, a mortgage on his lands as security. M. absconded, and died abroad; and then D., under a power of sale, sought to enforce the mortgage against the lands. Upon an information filed by the Attorney-General, it was

Held, 1st, That the recognizance to the Crown bound M.'s lands from its acknowledgment, and that the Crown could enforce its lien.

2nd. That D., being one of the sureties in the recognizance, had actual notice of the lien of the Crown, and that he must be postponed to the Crown, notwithstanding the registration of his mortgage and the non-registration of the recognizance.

This was an information, at the suit of the Crown, to enforce a recognizance given by one Moser to appear at the assizes for the county of Middlesex, to answer certain criminal charges. Moser did not appear, and the recognizance was estreated. To one of his sureties he had given a mortgage on his lands, and under a power of sale in it the mortgagee was attempting to sell. Thereupon the Attorney-General filed the information, the facts of which are set out in the judgment. The cause came on to be heard *pro confesso*, but counsel

for the defendant Daniell appeared and asked to have a lien on the other property of Moser.

Hodgins for the Crown; *Read, Q.C.*, for the defendant Daniell.

Esten, V. C.—On the 29th January, 1859, one Moser, with the defendant Daniell and one McKittrick as his sureties, became bound to the Queen in a recognizance for the due appearance of Moser at the next court of oyer and terminer and general gaol delivery, to be holden in the county of Middlesex, to answer certain charges. On the 26th February, 1859, Moser made a mortgage in fee to the defendant Daniell, to secure to him the payment of the sum of three hundred pounds and interest, of certain lands, known as part of lot number eleven, in the first concession of the township of North Dorchester, containing about one hundred acres. Moser made default in appearing according to the exigency of the recognizance, which was consequently estreated on the 24th March, 1859, and the sheriff was directed to levy the amount due under it from the goods and lands of Moser. The recognizance had not been registered, pursuant to the statute in that behalf, and the sheriff was unable to levy the amount of it from the lands which have been mentioned, because they were covered by the mortgage to Daniell. The present suit was then instituted, in order to obtain a sale of the lands, on the ground that although Daniell had priority at law, by reason of the want of registration of the recognizance, yet, as he must, from the very nature of the transaction, have had notice of the recognizance when he obtained his mortgage, the mortgage ought to be postponed to the recognizance. The mortgage contained a power of sale, which Daniell was proceeding to exercise; whereupon an application was made to me for an injunction to restrain the sale, which I granted. A motion is now made for a decree, and the question is, whether the recognizance or the mortgage is entitled to priority. Moser being dead, his widow, as devisee and administratrix, is a party to the suit. Neither on the motion for an injunction nor on the present occasion did Daniell appear, or give the court the benefit of a discussion of the question. Upon the former occasion I assumed that the recognizance bound the lands of the cognizor from the time of its acknowledgment, previous to the passing of the statutes 14 & 15 Vic. cap. 9. Considering that this statute was merely intended to secure notice to purchasers and mortgagees, I decided in accordance with the cases upon judgments not docqueted, that if they had notice *aliunde*, it was sufficient, and that they should be postponed. According to this determination, I should on the present occasion decree a sale. Daniell does not seem to dispute the propriety of such a decree, but merely suggests that in that case he should stand in the place of the Crown *quoad* the other property of Moser. I should think such an arrangement extremely just, and that both upon the common law of principal and surety, and upon the doctrine of marshalling, Daniell might possibly obtain such relief as he suggests. The difficulty is, however, to understand how it can be administered in the present suit. I have had some doubt, too, upon the main question. Originally, it appears, the recognizance bound lands from the time of their acknowledgment, and goods, in case of the crown, from the *teste* of the writ (Cruise's Dig. 4, p. 104; Chitty's Prerog., p. 284), as judgments bound lands from the time they were signed, and from the teste of the writ at first, and afterwards from its delivery to the sheriff. The statute 5 Geo. II. cap. 7, is considered to have converted lands into goods for the purpose of paying debts, and the crown is named in it. The effect of this statute has been denied in this Province to be to prevent judgments from attaching upon lands until the delivery of the writ to the sheriff, so that a person purchasing be from that time, although with notice of the judgment, free from it. This decision was at variance with the spirit of the act, which was eminently remedial in favor of creditors; but it is understood that it will be respected until reversed by higher authority. I am not aware that any decision has been pronounced upon the effects of the act, as regards the crown; but it seems a necessary deduction from the decision, that judgments of the subject did not attach upon land until the delivery of the writ; that the recognizance of the crown would not bind lands until the teste of the writ, inasmuch as the crown as well as the subject is to have the same remedies against lands as against goods, and the recognizance of the crown binds goods only from the teste of the writ. Supposing this view to be correct, it would, I think, follow that Daniell would be entitled to priority over the crown; and his having notice of the recognizance would be of no importance, inasmuch as it would be notice of an immaterial fact. But the language of the 14th and 15th Vic. cap. 9, sec. 1, seems to me necessarily to imply that the recognizance of the crown previous to that statute bound lands before the teste of the writ, and *ex consequentiâ* from the time of its acknowledgment, as no other commencement could be assigned to it. In this view, the case is precisely similar to that of the undocquetted judgment, of which a purchaser has notice *aliunde*, and to which therefore he holds subject. Following that decision, I must hold that Daniell, having necessarily had actual notice of the recognizance at the time he received his mortgage, was subject to it in equity, although entitled to priority at law, and that the crown is therefore entitled to equitable execution against the lands, of which a sale must be decreed in the usual manner, supposing the bill to contain the necessary allegations. The remaining question is, whether I can give to Daniell the relief he suggests against the ether property of Moser in this suit. I have every disposition to do so, but I cannot see my way to it. He may invoke the general right of a surety, and the doctrine of marshalling. Supposing the crown debt to be realized from a sale of the mortgaged lands, Daniell may be said to be in the position of a surety paying the debt. A surety so acting is entitled to all the securities held by the creditor; but on this hypothesis the recognizance is discharged, and no security remains, and the whole effect of the suit being accomplished is at an end. Then how can the doctrine of marshalling be applied? These are not cross funds; so that the junior creditor, seizing the common fund, may be declared a trustee of the other for the disappointed creditor; but a general creditor upon the whole estate fastens upon part of it mortgaged to a surety; which being applied, what remains is not a fund, but the general estate. If Moser were alive, it is clear nothing could be done. He being dead, his estate may be applied, it is true, but only by means of a general administration, for which a separate suit would be necessary, as I should not think it would be right, even if I had the power, to compel the crown to submit to a general administration in this suit, in order to throw its claim upon the residue of the estate, reserving the mortgaged lands for Daniell, and to wait perhaps for years for the satisfaction of its demand, while the general estate is in course of being realized. Without, therefore, expressing an opinion as to whether Daniell could have the relief which he asks, I think it cannot be made a part of the decree. I may add, that Daniell's whole claim is founded upon his mortgage, which has never been in contest, the crown admitting its validity, and merely claiming priority over it.

Todd v. The City Bank.

Injunction—Principal and surety—Discharge.

Where a creditor gives time to the principal debtor, by taking a mortgage from him and agreeing to postpone a registered judgment, without notice to the sureties, the sureties will be held to be discharged.

This was an application for an injunction to restrain the defendant Brown from levying the amount of a judgment recovered against the plaintiffs, under the following circumstances.

The plaintiffs, Messrs. W. & J. Todd, had endorsed a promissory note for £500, for the accommodation of the defendant, George Wright, who discounted the note with the defendants, the City Bank. The note not having been paid at maturity, the City Bank obtained judgment against Wright and the plaintiffs, and the same was duly registered. Subsequently the City Bank sold and transferred this judgment to the defendant. James Brown, who was proceeding by a *fi. fa.* goods to levy the amount from the plaintiffs. Thereupon the plaintiffs filed their bill to be relieved from paying this judgment, on the ground (amongst others) that the defendant Brown had given time to Wright, without the plaintiffs' consent, for the payment of the money. Upon examining witnesses in support of a motion for an injunction to restrain the proceedings of law, the plaintiffs failed to establish the giving of time; but it appeared that the defendant Brown and Wright, without the plaintiffs' knowledge, had entered into an agreement, by which Wright made a mortgage on certain of his lands for the purpose of raising money, and, in order to make it a first charge on these lands, Brown agreed to postpone the above judgment as a lien on the lands to the mortgage. Upon this appearing, the

plaintiffs amended their bill, alleging this fact, and charging that the postponing of the judgment to the mortgage was a discharge of the plaintiffs as sureties.

Fitzgerald for the plaintiffs.

Crooks for the defendants.

The following cases were cited and commented on:—*Mayhew* v. *Crickett*, 2 Swanst. 185, 191, and note (*a*); *Davies* v. *Stainbank*, 6 DeG. M. & G. 679; *Pearl* v. *Deacon*, 3 Jur. N. S. 879 and 1187, in Appeal; *Wright* v. *Sandars*, 3 Jur. N.S. 507; *Mellish* v. *Brown*, 5 Grant. 657; *Watson* v. *Alcock*, 1 Sm. & G. 319; *Capel* v. *Butler*, 2 S. & St. 457.

As to the first, whether a creditor can give up any security he obtains subsequent to the original transaction without the surety's consent, and still hold the surety, as was decided by Sir Page Wood in *Newton* v. *Charlton*, 10 Hare, 646, it was contended for the plaintiffs that *Newton* v. *Charlton* was not law, and that a creditor cannot abandon any advantage or any security he has obtained, although the same was obtained subsequent to the entry of suretyship, without the knowledge of the surety; and it was further argued, that even assuming *Newton* v. *Charlton* to be well decided, yet the obtaining and registering judgment on the promissory note was not obtaining any security within the meaning of the rule laid down in this case, and that the defendant Brown could not abandon or postpone the judgment to any other incumbrance on the property, without discharging the security.

The Court were unanimously of opinion that the postponing of the judgment was a discharge of the sureties, and ordered the injunction to issue.

Note.—In a recent case of *Pledge* v *Buss*, 6 Jur. N. S. 695, Sir Page Wood admitted that *Newton* v. *Charlton* was wrongly decided, and that he would not now feel at liberty to follow it. It is clear now, therefore, that a surety is entitled to the benefit of every after-taken security. And see *Lake* v. *Brutton*, 2 Jur. N. S. 839.

FISKEN V. RUTHERFORD.

Injunction—Suppression of material facts.

An *ex parte* injunction will be dissolved, if material facts be suppressed, or misrepresented to the court, on moving for it.

The plaintiffs in this case, upon filing their bill, had obtained an *ex parte* injunction upon affidavits, one of which was made by the plaintiff, John Fisken, in which it was stated that the defendant, Rutherford, was indebted to Ross, Mitchell & Co., in £6000 or thereabouts. The defendant now moved to dissolve this injunction, on the ground (amongst others) that the same had been obtained in consequence of untrue statements in the affidavits of the plaintiffs, and that they had suppressed material facts. The defendant showed to the Court, that of the above £6000 only £150 was due to the plaintiff, the balance being due to certain Banks to whom Rutherford's notes had been transferred by Ross, Mitchell & Co., and the proceeds of which they had received. The plaintiff Fisken was cross-examined, and admitted this state of facts.

Fitzgerald for the defendant.

Blake for the plaintiff.

The argument occupied two days. The Court dissolved the injunction on the above ground, and ordered the plaintiffs to pay the costs.

GOODHUE V. WHITMORE.

Practice—Parties—Bankrupt mortgagor—Imperial Act 12 & 13 Vic. cap. 106.

A mortgagor who has made a mortgage on lands in this Province, and who afterwards becomes a bankrupt in England, is not a necessary party to a bill to foreclose by force of the English statutes relating to bankruptcy.

This cause came up on further directions. The principal question involved was, whether the mortgagor, who had become a bankrupt in England, should be a party as well as his assignees.

Roaf, for the plaintiff, asked for the usual decree of foreclosure.

Hodgins, one of the defendants in person, submitted that the bankrupt mortgagor was a necessary party. The English statute required registration of the title of the assignees, but no such registration had been made here. He had filed a bill of his own, and had obtained a decree, in which the mortgagor was a party; and on coming into this suit asked his costs, as in *Allan* v. *Dougall*, 6 U. C. L. J. 64.

Fitzgerald, *English* and *S. Blake*, for other defendants, submitted that the bankrupt mortgagor was a necessary party.

The following cases were referred to:—*Bradley* v. *Brooks*, 26 L. J. Ch. 74; *Warren* v. *Hodson*,; *Kenwick* v. *Lafferty*, 7 Sim. 317; *Whitworth* v. *Davis*, 1 Ves. & B. 545; *King* v. *Martin*, 2 Ves. 641; *Collins* v. *Shiely*, 1 R. & M. 635.

SPRAGGE, V. C.—It seems clear, under the authorities, that the bankrupt is not only not a necessary party, but that he would not be a proper party to a suit for foreclosure. The provision in the 12 & 13 Vic. cap. 106, sec. 143 (Imperial act), does not seem to affect the question, unless the bankrupt ought to be made a party for the purpose of enjoining him from a sale of the property; but a *lis pendens* would protect the parties, and the statute does not seem to have been held a sufficient reason in England for making the bankrupt a party. As to the costs of defendant Hodgins, they should be governed by the case of *Allan* v. *McDougall*, 6 U. C. L. J. 64.

PRACTICE COURT.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

IN THE MATTER OF ARBITRATION BETWEEN JOHN KNOWLSEN AND FRANCIS INGLIS.

Award—Want of finality—Arbitrators—Excess of authority.

Where differences arose between the parties to a building contract as to extra work, and in consequence a reference was made of the matters in difference to arbitrators, and they awarded on matters in regard to the original contract not relating to extra work, and the bad part of the award could not be separated from the remainder, the award was set aside on the ground of excess.

(M. T., 1860.)

In this case a contract was entered into by Inglis to build and complete a dwelling house, carriage house, stables and wood shed, and other outhouses, on certain premises of the plaintiff in the Town of Lindsay, according to plans and specifications furnished to him by Knowlsen, and subscribed by each of the parties.

The contract was dated the 14th April, 1857, and by it Inglis agreed to do and perform all the said work in a good, sufficient, neat, substantial, and workmanlike manner, for the sum of £425 of lawful money of Canada, and to complete the dwelling house by the 1st day of November then next ensuing, and the carriage house, stables, sheds, and other outhouses, by the 1st day of December next ensuing, the date of the contract.

In that contract it was stipulated that Knowlsen should be at liberty during the progress of the work to make any alterations either in addition or diminution to or from the work as described in the plans and specifications, such alterations to be paid for in case an increase of work should be occasioned, or a deduction to be made from the price to be paid should the work be less in consequence of such alterations, the value of such alterations to be settled for on such terms as should be mutually agreed to between the parties.

The submission to arbitration bearing date the 15th Dec., 1859, recited, that whereas differences had arisen between the parties respecting the *extra work* done, and the alterations made by the orders of John Knowlsen, under the authority of the contract or agreement entered into on the 14th April, 1857, between the parties, and it was thereby agreed between the parties thereto, to refer *all such matters of difference* between them to the award, order, arbitrament, final end and determination of William Grant of Port Hope, builder, Thomas Fee of the town of Lindsay, carpenter, and Robert Brooks of the town of Peterborough, architect, the decision or award of any two of them to be final.

These arbitrators on the 28th December, 1859, made an award between the parties, and though by the terms of the contract all the work to be done under it was stipulated to be completed by the 1st December, 1857, the arbitrators found and declared that the time for the completion of the works referred to in the original agreement of April 14, 1857, was *extended* to the date of the award. They further declared that the times and modes of payment provided for in the original agreement, should be determined and regulated by the date of the award, and that the purchase of land provided for in the original agreement by Inglis from Knowl-

sen, should be carried out as originally intended; so far as relates to the price and mode of payment, but that the purchase and dates of payment of purchase money should take effect and be dated from the date of the award, the said Inglis to give Knowlsen a mortgage on the said land, to secure the sum of two hundred dollars in four annual instalments with interest.

They then found and declared that any loss sustained by Inglis in discounting notes received from Knowlsen, for work done under the original agreement should be borne by Knowlsen, unless at the time of giving such notes Inglis had been paid up all that he was entitled to receive from Knowlsen on the contract.

After awarding on several other matters, they declared in the award, that the total amount to be paid by the said Knowlsen to the said Inglis, was the sum of three thousand one hundred and nine dollars and twenty-one cents, save and except such sums as the said Knowlsen should from time to time have paid the said Inglis,—and for which he could produce good and sufficient receipts. They then awarded to themselves the sum of ninety five dollars, for their services as arbitrators, to be equally paid by the parties, and resolved to defer the publication of the award until the same should be paid.

In Easter Term a rule *nisi* was obtained by Knowlsen, calling upon Inglis to shew cause why the award should not be set aside on the following grounds.

1st. That the conduct of the arbitrators was irregular in refusing to receive evidence tendered on the matters in dispute.

2nd. That the award was not final as it did not decide the matters referred, but referred certain matters to future settlement.

3rd. That the award was uncertain, not specifying the amount to be paid, but leaving disputed accounts unascertained.

4th. That the arbitrators exceeded their authority in deciding on matters provided for by the original agreement between the parties, whereas the reference was of matters respecting extra work and alterations not provided for by such agreement; also in directing the extension of time and the effect of the agreement, and in prescribing and directing the performance of certain things by the parties, for which no authority was given by the submission.

During last term, *Hector Cameron* showed cause.

McLean, J.—It is difficult to imagine how three persons, selected no doubt by the parties for their fitness to decide upon the value of any extra work or alterations, which was all that was referred to them, could fancy themselves at liberty to enter into the consideration of the whole contract between the parties, and to declare that though all the work to be performed under it was by its terms to have been completed by the 1st December, 1857, the time for such completion was extended to the date of the award, and that the time of payment of £50, agreed upon to be paid in *three* annual instalments with interest, by Inglis to Knowlsen, shall take effect and be dated from the date of the award, so that the first instalment shall be due in twelve months from the date of the award, and that Inglis shall give Knowlsen a mortgage to secure the sum of two hundred dollars in four annual instalments with interest.

They seem, however, to have considered themselves clothed with authority to make all such arrangements between the parties as they might consider proper, without being in any way guided by the original agreement, and they have decided on matters which were clearly understood and settled by the original contract, as if they were matters in difference referred to them. But if they had satisfactorily disposed of the matters actually referred to them, all that has been awarded which is not sanctioned by the submission might have been set aside, leaving the decision of the matters referred to stand.

Unfortunately, however, instead of making their award as to the value of the extra work, they have named as the amount to be paid by Knowlsen to Inglis the sum of $3109 21c., except such sums as he may have from time to time paid for which he can produce sufficient receipts. It is clear that they must have included in that sum the whole amount to be paid under the contract for all the work to be done (£425), and they must have added to that sum $352 61c., to make up the large amount which they have declared to be payable by Knowlsen to Inglis, less the amount of such payments *as he holds receipts for*. Whether the extra sum of $352 61c. was for extras or for the work to be done under the contract, it is impossible to tell; but it is difficult to suppose that such an amount of extra work should be done on a house and all the buildings, the original cost of which was to be only £425.

The whole matter remains as much unsettled as it was before the reference; and it appears to me that the award, even if it could be sustained, would make matters more confused and complicated between the parties. The rule must therefore be made absolute for setting it aside.

Per Cur.—Rule absolute.

ELECTION CASES.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-Law.*)

(Before the Chief Justice of Upper Canada.)

The Queen on the relation of McVean v. Graham.

Copy of roll—Qualification of voters—Several voting—Residence of householders—British subject—Returning Officer—Costs.

Held, where a township Councillor was unseated, a new election ordered, and the Returning Officer supplied for the purposes of the new election by the township clerk with a second copy of the Assessment Roll of the township, that the Returning Officer was at liberty to use the copy of the roll supplied to him for the purposes of the first election.

Held also, that under an assessment of "Thomas Burrell and Sons" the Returning Officer did wrong in receiving the votes of the father and the three sons, as the latter could not be said to be "severally rated" on the roll within the meaning of sec. 76 of the Municipal Institutions Act.

Held also, that the Returning Officer did wrong in receiving the vote of Thomas Burrell who at the time of the election was not either a freeholder of the Municipality or a householder resident therein for one month next before the election.

Held also, that in the case of a householder residence in the particular ward where the party tenders his vote is not essential—residence in any part of the township being for the purposes of voting sufficient.

Held also, that a person born in New York in 1830, the son of a British subject who had emigrated from Ireland a short time previous, and a year or two after his birth came to Upper Canada when he was only about two years old, and where he has ever since lived is himself a British subject within the meaning of sec. 75 of the Municipal Institutions Act.

Held also, that a person living with his father on the land of his father having no interest of any kind in the land is not entitled to be assessed in respect of the land either as a freeholder or householder.

Held also, that although the conduct of a Returning Officer in some particulars be irregular in consequence of which he is made a party to a *quo warranto* summons yet if his motives were pure and his conduct free from corruption or partiality he is entitled to his costs.

(March 1860.)

McVean, the relator complained against the election of defendant as Councillor for Ward No. 2 in the Gore of Toronto, on the following grounds:

1st. That the Returning Officer did not and would not, though requested, make use of the assessmsnt roll delivered to him by the clerk of the township for the purpose of the said election.

2nd. That the Returning Officer received the votes of the following persons who were not entitled to vote—viz.: Thomas Burrell, Austin Burrell, John Burrell and Thomas Burrell (junior.) The first because he was not at the time of the election a resident inhabitant of the township nor a freeholder therein. The three others, because they were none of them *named* on the last revised assessment roll of the township. And also the vote of Joseph Brown, who was neither a freeholder, nor householder in the Ward, nor a resident therein. And also of James Shaw, who was an alien, and so not entitled to vote.

3rdly. Because the Returning Officer refused to receive the vote of William Harrison for the relator, though he was duly qualified to vote, and tendered his vote for relator.

4th. That Graham had only 16 good votes instead of 23, which was the number recorded for him. And that instead of their being only 18 votes polled for the relator, Harrison's vote ought to have been added, which would have made his number 19.

R. A. Harrison for relator.

McMichael for defendant.

Blevins for Returning Officer.

Robinson, C. J.—Having considered the affidavits, I am of opinion that it cannot be held that the Returning Officer did wrong in acting upon the copy of the revised assessment roll as first certified after final revision, and as certified to the Council, or in rejecting the vote of William Harrison on the ground that his name was not on that roll.

As to the vote of the four Burrells: Thomas Burrell, sen., was disqualified, not being a freeholder of the Municipality, nor a householder resident therein for one month next before the elec-

tion. And his three sons were not entitled to vote, not being severally rated on the last revised assessment roll.

Joseph Brown, is objected to by the relator, because he was not at the time of the election a freeholder, nor householder *in the Ward*. The proof is that he was for many months before the election, and at that time, a householder of the township, though not of the Ward No. 2, and sufficiently rated on the roll. His vote was legal, I think, under the 75th clause.

James Shaw, objected to as being an alien, I think the Statute 4 Geo. II. ch. 21, makes James Shaw a British subject, being born in New York some time before 1830, the son of a British subject, who had emigrated from Ireland, a short time before, and in a year or two after his birth passed on to Upper Cunada, when he was about two years old. He has lived here ever since. If he were resident in Upper Canada on 1st March, 1828, he would be clearly a British subject, under our own statute 4 & 5 Vic., ch. 7, sec. 5. It is not clear whether the father came to Upper Canada so early as on 1st March, 1828, I should think most probably not from the evidence, though that is not clear.

Of the relator's votes, William Wiley, was disqualified as being neither a freeholder, nor householder of the Municipality. The father owned land in the Ward which his two sons lived on, having no legal interest in it so far as appears. One brother was married, the other (the voter) was single and lived with him. There is nothing to shew that this was the one entitled to be treated as the householder and the other not. Patrick Phelan is objected to as not being resident within the *ward*, but he was qualified and resided within the Municipality.

Joseph Dawson objected to by Graham, the sitting member, as not being a freeholder or householder in the municipality at the time of the election: and it is proved that he was not, and his vote is not supported.

The result is, that Graham, the sitting member, has his 22 votes reduced by striking out all the Burrells, four in number, leaving 18 votes for him. And this still leaves him in a majority over the relator, whose 18 votes are to be reduced to 16 by striking out Wiley and Dawson.

I think the Returning Officer should have his costs, for I find nothing in his conduct that looks like corruption or partiality, and indeed nothing that can be said to have been done irregularly, except the carrying out the names of the Burrells, as if they had been severally on the poll book, and that was evidently done with no improper motive, but openly and under his sense of duty, supposing that they came under the name Thomas Burrell and Sons, which was on the poll book, and which the Returning Officer supposed entitled him to vote, when it was proved to him that these were the sons that occupied the alleged farm.

It weighs with me too in the view which I take of this case, both as regards the Returning Officer and the sitting member, that there is strong evidence of the relator having given up the contest, which occasioned the poll being closed on the first day. If it had not been so closed, which it hardly would or could have been, we can not tell that the reception of other votes would not have made the sitting member's right too clear to be disputed as regards the number of good votes. It is true that the relator denies in a manner his having given up the contest, and acquiesced in Graham's return, but it is rather an equivocal denial, and there is direct evidence from several witnesses that he did retire on the first day, and in such a manner as would be quite inconsistent with his afterwards entering into a scrutiny of votes.

In my opinion, the sitting member must retain his seat. And his costs, and those of the Returning Officer must be paid by the relator.

Judgment for defendant with costs.

(Before the Hon. Mr. Justice McLEAN.)

THE QUEEN ON THE RELATION OF JOHN C. HYDE VS. JOHN BARNHART, THE YOUNGER.

Municipal Institutions—Incorporated Villages—Election of Reeve—Day therefor—Absence of Councillors.

It is by sec. 130 of the Municipal Institutions Act enacted, that the members of every Municipal Council (except County Councils) shall hold their first meeting at noon on the third Monday of the same January in which they are elected, or *on some day thereafter, at noon.*

It is also by sec. 132 of the same Act enacted, that the members elect of every Council (except a City or Town Council) being at least a majority of the whole number of the Council when full, shall at their *first meeting* after the yearly elections, and after making the declarations of office and qualification when required to be taken, organise themselves as a Council by *electing one of themselves to be the Warden or Reeve of the Corporation.*

The Incorporated Village of Streetsville is represented by a Council of five members. On 21st January (being the third Monday of January) two members of the Council met at the Town Hall and qualified, but in the absence of the three remaining members of the Council were unable to proceed to business. On 23rd January the three remaining members met, and having qualified, organised themselves as a Council, in the absence of the other two of the Council, by electing one of themselves to be Reeve.

Held, that the election was legal, and in the absence of proof of fraud could not be set aside.

The Relator complained that John Barnhart, the younger, of the Village of Streetsville, Doctor of Medicine, hath not been duly elected and has unjustly usurped the office of Reeve in the Incorporated Village of Streetsville, in the County of Peel, under pretence of an election held on the 23rd of January last at the said Village of Streetsville, and declared that he the Relator has an interest in the said election as a Councillor of the said Village of Streetsville, and as a candidate at the said election

He shewed the following causes why the election of John Barnhart, the younger, to the said office should be declared invalid and void.

1st, That the said election was not conducted according to law in this, that the said pretended election did not take place at any regular or adjourned meeting of the said Council.

2nd, That the said Barnhart pretended to have been elected by three out of the five Councillors of the said Municipality who met together without the knowlege of the other two Councillors of the said Municipality, and without any notice having been given to the said other two Councillors either of the said meeting or of the time when or place where the same should take place, and that the three so meeting without the knowledge or consent of the other two, and without their having had notice, could not in their absence and without notice to them elect a Reeve.

3rd, That if the said election should stand it would be without the other two Councillors having had an opportunity of voting either for or against the said Reeve, and the said election would be an election by three and not by a majority of the Councillors of the said Municipality.

The affidavits filed on the part of the relator shewed that he was elected a Councillor for the Village of Streetsville at the election held on the 7th and 8th days of January; that on the 18th January he received from the Town Clerk notice to be at the Town Hall on Monday then next, 21st January, for the purpose amongst other things of electing a Reeve for the Municipality. That on the 21st, the day appointed by law, being the third Monday in January, he attended at the Town Hall in Streetsville at 12 o'clock, pursuant to the notice received, but none of the Councillors were present except Henry Kerr and the Relator. That the Village Constable was sent to two other Councillors, Robert Leslie and John Barnhart, the younger, to request their attendance, but that they returned no definite answer and did not attend. That there being only two Councillors present no meeting of the Council could be held or business transacted. That Dr. Crumbie, the other Councillor elected, was absent from the Village on professional business. That on Wednesday, the 23rd January, the Relator had occasion to be absent from the Village of Streetsville and to come to the City of Toronto, and that Henry Kerr, another of the Village Councillors, was also in Toronto and absent from the Village on that day. That during the absence of the Relator and Kerr on the 23rd January the three other Councillors assembled at the Town Hall in Streetsville, and that they then and there declared the said John Barnhart Reeve. That the Relator had no notice or knowledge whatever of that meeting, and that though the Village Constable was sent to his place of residence, and that of Henry Kerr, that the other Councillors must have been well aware at the time that they were absent from the Village. That the Relator was a candidate for the office of Reeve at that election, Henry Kerr having promised to nominate him at the meeting of the 21st January, and that he would have done so had there been a quorum present at that time. And that he would have nominated him on the 23rd January, and the Relator would have tried to be elected for that office at that meeting had the said

Kerr and himself received notice or been aware of such meeting in time so that they might have been present. That the Relator has since been told by Defendant that the reason he and Leslie did not attend the meeting on the 21st January was because he knew that at that meeting they would be in the minority.

On the part of the Defendant it was shown that no meeting of the Council took place on the 21st January, being the third Monday of the month. That on that day only the Relator and Henry Kerr were present. That the Relator desired in the absence of a quorum to take minutes and to adjourn the Council till some time in February, but that the Clerk refused to consent to such proceedings, not considering it competent for two members to transact any business. That on the 22nd January none of the Councillors attended at the Town Hall in Streetsville, the usual place of meeting of that body, but that on the 23rd, about a quarter of an hour before twelve o'clock, three members, Messrs. Barnhart, Crumbie and Leslie, appeared at the Town Hall, and the Constable was sent to the residences of the Relator and Henry Kerr to inform them that the other members of the Council were at the Town Hall and to request their attendance. That the Constable returned with the information that the Relator and Kerr were not at home, and thereupon the Clerk called the Council to order, the members present having previously at that meeting made and subscribed the declarations of qualification and office according to law. The absent members, John C. Hyde and Henry Kerr, having made and filed with the Clerk their declarations of qualification and office on the 21st January, when attending for the purpose of a meeting at the Town Hall. That on the Council being called to order, the Clerk presiding, it was moved by Councillor Leslie, seconded by Councillor Crumbie, that John Barnhart be Reeve of the Village of Streetsville for the current year, which motion was carried unanimously. That the Reeve having taken the oaths required by law, and the Council being regularly organized, proceeded to business.

The affidavits of the two Councillors who were present with Mr. Barnhart when he was elected Reeve were filed, and in them each of the Councillors swore very distinctly that he would not have voted for the Relator as Reeve had he been present, and "*will not vote* for him should the election which has taken place be declared void."

The affidavit of Dr. Crumbie shewed certain other facts which led strongly to the belief that the Relator was well aware of the views of the other Councillors in the matter of the election of a Reeve, and that being so aware he was willing to have recourse to contrivances to prevent the views of the majority being carried out.

Dr. Crumbie swore that on the morning of the third Monday in January he was called to visit a patient upwards of thirty miles distant from Streetsville, and did not return till the next day about ten o'clock in the morning. That about noon he went to the Town Hall, but found none of the Councillors there. That on the 23rd January, a majority of the Council being present, and notice being sent to the places of residence of those who were absent, the proceedings prescribed by law were had, and the defendant unanimously elected Reeve. That the Relator did not tell him he was a candidate for the office of Reeve, and that he would not have voted for him and "will not vote for him to be Reeve." That on Friday evening previous to the election of Reeve the Relator called on him and urged him to accept the office of Reeve which he refused. That the Relator then informed him that if he would stay away from the election of Reeve on Monday, 21st January, he, the Relator, "could get all he wanted accomplished," that he requested him not to attend at the meeting on the 21st, and that he "verily believes that John C. Hyde, the Relator, was concerned in getting him away from Streetsville on the morning of the 21st, as the party who called him away is related by marriage to him, and notwithstanding he went a distance of thirty miles the patient he went to see was from home when he arrived there."

McMichael for Relator; *Robert A. Harrison* for Defendant.

McLean, J.—It appears that the Relator who complains of the election of Reeve by the majority of the Councillors in the absence of himself and another Councillor who was favourable to his views, was quite willing to induce one of the Council to neglect or rather abandon his duty, so that he, the Relator, could get all he wanted accomplished. What he wanted is shewn by his own affidavit, in which he says he was a candidate for the office of Reeve, and would have been proposed by Henry Kerr on the 21st had there been a quorum of the Council present, and on the 23rd had they been present at the election. The failure of the attempt to induce Dr. Crumbie to remain away from the meeting of the Council on the 21st leads very strongly to the conclusion that his absence was procured by an unworthy and despicable trick on the part of some one who desired that the Relator might get all he wanted accomplished during his absence.

Had Councillors Barnhart and Leslie attended on the 21st, as requested, the Relator, according to his statement to Dr. Crumbie, would have succeeded in his object of being elected Reeve, inasmuch as the four Councillors present would have been equally divided on the question of the election of Reeve, and the Relator, as the highest rate-payer as to amount, would have been entitled to a casting vote in his own favour. But the Councillors opposed to the election of the Relator as Reeve, seeing, as he declares in his affidavit, that they would be in the minority if they did attend declined by their presence to promote the election of one who was not the choice of the majority of the Councillors, and by staying away frustrated the Relator in getting all he wanted accomplished.

This in fact appears to be the chief cause of complaint, though the ground of objection to the election of Defendant as Reeve is also taken,—that he was elected in the absence of the Relator and Henry Kerr, and without any notice to them of the intended meeting on the 23rd January.

It appears by the affidavit of Mr. Hope, the Clerk of the Council, that none of the Councillors attended at the Town Hall on the 22nd January. Had the election taken place on that day the Relator could not have reasonably complained (though he might have done so with as much reason as he now does) that it took place without notice to him and without his knowledge, for on the 22nd it appears that the Relator was present at Toronto, and filed in the office of the Clerk of the Counties Council his *certificate* of *being Reeve* of the Township of Toronto for the present year, and sat in the Council as the representative of that Township.

The Relator in his affidavit states, that on Wednesday, the 23rd January, he had occasion to be absent from the *Village of Streetsville, and to come to the City of Toronto*, thus inducing a belief that he came to the City of Toronto on the 23rd. It would have been more candid to have stated that he absented himself from the Village of Streetsville on the 22nd for the purpose of assuming his position as a member of the Counties Council as Reeve of the Township of Toronto, and that he continued absent as the representative of that Township on the 23rd when the election of Reeve of Streetsville took place. The affidavit appears intended to convey the idea that the three Councillors, by whom the election was made, took advantage of the casual absence of the Relator and Henry Kerr in Toronto to do what they did in electing a Reeve; when the fact is, that the Relator absented himself on the 22nd, and remained absent on the 23rd, expressly for the purpose of representing another Municipality.

Viewing all the circumstances it is impossible to believe that the Relator and Henry Kerr could have hoped or believed that the election of Reeve of Streetsville would be deferred to suit their convenience, or that it would await their return from Toronto; but if they did really entertain any such notion they could scarcely have supposed that their presence would have made any difference in the election of Reeve, if the affidavits filed are entitled to any credit.

The 180th section of the Municipal Institutions Act, chap. 54, Consolidated Statutes, provides, that the members of every Municipal Council (except County Councils) shall hold their *first meeting* at *noon* on the *third Monday* of the same January in which they are elected, or *on some day thereafter* at *noon*, and the members of every County Council shall hold their first meeting at noon or some hour thereafter, on the *fourth Tuesday* of the same month or on some day thereafter.

Then the 182nd section provides, that the members elect of every Council (except a City or Town Council), *being at least a majority of the whole Council when full*, shall at their *first meeting* after the yearly elections, and after making the declarations of office and qualification when required to be taken, organize themselves as a Council, by electing one of themselves to be Warden

or Reeve of the Corporation, and such person shall be the head of the Council.

Under the first mentioned section the 21st was the day (being the 3rd Monday of the month of January) on which all Municipal Councils (except County Councils) should have held their meeting, but the section does not make it imperative to meet on that day. It declares that such Municipal Councils shall meet on that day *or on some day thereafter at noon*. So that as in this case if a meeting from any cause, whether accident or design, has not been held on the 21st it might legally be held on some day thereafter at noon.

The Council of Streetsville did not meet on the 21st, but a majority of the whole number of the Council when full met on the 23rd of January, and then organized themselves as a Council by electing one of themselves to be Reeve of the Corporation. This they were required to do at their *first meeting*, and though two members of the Council were absent, and it may be true that they had no knowledge or notice of the meeting, the meeting and the election of Reeve seem to have been in strict accordance with the provisions of the statute.

The want of notice of such meeting affords no sufficient reason for setting aside the election of Reeve, for it does not appear to have been the duty of any one to give such notice, and though the Clerk of the Council gave notice on the 18th January of the intended meeting on the 21st, it was not as a matter of duty that he did so, for no such duty is imposed upon him by law, and he could not be expected to give notice of a subsequent meeting of which he may have been ignorant himself till the time when the members presented themselves at the Town Hall.

If indeed any number of members had taken pains to conceal from others the time intended for their first meeting, or had met at any other than the usual and proper place of meeting of the municipality, there might be grounds for contesting proceedings of so irregular a character; but no such grounds exist in this case, and when the Relator left Streetsville on the 22nd to assume the duties of Reeve of the Township of Toronto in the Counties Council, he must have been well aware that those of the Council of Streetsville whom he left behind were under no obligation to send him notice of a meeting to be held on the following day for the purpose of organizing the Council of Streetsville, but that they were quite competent to elect a Reeve in his absence. They might very well assume that the Relator, by taking his seat in the Council, had made his election to continue as the Reeve of the Township of Toronto, and that he could no longer aspire to the apparently incompatible office of Reeve of Streetsville.

It appears to me that while the Relator has by this proceeding called forth evidence calculated to throw some degree of discredit on his own views in relation to the election of Reeve, he has wholly failed to establish any ground on which the election of the Defendant to that office can be set aside or declared to be null and void.

I do therefore adjuge, that the Relation and Statement be dismissed with costs, to be paid by the Relator to the Defendant.

Judgment for Defendant with costs.

(Before His Honor JAMES ROBERT GOWAN, Esq., Judge County of Simcoe.)

THE QUEEN, ON THE RELATION OF DANIEL RICHMOND, AGAINST ALEXANDER TEGART.

Municipal Act—Qualification of Councillors—Overseers of Highways disqualified—Notice to Electors—Effect thereof—Costs.

Held, that a person in the year 1860, by by-law of the township of Nottawasaga, appointed an overseer of highways—which office he accepted—was, within the meaning of sec. 73 of the Municipal Institutions Act, "an officer of the municipality, and as such not qualified to be elected a councillor of the municipality" at the election held in January, 1861.

Held, also, that notice of the disqualification having been given to the electors at the time of the election, relator, who claimed the seat, was entitled to be seated.

Held, also, that relator was entitled to costs as against defendant.

(March 2, 1861.)

A summons, in the nature of a *quo warranto*, had been issued in this case upon the *fiat* of Judge Gowan, calling on the defendant to shew by what authority he usurped the office of councillor for ward No. 3 of the township of Nottawasaga, and why the relator should not to be seated in his place.

The grounds upon which the summons was issued were, that Alexander Tegart—who had been elected at the annual municipal election for the ward as councillor—was disqualified, as holding the office of pathmaster or overseer of highways for the township of Nottawasaga; and that he was also disqualified on account of receiving "an allowance" from the corporation as such overseer. It was also made a part of the statement that relator, at the nomination, had objected to Tegart as being disqualified as such overseer; and that the returning officer had expressed his opinion to the effect that Tegart was disqualified; and that the electors having had notice of the alleged ineligibilty of Tegart that the relator should be seated.

The facts appeared to be, that in May of 1860, the municipal council of Nottawasaga appointed Tegart (the defendant) overseer for one of their divisions, by by-law, which appointment he, Tegart, had accepted. At the election for the ward, holden on the 7th and 8th January last, Richmond, Tegart and one Jonah Long were put in nomination. Upon Tegart being proposed Richmond objected to him as being disqualified, on account of holding the office of overseer. The returning officer, on being appealed to, read the clause in the act disqualifying persons from holding the office of councillor, and expressed his opinion that Tegart was disqualified. Tegart, however, insisted upon running, and said, "That he would run the risk, and in the event of his being unseated would pay the costs." Long having withdrawn, the polling commenced, and at four o'clock upon the second day, Tegart declared elected by a majority of one—the numbers polled being for Tegart 41, and for Richmond 40. Several affidavits were put in on behalf of relator, showing that both the electors present at the nomination and those who, not then present, afterwards voted, were aware of the objection that had been made to Tegart's candidature. On behalf of the defendant, it was sworn by some of the electors that what they understood by the objection was, that Tegart was protested against as receiving an allowance as overseer.

McCarthy, for the relator, contended that Tegart was "an officer of the corporation," as being overseer of highways, and therefore disqualified by sec. 73 of cap. 34 Con. Stats. U. C. from being a councillor for the township. He referred to sub-secs. 2 & 3 sec. 248 of same act, and 5 U. C. L. J. p. 44; that being appointed and having accepted the office of overseer, he continued such officer, in the absence of anything in the by-law appointing him to the contrary, until removed by the council, sec. 174; that his duties as overseer and councillor were clearly incompatible, and his was such a case as was within the spirit of the act; that he received an allowance in not having to perform his own statute labor, and was on that account disqualified, referring to *Regina ex rel Coleman* v. *O'Hara*, 2 U. C. Prac. R. 18; *Regina ex rel Moore* v. *Miller*, 11 U. C. Q. B. 465; that it was clearly a case—supposing Tegart to be disqualified—for the relator to be seated, because the electors had express notice of the facts, and also from the returning officer's statement of the law: *Regina ex rel Clarke* v. *McMullen*, 9 U. C. Q. B. 467; *Regina ex rel Harvey* v. *Scott*, 2 U. C. Cham. R. 88; and further as to costs, *Regina ex rel Luiz* v. *Williamson*, 1 U. C. P. R. 94; *Regina ex rel Dexter* v. *Cowan*, 1 U. C. Prac. R. 107; *Regina ex rel Davis* v. *Carruthers*, 1 U. C. Prac. R. 114.

Moberly, for the defendant, argued that as by sec. 150 of the Municipal Act it was compulsory to appoint a certain class of officers there enumerated—such as clerk, treasurer, and by sec. 243, under which overseers were appointed—it was discretionary that a difference was to be made between the two classes of persons to be appointed; that under the by-law, which was entitled, "For appointing overseers for the year 1860," the defendant had ceased to be an officer upon the last day of the year; that the affidavits of the treasurer and others completely disproved the allegation of Tegart receiving an allowance from the corporation; and that it was not a case for a new election, the electors being ignorant of the objection taken.

GOWAN, Co. J.—The fact of the defendant's appointment as one of overseers of highways of the township, in May, 1860, does not appear to be questioned. It is stated in more than one of the affidavits filed, and a certified copy is filed of the by-law appointing

him and others to that office. It appears, moreover, that he accepted the office and entered upon its duties.

The by-law referred to is called "A By-law for the appointment of Overseers of Highways on the several Concession and Side Lines within the Township of Nottawasaga, for the year 1860." The enacting part, however, is more general; so far as material is in these words: "The following persons shall be and they are hereby appointed overseers of highways for the several divisions, &c."

This by-law was passed in council on the 1st of May, 1860, and it is urged that it was for that year only. The appointment appears to me to be a general one; and the title I think cannot, according to the established rule of construction, be allowed to restrict the enacting part of the by-law, to limit the appointment, so that it would expire on the last day of the year 1860. But even if it did, sec. 174 would, as was argued for the relator, have the effect of continuing overseers of highways in office at all events until after the first meeting of the council in 1861. Sec. 174 provides that "all officers appointed by a council shall hold office until removed by the council." The words are sufficiently broad to take in the present case, and the particular office is one within the mischief which the section was designed to guard against—the public injury and mischief that would result in case a municipality was left without officers. So that if an overseer of highways is an officer of the municipality, *within the meaning of section* 73, the defendant holding that office was disqualified.

As early as 1793 the office of overseers of highways was created by statute in Upper Canada, and it has lasted ever since. Town or township officers were then chosen by the inhabitants, who assembled yearly for the purpose: (33 Geo. III. cap. 3.) In various statutes since that time, and down to the first District Council Act, the officer was recognized, and in the present law the Legislature in speaking of officers must be assumed to have spoken of existing facts, and to have had overseers of highways in mind. Indeed this would appear on the face of the act, for in sec. 243 sub-sec. 2 overseers of highways are expressly termed officers of the corporation, and councils are authorized to appoint them. The words used in sec. 73 are, "No officer of any municipality," &c., "shall be qualified to be a member," &c. Overseers of highways are appointed by councils, hold a post or place under and are accountable to them, have certain powers conferred and duties made incident to the appointment—surely this of itself constitutes an office—the incumbent an officer. And I must think now, as heretofore, overseers of highways are officers of municipalities.

But are they *such* officers as were intended to be disqualified under sec. 73? So far as the particular office is concerned, a reason for disqualification would be found in the incompatibility of the office of overseer of highways with that of township councillor; and that incompatibility would certainly exist if under any circumstances the individual would in one of his capacities be subject to his own correction in another; if the duties of both offices could not be carried on with efficacy and impartiality, at common law a disability for office in the holding of some other office incompatible therewith.

Now if overseers of highways could be called to account before township councils for the exercise of their duties, or the disposal of public monies or property coming into their hands, they could not occupy that free, unencumbered and independent position which a member of bodies such as our municipal corporations, with their large powers for local legislation and control, ought to be placed in, and in which the Legislature designed they should be freed from irregular influences.

Looking at the duties of overseers of highways as prescribed by the repealed statutes we see what the office was designed for, and what is its range of duties. They were to make and keep in repair the highways, call out persons bound to labor, and to superintend the same; expend monies receivable for re-constructing roads—their general duties being, with the means within their control, to keep the roads clear. But specific statutory duties are not now traced out for them; that is left to the municipality. Sec. 174 of the Municipal Act enacts that all officers appointed by a council shall perform all duties required of them by the by-laws of the council *having jurisdiction over such officers*—in other words, by the council appointing them.

Turning to the by-law of the municipality of Nottawasaga appointing defendant, I find that certain "duties of overseers of highways" are referred to, and incorporated, as it were, with it; and to this code of regulations overseers of highways are subject. This paper of duties of overseers of highways—which appears to have been printed for the use of officers—is divided into distinct paragraphs: the first fifteen particularly regulating the duties of this officer. By the second section, so to term it, the ordinary duties are to be performed by the first of September; it reads thus: "He must cause all statute labour, and money in commutation of statute labour, and all money that may come into his hands by virtue of his office, to be expended between the 10th of May and the 1st day of September." It is urged for the defendant, that as his duties are to be completed on that day, he cannot be regarded as an officer after his work is done. This I think an erroneous view. It probably would be so held in the case of an assessor, who has certain duties defined by statute to perform, and who is *functus officio* when the last is completed, and who is not liable to be again called on to act. Overseers of highways stand in a very different position. In a climate such as ours, the roads, particularly in the spring and fall, may in a single day be so injured as to be impassable or dangerous, and, unless travel is to be stopped, require immediate repair; and in winter may be blocked up with snow drifts; and it is particularly necessary, at such times, to have an officer whose duty it becomes, and who has the means under his control, to repair the damage or remove the obstruction. And sec. 3 in the overseer's regulations is evidently framed to meet such contingencies. It is as follows: "In case of any sudden obstruction or damage to a road, or for the purpose of putting up marks to guide travellers over frozen waters, the overseer is required to expend any money in his hands, or to call out statute labour under his direction, at any other time than between the 10th of May and the 10th of September; and if he has no money or labour unexpended he shall nevertheless call out persons residing in his division, apportioning such labour as equally as may be amongst the inhabitants; and he shall immediately give in an account of the labour so performed to the township clerk."

Looking at these regulations as a whole, sec. 2 evidently relates to ordinary and regular duties; sec. 18 to extraordinary duties, rendered necessary by some sudden obstruction or damage to a road. And the latter section assumes that the officer may have monies in his hands after the 1st of September; and if he has no labour or money unexpended, he is to call out the persons in his division to work, apportioning the labour amongst them, and immediatly after give an account thereof to the township clerk. Thus he may be called upon to act, and there is no other person that can act in the way spoken of at any time up to the first meeting of the new council in January: and if so, he might be placed in the position before referred to — subject in one of his capacities to his own correction with another.

I must think, therefore, an overseer of highways is an officer within the meaning of the 73rd section. At common law the acceptance of the second office could doubtless act as a surrender at law of the former. By express provision in the Municipal Act the individual being disqualified by holding the office, the election as councillor is void.

Is the relator, who is under no disqualification, and who stood within one of the defendant in the votes given at the election, to be declared duly elected, or a new election to be ordered? Upon the evidence before me I find that the objection was publicly taken at the time of the election, and insisted upon by the relator; that the returning officer publicly read the clause in the statute, and gave it as his opinion that the defendant was disqualified by reason of his being an overseer of highways; and that the electors had full opportunity for hearing all that passed, and there is every reason to believe, from the affidavits on both sides, that the electors generally had knowledge of the objection; and were aware that the defendant sought election, taking the risk of its being set aside; and that there was apparently a full vote in the ward, the relator receiving within one vote of the defendant. I do not think a new election should be had; and though the cases cited in our courts which are referred to in Mr. Harrison's valuable work the "Municipal Manual," do not go the length of seating the candidate having the next highest number of votes to the parties dis-

qualified, yet the principles to be collected from them warrant the conclusion I have arrived at.

I have referred to several English cases, and collect from them that if an election be made of a person who is disqualified; that is incapable of being elected; and notice of disqualification be given to the electors, every vote afterwards is considered as not being given at all. The effect of which is, the candidate having the next highest number of votes is elected—the election of the disqualified person being void. Every man is bound to know the law with reference to every act he undertakes to perform; and where an elector is apprised of the fact of disqualification of a candidate, and yet votes for him, he assumes the risk of throwing away his vote, in case his construction of the law is wrong. The law applied to the present case shows that the relator is entitled to be admitted to the office.

As to the question of costs, in view of the decided cases in our courts, and of the declarations made by the defendant himself, as stated by the township clerk and others, that "he would run the risk, and if his election was declared invalid, would pay the costs," I do not think I should withhold costs from the relator. I regret very much that the defendant did not avail himself of the right given him by law to disclaim; but he does not appear to have taken any steps to obtain advice after the election, but acted on his own judgment.

My judgment is, that the defendant hath usurped and does usurp the office, and that he pay the relator his costs; and I adjudge that the relator was duly elected to the office of councillor for the township, and be admitted thereto.

Judgment for relator with costs.

(Before his Honor the Judge of the County of Kent.)

THE QUEEN ON THE RELATION OF NORTHWOOD v. C. J. S. ASKIN.

Municipal Institutions Act—Qualification of Candidates—Property—Lease—Assignment.

On 1st May, 1859, J. D. demised by lease under seal certain premises to E. B. D. for the term of five years. This lease contained a covenant that the lessee should not assign without leave of the lessor. Subsequently to its date the lessee with the assent of the lessor assigned the lease to the Defendant for the remainder of the term then unexpired. Defendant then verbally assigned his right to the term and sublet to one R.P. who entered into possession of the demised premises. *Held*, that the assignment of and by Defendant to R. P. being by parol and being without the knowledge of the lessor J. D.; that defendant was notwithstanding it properly assessed in respect of the demises premises.

(April 9th, 1861.)

The relation in this matter set forth that the defendant usurped the office of Councillor for Ebert's Ward, in the Town of Chatham, for that he the defendant was not duly elected or returned as such Councillor, in this, that he defendant was not at the time of his supposed election, seized or possessed of the property qualification to qualify him to be elected to, and returned to serve in the said office.

Secondly, that the defendant did not before entering upon his duties as Councillor, nor within twenty days from the date of his supposed election, take and subscribe the necessary declaration of qualification, and office; but on the contrary thereof only declared in his said declaration of qualification that he was seized or possessed of a part of Lot No. nine on the west side of King street, in the said Town of Chatham, which, from the Assessment Roll for the said Town, for the last year, 1860, appears to be assessed to him as tenant, at the yearly value of eighty dollars, and no more.

The affidavit of the relator accompanying the relation, set forth that on examination of the Assessment Roll, the relator found the defendant assessed in Eberts Ward as a tenant or householder only, of part of Lot No. nine on King-street, one John Sheriff being the owner thereof—at the annual value of eighty dollars—and also as tenant or householder of part of Lot No. eighty-nine, on King-street, one John Degge being owner, at the annual value of eighty dollars; and in Chrysler's Ward as owner or freeholder of Lot No. Ten in block (B) on Cross-street, half an acre, at the annual value of thirteen dollars—and that deponent is well acquainted with the said part of Lot Number Eighty-nine, King-street, so assessed to the said defendant, and that he knew that one Rowley Pegley, surgeon, has been in the possession or occupation thereof, as he the deponent was informed, in his own right, as tenant thereof, since about the first of December, 1860, and that said defendant had not since the last named time, been in the occupation or possession of the said part of Lot Eighty-nine in any way whatever, and was not in the occupation or possession thereof at the time of said election.

In reply to the relation, the defendant, by affidavits says that he appears on the Assessment Roll for the Town of Chatham, for the year 1860, as assessed for the several properties set forth in the relator's affidavit, that he paid the taxes for the same for that year, to the amount of sixty dollars, or thereabouts. That the property known as part of Lot No. Eighty-nine, King-street, so assessed to him, had been held by one E. B. Donnelly, druggist, by indenture, for the term of five years from the first of May, 1859, from one John Degge, the owner thereof; that the said Donnelly assigned said lease to him (the defendant) with the assent of the Lessee, Degge for the remainder of said term; and that he, the defendant, now holds the said house and that he has paid the rent and taxes thereupon up to the present time.

Thirdly—That he placed Rowley Pegley in possession of the said premises without the knowledge or consent of the said Lessee Degge, and the said Pegley now has no lease or other writing from the said Degge, or from him the defendant, of the said premises, and that he the defendant, still holds the key of the same, and held the same at the time of his election to the office of Councillor, at the last election for the said town.

The defendant corroborated his own affidavit, by the affidavit of Duncan McColl, Clerk of the Municipality of the Town, which states that the defendant is assessed for three properties in the Town on the last Revised Assessment Roll for 1860, more than sufficient to qualify him for the office of Councillor for the said Town; and that the defendant appears by the Collector's Rolls, to have paid for taxes in that year, on the said properties the sum of forty-one dollars and twenty-eight cents.

The defendant, further put in the lease from John Degge to E. B. Donnelly of the part of Lot No. Eighty-nine, on King-street, and the affidavit of the Lessor, that the above named defendant holds the original Lease made by him to E. B. Donnelly of the premises, by assignment from the said E. B. Donnelly to the defendant. That he, Degge, has never given a lease of the said premises to any one else, nor has he given consent to the said defendant to sub-let the premises.—That the said defendant has paid him the rent for said premises up to the first of February, 1861, and that he has always paid such rent since the said assignment of lease to him.

At the last hearing, Rowley Pegley appeared on subpœna, and and on being sworn, said—"That he knows Lot No. Eighty-nine, on King-street, with the Drug store on it; that he is in possession of the premises; has been in such possession since the eighth of November last; got possession from defendant, who has not been entitled to interfere with the possession; at least, he thought not; knows Degge the Lessor; made arrangements with regard to paying him the rent three or four weeks after he, Pegley, was in possession. It was not in writing; I was to occupy the house for a year; did not agree to pay rent to any one else; Degge did not object to witness having possession; he has paid Degge nothing. As Degge says in his affidavit, he had received the rent from defendant up to February last; he witness cannot say that he is liable for rent up to that time to him. He supposed he is liable for rent to the defendant up to February last. He has had exclusive possession of the premises since November last; Degge and he were to have a written lease of the premises; I was to pay him thirteen dollars per month; this was agreed on in a cursory conversation."

The lease was a statutory one, under an act to facilitate the leasing of lands and tenements, embodied in Con. Stat. p.918, clause 7. One of the covenants of the lease was, that the Lessee would not assign or sub-let without leave of the Lessor.

In the course of the hearing the relator admitted that the defendant was assessed for all the lots above mentioned, *including the premises in dispute.*

McCrea for relator; *R. S. Woods* for defendant.

WELLS, Co. J.—At the hearing on the 22nd of Feb., last, an objection was taken by the defendant's counsel that the defendant was not bound to answer, owing to a true copy of the relation

not having been served on the defendant, and the objection prevailed. At the next hearing on the 19th March ult., the defendant's counsel again denied the right of the relator to proceed on account of no new order or summons having been obtained—that the former order had lapsed. The point having been reserved until the Judgment should be made up—I now decide that the former hearing having been disallowed on a a clerical error in the copy of the relation, and the summons having been originally made returnable on the eighth day after the day on which the writ was served, no new summons, or order for the time, was necessary.

The qualification for a Councillor for towns required by the 70th Sec., Mun. Ins., Con. Stat., p. 530, is that he has at the time of the election, in his own right, or in the right of his wife, as proprietor or tenant, freehold or household property, rated in his own name on the last Assessment Roll of such municipality, to the value of eighty dollars, per annum, in freehold, or one hundred and sixty dollars, per annum, in leasehold; and in the same proportions where the property is partly freehold, and partly leasehold. The affidavit of the Town Clerk does not specify the property or properties on which the defendant is assessed so as to more than qualify him, as he states, for the office of Councillor; but other evidence, and the admission of the relator, put it beyond doubt that the defendant was sufficiently assessed to enable him to be elected such Councillor. The other question, as to the "right," at the time of the election of the defendant to the properties for which he was so assessed, must be decided upon strictly legal grounds, opening out some of the most intricate points in respect to the laws governing the holding of real property. The 70th Sec. above cited, does indeed declare that the qualification of all persons, where a qualification is required under the Act, may be of an estate either legal or equitable. It cannot, however, be made applicable to the defendant's case, as there are no equities alleged in his favour, if his strictly legal right to any of the holdings fail him.

The question of possession, raised by the relator, would be determined, it would seem, by the Assessment Roll of the year before the electon. It may, however, be one of the necessary elements in determining the question of "right," raised by the evidence, and therefore cannot be properly ignored.

The premises in dispute, 89 on King Street, were leased by the owner John Degge, to E. B. Donnelly or assigns, on the 1st May, 1859, for five years, at the yearly rent of thirty-six pounds, payable in quarterly instalments of nine pounds each, in advance. The lessee Donnelly assigned the premises to the defendant for the residue of the term, who was assessed for the same for the year 1860, and who paid the rent of the premises up to the 1st Feb last, some three weeks after the return of the defendant as a Councillor of the Town. It is one of the defects in this mode of procedure that without a personal examination of the parties or witnesses, *viva voce*, instead of a reliance being placed upon affidavits, many particulars cannot be arrived at without great delay, which may be required in the adjudication of the case. The rent was however to be paid quarterly in advance, and it is to be supposed that the defendant paid the rent some two months and a half before the election took place, although the date of payment is not stated in the affidavits. The defendant, besides going into possession of the premises, paying the rent for the same, being assessed for them, and paying the taxes on them for the last year, states that he held the key of the same at the time of the election, and still holds it, although he placed Rowley Pegley in possession of the premises, without the knowledge of the lessee Degge, and without any lease or other writing from the said Degge or himself. The witness Pegley, testifies that he has sole possession, as he believes, and in equity he may make good his claim, if that be important to him. As the case now stands, however, it is quite certain that the defendant has the right to them, of which he has never divested himself, or been divested, and that he can maintain an action for the enjoyment of the same in any Court of Law, of competent jurisdiction.

By the 4th sec. cap. 90, Con. Stat., it is enacted, "*that a partition and an exchange of any land, and a lease required by law to be in writing of any land, and an assignment of a chattel interest in any land, and a surrender in writing of any land, not being an interest which might by law have been created without writing, shall be void at law, unless made by deed.*"

A lease may be made by a verbal agreement, if the term be not for more than three years; but if it do exceed three years, then, by the statute of Frauds, 29, Car 2, cap. 8, sec. 1, it must be in writing, signed by the lessee or his agent, and that agent must himself be authorised by writing to do so. By this statute, the lease from Degge to Donnelly, being for five years, required to be in writing, and by our own Statute above cited, a lease then required by law to be in writing, "*shall be void by law, unless made by deed,*" or under seal. The lease being in writing and under seal, was therefore valid, and we are now to enquire whether any pretended assignment from the defendant to Pegley was also legal, the assignment from Donnelly to defendant being shewn without question. By the above mentioned Statute of Frauds, 29 Car. 2, c. 8, it is enacted that "*all assignments of leases for terms for years, shall be by deed or note in writing signed by the party assigning or his agent thereunto lawfully authorised by writing.*" Even were the original lease only for three years, and verbal, as it might have been *assigned*, save in writing,—the exception in the statute not applying to assignments, as it does to leases.

The right to the premises in dispute, must therefore be considered to be in the Defendant,—the party occupying the same being here under no title recognisable in law, holding at best a joint possession with defendant, who has not, so far as is shewn, been ousted or disseized. Allowing the defendant a qualification for one half the yearly value of the premises, he would be more than qualified as a Councillor, including his other properties concerning which there is no question.

There is an apparent irregularity in the form of the declaration of office, made by the defendant in the specification of the estate upon which he qualified; but he declared substantially that he was seized or possessed of such an estate as qualified him to act in the office. The declaration was irregular, but was not a nullity, such as to operate a forfeiture of office, even were not the 175th clause requiring the declaration, in a certain form, merely directory and mandatory.

It was intimated by the Chief Justice of the Common Pleas, in *Reg. McGregor* v. *Kerr*, Law Journal, March, 1861, that he was inclined to support the election of the defendant, and to go as far as the facts would allow, for the purpose of reconciling the mode of rating, if he (the defendant) had really a legal qualification. Under this ruling I should feel it my duty not to ignore an election by the people, unless no doubt could exist in law as to the absolute necessity of the same having to be done.

Judgment for the defendant, with costs.

DIVISION COURT CASES.

(In the First Division Court of the County of Carleton.)

SIMON FRASER, ESQ., SHERIFF, &C., v. G. B. L. FELLOWES, AN ATTORNEY, &C.

Liability of Attorney to Sheriff for fees on writs of mesne process.

An attorney placing writs of mesne process in the hands of the Sheriff is personally responsible for the amount of Sheriff's fees. The Sheriff is not bound to look to the parties to the suit, but for such fees may at once sue the Attorney.

(28th December, 1860.)

This was an action to recover the sum of £9 13s. 5d., and interest, for services rendered by the plaintiff in the service of process, &c., as Sheriff of the county of Carleton.

The defendant admitted that the services were all rendered and the charges correct, but contended that he was not liable to the Sheriff for the service of process put into his hands by the defendant, as the attorney of other parties, but that the Sheriff must look to the parties, plaintiff or defendant (as the case may be), for whom the process may have been served; and also that he had given the plaintiff notice that he would not be responsible as the attorney of other persons.

The account was from 1856 to the Fall Assizes in 1859, and contained charges to the amount of £1 16s. 6d. for fees in two cases in which defendant was the plaintiff himself.

ARMSTRONG, Co. J.—The only question referred to me is whether an attorney who puts process into the Sheriff's hands in this

country is liable personally for the fees accruing to the Sheriff for such services. I have no hesitation in saying that I think he is, and that such is the law in this country. It was so held in the case of *Corbett* v. *McKenzie*, 6 U. C. Q. B. 605.

In every case where the Sheriff is employed by the Attorney, there is an implied contract on the part of the Attorney to pay the fees incurred; and it would be very inconvenient to Sheriffs, and unreasonable, to suppose that they should be forced to look to suitors, who may be in distant and foreign countries and with whom they seldom have any communication. Although sheriffs in England may not have an action against an attorney, which I do not find very clearly settled, yet in numerous cases it is held that the bailiff who serves the process may recover from the attorney in the suit.—*Wallbank* v. *Quarterman*, 3 C. B. 94; *Maite* v. *Maud*, 2 Ex. 608. And in this country, as the sheriff is the officer immediately employed by the attorney, I think he has a right to look to his employer for his fees.

There was evidence on the part of the defendant, that he gave the sheriff some years ago a general verbal notice that he should look to the defendant's clients and not to him for his fees, but has since paid him some fees, as other attornies have done, and placed writs, &c., in his hands, in the usual way of the profession. I do not think such a notice sufficient to relieve the defendant from his liability. It is the general practice of attornies to charge in their bills sheriff's fees on all process, &c., served in the case; and if they do not in all cases recover the amount themselves, that is no reason why they should not pay the sheriff in such cases as they may choose to employ him.

I give judgment for the plaintiff for £9 13s. 5d., and order execution to issue in six days.

UNITED STATES LAW REPORTS.

COMMON PLEAS, PHILADELPHIA.

(*From the Philadelphia Intelligencer.*)

COLLADAY V. BAIRD.

In Equity.

A person who has appropriated to himself a particular label, sign or trade mark, indicating that a certain article is made or sold by him or his authority, and with which label or trade mark the article has become identified, is entitled to the protection of a Court of Equity, which will enjoin any one who attempts to pirate upon the good will of his friends or customers by using such label, sign or trade mark without his authority; but there must be, between the genuine and fictitious marks, such general similarity or resemblance of form, color, symbols, designs, and such identity of words and their arrangement, as to have a direct tendency of misleading buyers who exercise the usual amount of prudence and caution; and there must also be in such a distinctive individuality in the mark employed by the counterfeiter as to procure for him the benefit of the deception resulting from the general resemblance between the genuine and the counterfeit labels or trade marks.

Motion for Special Injunction.

The following opinion was delivered by

LUDLOW, J.—The complainant, in his bill, alleges that he is the manufacturer of a certain style of goods known in the market as "Aramingo Check;" that, at great labor, care and expense, he has been able to produce a superior article, which he now manufactures and sells in large quantities, especially in the city of New York; that in the year 1854, he devised and adopted a certain trade mark, or name, to wit, the words "Aramingo Mills," and that he caused tickets, or labels, bearing the said trade mark, to be lithographed and printed. These labels, or tickets, the complainant used, by placing one of them outside of each piece of goods forwarded to market for sale; and thus the trade mark became identified with the goods manufactured by the complainant, although his name does not appear upon the label as manufacturer. The complainant further alleges, that the defendant, intending to deprive him of the exclusive use and benefit of his trade mark, cunningly devised a label upon which the words "Aramingo Mills" appear; and thus, by a colorable artifice succeeded in defrauding him of a portion of his well-earned reputation and profit, having introduced an article of check, into the New York market, and sold the same, in appearance similar, but in fact inferior, to the article manufactured by him, the complainant.

The defendant declares that true it is that the goods so manufactured are so made at a place called the "Aramingo Mills," but that these Mills have long been known by that name, and that the complainant has no exclusive right to the use of the name as a trade mark; that the defendant also manufactures his goods at the same establishment, being in fact the lessor of the complainant; he further denies that he ever, in any way, intended or did introduce his goods into the market by a fraudulent device; and that, although upon the label now used by him the words "Aramingo Mills" appear, yet that he has a perfect right to use them, especially as he intends to succeed in business by his own name and fame as a manufacturer, and has, therefore, among other things, inserted his name in full upon the label.

This brief statement of the bill filed, and the affidavits presented, will enable us clearly to understand the true principle involved in this case, and while we have been unable to discover, in print, any adjudged case of authority in Pennsylvania, yet the subject is not new, and has repeatedly received the attentive consideration of justice both in this country and in England. The principle has been firmly established that while a manufacturer has no copyright in a label, he yet may adopt a trade mark, which so far becomes his own property as to entitle him to the protection of courts of law and of equity.

In *Patridge* v. *Menk*, 2 Sandf. Ch. 622, the principle is stated, and we think, accurately, thus, "The Court proceeds upon the ground that a complainant has a valuable interest in the good will of his trade or business, and having appropriated to himself a particular label, sign, or trade mark, indicating that the article is made or sold by him or by his authority, or that he carries on business at a particular place, he is entitled to protection against one who attempts to pirate upon the good-will of his friends or customers, or the patrons of his trade or business, by using such label, sign, or trade mark, without his consent or authority."

The leading English cases at law and in equity upon this subject, will be found collected in a note to *Coats* v. *Holbrook*, 2 Sandf. Ch. p. 599. Also *Clement* v. *Maddick*, 16 Leg. Intg. p. 286. While in *Taylor* v. *Carpenter*, decided by Judge Story, and said to be badly reported, in Law Reg. 437; in *Coats* v. *Holbrook*, *Taylor* v. *Carpenter*, (a New York case,) *Patridge* v. *Menk*, 2 Sandf Ch. p. 586 to 628, as also in *Coffeen* v. *Brunton*, 4 McLean, 516, *Howard* v. *Henriques*, 3 Sandf. S. C. 725, when the name of a hotel was treated as trade mark, *Davis* v. *Kendall*, 11 Am. L. Reg. 680. *Dayton* v. *Wilkes*, 16 Leg. Int. 292. *Coats* v. *Platte* 19 Leg. Int. 213, will be found the leading American views upon this subject, down to a recent period of time, and which fully sustain the principle which we have heretofore stated.

While the general principle is thus established a difficulty frequently arises in determining the particular circumstance of each case; or as in this instance in determining how far one may use a *name* adopted by another, as a trade mark, and yet not conflict with his legal or equitable rights.

It may be remarked in general, that while an imitation or facsimile or a mere colorable artifice will bring the offending party clearly within the rule, no decision has ever yet declared the right of a manufacturer to be absolute in a *name* as a *name* merely; it is only when that name is printed in a particular manner upon a particular label, and thus becomes identified with a particular style of goods, or when a name is used by a defendant in connection with his place of business (and not his manufactured goods), under such circumstances as to deceive the public, and rob another of his individuality, and thus destroy his fame and injure his profits, [see *Howard* v. *Henriques*, 3 Sandf. 725, a case which will be be hereafter commented upon], that it becomes a *trade mark*, or in the nature of a trade mark, and as such entitles its possessor or proprietor to the protection of courts of justice. Hence the true rule to test the question of a piratical use of a name is not simply to discover that a *name* has been used in a particular manner by a defendant, but to determine how far the use of it in the manner said to be piratical, has either in fact deceived the public or is calculated to deceive persons of ordinary intelligence.

In *Croft* v. *Day*, 7 Beavan, 88, the Master of the Rolls lays down the following rules:

1st. There must be such a general resemblance of forms, words, symbols and accompaniments as to mislead the public.

2nd. A sufficient distinctive individuality must be presented so as to procure for the person himself the benefit of that deception

which general resemblance is calculated to produce. The Vice-Chancellor in *Patridge* v. *Menk*, 2 Sandf. Ch. 624, applies the following tests:

1st. The Court will not interfere when ordinary attention will enable purchasers to discriminate.

2nd. It must appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article in question, would probably be deceived.

These principles run through all the cases, so that while one, who ignorantly or by design uses an imitation or fac-simile of the trade mark of another, is within the rule, so also is that defendant who employs a colorable artifice, not strictly speaking a fac-simile or imitation. And to this last point, see *Coffeen* v. *Brunton*, 4 McLean, above cited. Let us now apply these principles and tests to the case in hand.

The label of complainant is printed upon paper of a pinkish hue, bearing at the top thereof in large capitals, and in a semi-circular form the words:

ARAMINGO MILLS.

Immediately beneath these words is a circular vignette, supported upon each side by two oval vignettes; below, in large capitals, are the words "CHECKS" and "WARRANTED," and then in small capitals, "INDIGO BLUE."

The label of defendant is printed upon paper of a "buff" tint, with a fanciful and deep pink border, within which is an oval space and on which the following words are printed and arranged thus:

SUPERIOR
DOMESTIC
POWER LOOM GOODS,
Manufactured by
WILLIAM BAIRD,
At Aramingo Mills,
FRANKFORD, PA.
Warranted Fast Colors.

The words "AT ARAMINGO MILLS," are printed in small capitals.

The most casual observer will at once discover that these two labels differ in many important particulars.

The label of complainant is nearly one-third larger than that of defendant, the color of the ink used is different, as well as the size of the letters, the one has three distinct vignettes, the other none whatever; the words upon each of the labels, except the two "Aramingo Mills" are different; the most ignorant person must at once, at a glance, detect these differences so far as they relate to the general appearance of the labels—even the objectionable words themselves present marked features which cannot escape the observation of any one. In the complainant's label they strike the eye at once, because they are printed, we before said, in large capitals, at the top of the label, and in black ink, while in the defendant's they are introduced near the end in small capitals, of a pinkish tint, and although distinct, present no striking peculiarities.

The label of the defendant cannot be said to be in any sense an imitation or *fac-simile* of that of complainant; nor can it be said to be even a colorable imitation, device or artifice. If, then, we sustain the present motion, we are driven to the position that the mere use of the words "Aramingo Mills" *upon the label of defendant*, renders him liable for the piratical appropriation of a trade-mark.

That the legal effect of such a position would be doubtful, appears, we think, by an application of the principles and tests heretofore referred to in this opinion.

If, from abundant caution, we were disposed to adopt a most liberal doctrine—one radical in its practical operation—and grant this motion, a particular reference to a few of the adjudged cases, presenting facts most strongly in favor of the complainant's views, will convince us that the decision would be one of doubtful propriety.

In *Patridge* v. *Menk*, the name "A. Golsh" was the valuable portion of the label, because the friction matches made by him had acquired an extensive reputation with the trade as "Golsh's Matches," and although it appeared that the defendant had printed, certainly upon one of the labels used by him, the same name but in connection with the words "*late chemist for*," in small capitals; yet the Vice-Chancellor dissolved the injunction upon the ground that a purchaser seeking for the Golsh match, would at once, upon, reading the label, discover the difference between the maker of that and any other article. The Chancellor upon appeal affirmed this decision.

So in *Spottswood* v. *Clarke*, an English case, reported in Sand. Ch. 638, the Lord Chancellor dissolved *an injunction* which the Vice-Chancellor had granted, with liberty to the plaintiff to bring an action at law, where the plaintiff in the case was the owner of a publication called "The Pictorial Almanac," and the defendant of one called "Old Moore's Family Pictorial Almanac," although the covers of each book were to a certain extent similar, both being decorated with a pictorial representation of the Observatory at Greenwich, and in the title as printed on the cover, making use of nearly the same expressions.

The two strongest cases which can be cited in favor of the complainant are *Coffeen* v. *Brunton*, 4 McLean, 516, and *Howard* v. *Henriques*, 3 Sandf. 725. In each of these the principles applicable to the subject under consideration were carried much further than in any other of the adjudged cases. In the first, the plaintiff insisted upon his right to the use of the name "Chinese Liniment," and that his right had been interfered with by one who printed the words "Ohio Liniment" upon his label. Judge McLean granted the injunction, but upon the ground that "from the body of the label and of the directions for the use of the medicine, it is clear that the language of the defendant so assimilated to that of the plaintiff as to *appear to be the same medicine*. The alterations being only colorable." This case is clearly distinguishable from the present, here the differences between the two labels as to the words "Aramingo Mills" are such as to guard the purchaser.

In *Howard* v. *Henriques*, the Court went one step further, and declared that the proprietor of an hotel, called the "Irving House" or "Irving Hotel," had—*although the name did not appear upon the building*—such a right to it as to secure the protection of the Court against one who endeavored to use it in connection with and upon his place of business.

This case, strong as it is, can, we think, easily be distinguished from the present. The "Irving House" or "Hotel" became identified with a particular building; here the goods are identified, not with the "mills"—that is the building—but with the label bearing the words "Aramingo Mills." They are known in the market by the label, and the label alone. Besides, while the principles established before the decision in *Howard* v. *Henriques* may have been correctly extended to meet that case, yet, in weighing its authority it ought not to be forgotten that the circumstances attending it were peculiar, for the name in dispute was that of an hotel, and although not displayed upon any particular part of the building, was, as a matter of fact, as well known as "the City Hall" or "the Trinity Church," and the assumption of the name under the circumstances was a palpable fraud, and so considered by the Court.

In the Omnibus Case, *Knott* v. *Morgan*, 2 Keene R., 213, the device was clearly colorable, for, in addition to the fact that the omnibuses bore the same external decorations, the carriages were named "The London Conveyance Company," and "The London Conveyancer Company," an artifice well calculated to deceive a transient traveller.

In conclusion, having endeavored to show that this case does not fall within the principles applied to cases involving the use of a trade-mark by means of an imitation fac-simile, or colorable artifice, and which relate to personal property, to manufactured articles, and to such things as are necessarily moveable. We might refuse this motion, because the complainant puts his case upon the ground that he has been injured by the piratical use of his label; willing, however, to go further, and grant the relief sought, if the facts established required it, we have examined the law upon the question of the use of a name merely, and for the purpose of illustrating the principles, we have cited at length the leading cases upon the subject. The result of this examination has been to lead the mind to a serious doubt. This doubt has been strengthened from a knowledge of the fact, that the defendant manufactures his goods at the "Aramingo Mills," or in an

establishment occupied by the complainant, and which, for some years, has been known by that name.

Without, therefore, deciding the question, (which is also a matter of doubt,) as to the real intention of the defendant in using the objectionable words upon his label in the present state of the law, we are not prepared to say absolutely that the use of the name printed as it in fact is upon defendant's label is a violation of the law. We must therefore adopt the judicious course pointed out in *Patridge* v. *Menk*, and *Spottswood* v. *Clarke*, and leave the complainant to maintain his right by an action at law. We refuse to grant this motion.

The motion for a special injunction is refused.

GENERAL CORRESPONDENCE.

Bill of Exchange—Qualified acceptance—Notice to drawer.

To the Editors of the Law Journal.

Gentlemen,—A draws a bill of exchange upon B (who is resident and carries on business at the town of M.), without naming any place of payment in the body of the bill. B accepts, payable at the Bank of Upper Canada, at the town of N., distant seven miles from the town of M., although there are Bank agencies at said town of M., and B has no residence or place of business at said town of N. Of the character of this qualified acceptance, A, the drawer, receives no notice from the holder of the bill. The bill, at maturity, is presented for payment at the Bank of Upper Canada, at the town of N., but not to B personally, and is dishonored and protested in the usual manner.

Query: Is such presentation good in an action upon said bill against A, the drawer?

The question will turn upon locality;—whether the circumstance that the place appointed in the acceptance for payment of the bill was not located in the same town as the residence of the acceptor, relieved the drawer, in the absence of notice of such qualified acceptance, of his liability.

In a judgment recently delivered in the United States Supreme Court, in term, the court decided (the then justices present concurring in opinion): "If the Bank of Upper Canada, where this bill was made payable by the acceptor, was located in the same city, town or village where such acceptor resided, the acceptance, payable at such Bank, would have been entirely proper;" and that "a qualified acceptance, making the bill payable at another town, taken by the holder without the assent of the drawer, would discharge the drawer."

Will you please be good enough to consider the above point, and give an opinion upon it in your next number?

Yours, &c.,

Law Clerk.

Port Hope, 18th April, 1861.

[If A, who drew the bill upon B, did not think it necessary to name any place of payment in the body of the bill, we cannot see what right he has to complain that B accepted the bill payable at a particular place, though in a different town from the one in which he resided. Of this the holder might have had cause to complain, and to it might have objected; but he did not do so; he was satisfied with the acceptance. We do not think there was any obligation upon the holder to give notice of the acceptance to the drawer. We speak, of course, without reference to decided cases. We know of no case in point, decided either in England or in Canada. The American case, to which our correspondent refers, appears to conflict with our views of the law. We should like to have a more particular reference to it. It certainly does not square with our ideas of the law, so far as at present we understand it.—Eds. L. J.]

Articled Clerks before 10th June, 1857—Requirements before admission.

To the Editors of the Law Journal.

Gentlemen,—In reading the reported case, *In re. Hume*, U. C. Q. B. Rep. vol. 19, p. 373, the following questions arose in my mind, and I think your answer to them will be of great importance to students pursuing the study of the law.

1st. Is it necessary for a clerk, whose articles bear date before the 10th June, 1857, to have such articles filed, according to the Act 20 Vic. cap. 63, sec. 7?

2nd. Is it also necessary for said clerk to attend two terms of the sittings of the Courts of Queen's Bench and Common Pleas?—Same Act, sec. 3.

3rd. Is it also necessary for said clerk to be examined in the books prescribed by the Law Society, under the authority given them in same Act, sec. 3?

The above are three important questions to the articled clerk. We all are aware that service of clerks to attornies under their articles was regulated by the Acts 25 Geo. III cap. 4, 37 Geo. III. cap. 13, and 2 Geo. IV. cap. 5, 1822, which last mentioned Act was the principal one. In 1857 the statute 20 Vic. cap. 63 was passed (10th June, 1857). It is now held by a great many students and lawyers, that every articled clerk, whether articled before or after the passing of the Act 20 Vic. cap. 63, should have their articles filed according to the provisions of said Act, attend the sittings of the Courts of Queen's Bench and Common Pleas, and pass the examination by paper and *viva voce*.

It looks unreasonable and unjust to the articled clerk, who bound himself under his articles, under the powers given him by the Act 2 Geo. IV. cap. 5. Can it be the intention of the Legislature to compel such clerk, by an act passed after he is bound by a former act, to attend, at great expense, two terms of the courts at Toronto? The Act 20 Vic. cap. 63, sec. 7, states that "every person bound in contract after the passing of this act shall file articles," &c. All very well, so far; but then comes the Consolidated Statutes of Upper Canada, wiping out all former acts (see Con. Stat. U. C. cap 35), and distinctly stating that every person seeking admission as attorney shall comply with said chapter.

By answering the above in your next issue, you will much oblige a number of clerks who are in the same state of perplexity as myself.

Yours truly, Articled Clerk.

Hamilton, April 17, 1861.

[1st. It is not possible to read either s. 7 of 20 Vic. c. 63, or sec. 11 of Con. Stat. U. C. cap. 55, with which it corresponds,

as applicable to articles of clerkship entered into before the 10th June, 1857. In the first place, as noticed by our correspondent, sec. 7 commences, "Whenever any person *shall*, after the passing of this act, be bound," &c., showing that the section was designed to apply only to articles of clerkship entered into after the passing of the act. In the second place, though these precise words do not appear in sec. 11 of the consolidated act, yet as that section, like the former, requires the affidavit mentioned in it to be made "within three months after the date of the contract," it follows that where the contract was entered into more than three months before the passing of the act, it is quite impossible to comply with its provisions. We do not know whether the Law Society has made any regulation affecting the filing of articles entered into before the 10th June, 1857, but, whether or not, would advise an articled clerk so circumstanced, as a matter of precaution, to file his articles at the earliest possible time, and at all events at least fourteen days next before the first day of the term in which he intends to seek admission.

2nd. We think that a clerk articled before the 10th June, 1857, where time permits, is as much bound to keep the terms under sec. 3 of the act of 1857 (Con. Stat. U. C. cap. 35, sec. 3, subsec. 2), as a clerk articled since that date. In the doing of this there is no impossibility, as in the former case, and the act seems to require it. We refer especially to sec. 23 of the act of 1857 (Con. Stat. U. C. cap. 35, sec. 23).

3rd. Yes. It is not possible to read the whole act, and come to any other conclusion.—Eds. L. J.]

Law and Lawyer.

To The Editors of the Law Journal.

Kingston, 5th April, 1861.

Gentlemen,—As I believe your valuable Journal advocates as well the interests of Law-Students as of the Profession at large, I am induced to indite this epistle to you, *de profundis* of a country office in extensive practice, in the hope that it may call forth from you ere long, a vigorous Editorial on the subject. You must not suppose that my remarks apply to the mere imaginary grievance of a discontented individual. Grave dissatisfaction has for a long time prevailed among studiously disposed Law Students, on account of the indifference shewn by their Employers in performing their duties by them in accordance with the usual undertaking contained in their Articles. This neglect, serious as are its consequences to the Student, cannot, I am convinced, be owing to anything but the want of consideration on the part of the Bar.

The inconvenience which practising lawyers might suppose would attend their efforts to indoctrinate their students into the mysteries of their profession, would be very slight indeed, and would I am sure, be more than compensated by the increased attention and accuracy of the latter. There could surely be no great difficulty in explaining to a student the effect of a Deed or a Pleading which he is about to copy, as to deter any one from attempting it; and if in addition the Principal could devote half-an-hour *per diem* to reading with his students the Books of practice and explaining to them the effect of our Provincial Statutes, the good effects of this course would ere long be perceptible.

I know of several offices where little or no attention whatever is paid by the principal to this province of his duties, and the consequence that such students as are articled but unsalaried, become early discouraged, and finding that they can learn little or nothing from their office work, avoid it as much as possible; spend no more time in their Employers office than they can help. They think, and with reason, that their contract should be carried out *literally* or not *at all*.

The best remedy for such a state of matters would be the one I have above suggested, and hoping that you will endeavour to bring it before the Profession and Public, I remain

Yours &c,

A Law Student.

Attorney—Delivery of bill before action—Items—Statutable defence.

To the Editors of the Law Journal.

Gentlemen,—Will you oblige me with your opinion on the following questions, in the next number of your Journal.

A, an attorney, brought an action for B against C; recovers a verdict, taxes his costs, enters judgment, &c. C, during the progress of the suit, becomes insolvent; the sheriff returns the execution *no goods;* A sues B for his costs, and makes out his claim as follows:

To amount of costs taxed in suit of B *v.* C...	$56 53
To costs proving claim chancery suit G *v.* E.	12 80
Costs of *fi. fas.*, &c.....	11 85

At the trial B moves for a nonsuit, on the ground that the bill had not been delivered in detail, as required by sec. 27 of the Con. Stats. U. C. page 419.

B made an affidavit of the amount of debt and costs *due him*, and proved his claim in the chancery suit above referred to. A bill, as above stated, was delivered a month before action brought.

1st. Should *A* have delivered a bill in detail before suing, or should *B* have applied for it within the month?

2nd. Is B's defence a statutable one, and if so, could he set it up at the trial without giving six days' previous notice? (Con. Stat. U. C. page 151, sec. 93.)

3rd. B having made an affidavit of the amount of debt and *costs due him*, and having assigned the judgment to D—*quære:* Would this obviate the necessity of delivering a bill a month before suing?

By replying to the above in your next issue you will oblige

Your obedient servant,

Sarnia, 24th April, 1861. S. P. Y.

[1. The bill delivered was not, in our opinion, sufficient. It should have been of the items in detail. We refer to *Drew et al* v. *Clifford*, 2 C. P. 69; and *Philby* v. *Hasle*, 29 L. J. C. P. 370. It is the duty of the attorney before action to deliver the bill—not of the party liable to demand, as supposed by our correspondent. The statute reads, "*No* suit at law or equity shall be brought for the recovery of fees, charges, or disbursements, &c., *until* one month after a bill thereof, &c.,

has been delivered, &c." In proving compliance with the act it is not, however, necessary, in the first instance, to prove the *contents* of the bill. It is sufficient to prove that a bill was delivered. It then devolves upon the party liable to shew that the bill delivered is not such a bill as constitutes a *bonâ fide* compliance with the act. (*See* Con. Stat. U. C. cap. 35 s. 36.)

2. We certainly think the defence is a statutable one, within the meaning of Con. Stat. U. C. cap. 19 sec. 93.]—EDS. L. J.

Dower—Seisin—Sufficiency of evidence.

TO THE EDITORS OF THE LAW JOURNAL.

BELLEVILLE, 24th April, 1861.

GENTLEMEN,—As a reader of your invaluable Journal, and one having frequent recourse to its pages for information, more particularly that portion of it devoted to the consideration and publication of knotty questions, submitted to you, under the head of "Correspondence"—your remarks upon which are of immense benefit to the law student—I take the privilege of asking your opinion upon a matter relating to the right of dower; respecting which I have been unable to satisfy myself from works bearing upon that subject (which are not very voluminous), neither can I find any decision that will throw any light upon it. It is this:

A purchases 500 acres of land from B, from whom he receives a bond for a deed. A goes into possession, and gets married; and, in accordance with the conditions of the bond, regularly makes the required payments, until there is only due thereupon say £200. A has large business transactions with one C, with whom B also has dealings. B says to C, you have an open account with A, give me credit for so much, and I will authorize you to collect the balance of £200 due on the bond from A. This arrangement is completed, and C induces A to give a mortgage for this £200, and other sums due him upon the 500 acres. A, at the time of the execution of the mortgage, had been married nine years, but had never received a deed. No action is taken on the mortgage for 15 years from its date, when a suit of foreclosure is instituted; and A loses possession, after having held it, with his wife, for 24 years before proceedings taken.

Will the 24 years' possession establish such a seisin in the husband as will entitle the wife to dower; or will the mortgage militate against the computation of the 20 years?

Park on Dower says, "That a right or title to property, however complete in other respects, will never furnish a foundation for a claim of dower, if unaccompanied with that which is technically termed seisin." He subsequently states, "That in the application of the rule requiring a seisin in the husband, it is material that the law does not require an *actual* seisin, or seisin *in deed*; but that it is sufficient to satisfy the rule that the husband have a seisin *in law*.

I take it that over 20 years' possession of the land, before any action, will amount to a seisin at law, although the husband never had a deed; and that the mortgage cannot operate unfavourably—more than twenty years having elapsed before bill filed; and that the widow will therefore be entitled to dower.

Your answer to the above query will greatly oblige,

Your obedient servant, A. R.

[The rule of law is, that a widow is entitled to dower out of all lands whereof her husband was seized during coverture.

If seisin be denied, the widow is not driven of necessity to produce and prove her title deeds. She might, we apprehend, rest her case on proof that he died in possession; that he had been in possession, as owner, twenty years or upwards; or that her husband was in possession, and while in possession made a conveyance in fee simple. (*See* remarks of Draper, J., in *Towsley* v. *Smith*, 12 U. C. Q. B. 555: *see*, also, *Lockman* v. *Nesse*, 5 U. C. O. S. 505.)

The mortgage from A to C, though not so stated, was, we presume, the ordinary one in fee simple. When it was executed A was in possession. C accepted it, and, as it appears, subsequently foreclosed it. Proof of these facts, together with the other facts stated by our correspondent, would, we think, be sufficient evidence of seisin in an action for dower brought by the widow of A against C, or his privies in estate. (*See* Com. Dig., Estoppel, B: *see*, also, *McLean* v. *Laidlaw*, 2 U. C. Q. B. 222.)]—EDS. L. J.

REVIEWS.

THE WESTMINSTER REVIEW. The opening article of this quarterly for April is a review of a lecture on the study of History, by Charles Kingsley, in which are laid before the reader the opposite systems pursued in the treatment of the favourite subject of the lecturer. We next meet one of the many interesting papers to which the recent events in Southern Europe have given birth, under the heading of the Sicilian Revolution. Voltaire's Romances and their moral present a criticism upon the lighter literary efforts of one of the most distinguished men of his own time. The paper upon Cotton Manufacture will be read with much interest at the present moment in view of the troubles now existing in the Southern States of America, which may temporarily, at least, very much affect the supply of that great staple commodity, usually obtained in that portion of the world. The usual extended review of contemporary literature brings to its close a number which sustains the high reputation freely conceded to the master-pieces of English Review literature.

THE UNITED STATES INSURANCE GAZETTE contains a large collection of Reports of various Insurance Companies throughout the United States and Canada.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

GEORGE MANNING FURBY, of Port Hope, Gentleman. (Gazetted, April 6, 1861.)

GEORGE D'ARCY BOULTON, of Toronto, Esquire, Barrister-at-law. (Gazetted, April 6, 1861.)

JOHN WRIGHT, of the Town of Port Hope, Esquire, Attorney-at-law. (Gazetted, April 6, 1861.)

WILLIAM HEPBURNE SCOTT, Esquire, Attorney-at-law. (Gazetted, April 6 1861.)

REGISTRAR.

WILLIAM S. SCOTT, of the Town of Prescott, Esquire, to be Registrar of the County of Grenville, in the room of John Patton, Esquire, deceased.

CORONER.

HENRY JAMES TAYLOR, of the Township of Escott, Esquire, to be Associate Coroner for the United Counties of Leeds and Grenville. (Gazetted April 6, 1861.)

TO CORRESPONDENTS.

"CHARLES DURAND"—"PAUL DUNN"—Under "Division Courts."

"LAW CLERK"—"ARTICLED CLERK"—"A LAW STUDENT"—"S. P. Y."—"A. R."—Under "General Correspondence."

DIARY FOR JUNE.

1. Saturday..... EASTER TERM ends.
2. SUNDAY ..... *1st Sunday after Trinity.*
3. Monday ..... Last day for notice of trial County Court.
9. SUNDAY..... *2nd Sunday after Trinity.*
11. Tuesday..... Quarter Sessions and County Court Sittings in each County.
13. Thursday..... Sittings of Court of Error and Appeal commence.
16. SUNDAY..... *3rd Sunday after Trinity.*
23. SUNDAY..... *4th Sunday after Trinity.*
29. Saturday ..... Last day for County Councils finally to revise Assessment Rolls. and for apportionment of School moneys by Chief Supt. of Schools. Chief Supt. to report state of Grammar Schools.
30. SUNDAY..... *5th Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JUNE, 1861.

NOTICE.

The proprietors of the LAW JOURNAL *have at length determined to take legal proceedings for the recovery of unpaid subscriptions. All accounts amounting to $20 and upwards, will be, without further notice, placed in suit on the 1st July next. Subscribers concerned, who desire to avoid law costs, are therefore required to pay their dues before the day indicated, or abide the consequences of neglect.*

ABOLITION OF REGISTRATION OF JUDGMENTS.

By far the most sweeping Act of last session of Parliament is that entitled "An Act to repeal the laws relative to the Registration of Judgments in Upper Canada."

We can scarcely realize the fact that this Act is become law. It is certainly not a law for which there was much, if any, agitation. All of us were more or less familiar with the abuses that had crept into the system of registered judgments, but none expected a measure of redress in the shape of a bill that would effect the entire destruction of the system itself.

We are not in favor of revolutionary measures. We prefer rather to heal than to destroy. Such, it is said, is the great secret of the strength and stability of the British constitution. He would be a poor physician who, instead of endeavoring to remove disease, should intentionally kill his patient. If the system of registered judgments involved any good, we must say the Legislature has been too precipitous in killing the good in order to get rid of its attendant abuses. There are men who drink strong drinks to excess, but is there a sane man who would on that account urge the destruction of all grain and of all vineyards? The true rule is, to remedy the abuse, rather than work the destruction of the thing abused, if good in itself. We at once admit that the law of registered judgments was accompanied of late with much abuse; but we at the same time think that the law itself, if properly regulated, was a good law.

The law of debtor and creditor is in every civilized community an important branch of jurisprudence. "Pay that thou owest" is the natural command of every system of administrative justice. It has its corrolaries. A man's property, both real and personal, should be liable for his debts, and so liable as to be available. Property is purchased with money. Debts are contracted on account of property. Credit is given on the faith of property. Men are measured more by the breadth of their acres than by inclination for honesty. The former is visible—the latter not in general apparent; the former is tangible—the latter uncertain and unreal. That, therefore, which may be the subject matter of the debt, and is often the security, or at least the inducement, for contracting the debt, should be made available for the payment of the debt, and the more available the better in the interest of truth and justice.

It is repugnant to our present ideas of civilization that a man's body should be seized in liquidation of his debts. Besides, the body of a debtor, in a country where slavery is prohibited, is not easily converted into cash—the one thing needed. But these objections do not exist in the way of making a man's chattel property and his lands responsible for his debts.

Owing to feudal and other reasons, land in England has been less available to creditors than goods and chattels. At common law, goods and chattels, and growing profits of lands, were the only property which could be taken in execution by a creditor. The first step in advance was the 13 Ed. I., St. 1 cap. 18, which enabled the sheriff, under certain circumstances, to deliver to the creditor one half of the land of the debtor, until payment of the debt thereout. This was the origin of the writ of "elegit"—a writ which derives its name from the words *Quod elegit sibi executionem fieri de omnibus catallis et medietate terræ.* The proper writ against goods and chattels has always been the well known one of *fieri fiacias.* Lands in the colonies being more a subject of barter than in England, have been from an early period looked upon in the nature of goods and chattels for the payment of debts. In this colony there is in force not only an English statute of 5 Geo. II. c. 7, which declares that lands and other hereditaments and real estates situate or being within the colony, shall be assets for the satisfaction of debts, but subject to the like reme-

dies, proceedings and processes, in any court of law or equity, for seizing, extending, selling or disposing of the same towards the satisfaction of debts, in like manner as personal estate in the colony is seized, extended, sold and disposed of for the satisfaction of debts. On the back of this there are our own statutes, allowing the sale of lands under writs of *fieri facias*, but subject to regulations providing that personal property shall be exhausted before real property is sacrificed

These statutory regulations would be all that is required, if it were not in the power of debtors, dishonestly inclined, to get rid of their property, real and personal, between judgment and execution. In most cases an interval of more or less duration elapses between the time that judgment is pronounced, and the time that execution against goods can be issued. During this interval it is in the power of the debtor, under circumstances of strong temptation, to put his personal property out of his hands. Even after execution issued, and before levy, were it not for the Statute of Frauds, there would be a similar door to dishonest practices. Under the operation of the Statute of Frauds, so far as the courts of record at all events are concerned, the deposit of the writ in the sheriff's hands effects a *lien* on the personal property until seizure. This, as it is well known, is a very wise provision—one which, with few exceptions, works beneficially—in few instances does harm—in most instances prevents fraud.

In this country it is as easy for a debtor to get rid of his lands as of his goods. The temptation to dishonesty in the one case is as great as in the other; and the opportunity for fraud is, if possible, in the case of lands, more tempting than in the case of goods. Though in England the sheriff is by one and the same writ commanded to seize the whole of the debtor's chattels, and one half of his real property, yet here no writ can be issued against lands until the return of the writ against goods. If the debtor, before judgment, fail to get rid of his lands, it is in his power to do so after judgment, and even while a writ against his personal property is in the hands of the sheriff. Why should there not be the lien on lands from the time of judgment until seizure? Why should not, at least, the writ against goods and lands be at all events joint, so as to bind the lands, if necessary for purposes of execution, from the issue of the first execution—that is, as soon as possible after judgment?

It was at one time supposed that a judgment of a court of record, whether registered or not, operated as a lien upon lands. The doubt was subsequently removed by express legislation. It was by act of parliament declared that unless registered, no judgment should operate as a lien on lands. Now it is declared that no judgment, whether registered or not, shall operate as a lien on lands. Why this great change? Because, it must be said, abuses grew into existence which our legislative physicians were unable or unwilling to heal.

The law was, that a registered judgment should be a lien on lands. To enforce this lien, resort was necessary to the Court of Chancery. The costs of that court were discovered to be so enormous, that the remedy was worse than the disease. Cases are said to have occurred, where the land of an unfortunate debtor, dragged into the Court of Chancery by a confiding creditor, has been, after great delay, involving endless "appointments," and as endless disappointments, sold to pay law costs to a frightful amount, and leaving little or nothing to the creditor who put the court in motion. Literally this was invoking a demon to one's destruction. But if the machinery of the Court of Chancery was found to be such that its cost could not be reduced, and to be too expensive for the purpose intended, why not have substituted a more simple and less expensive machinery? Nobody complained that the existence of the law allowing a registered judgment to operate as a lien on lands was a grievance requiring legislative action, but that the machinery for making that lien available was so costly that it consumed the property it was designed to administer for the benefit of judgment creditors. The abuse undoubtedly did exist. It of late festered to such an extent, that it appears our legislators, in their haste to apply the dissecting knife, have (blindly, we think) destroyed the vitals of the system itself.

But enough, the law of registered judgments is dead, and it only remains for us, without further lament, to bury it.

Let us next, now that the shock is over, calmly contemplate the void created, and while considering the means of its death, weigh the probable consequences of the void in relation to existing laws.

The statute is simply entitled "An Act to repeal the laws relating to the Registration of Judgments in Upper Canada," but enacts among other things, that "no judgment, rule, order or decree for the payment of money of any court of Upper Canada, shall create or operate as a lien or charge upon lands or any interest therein."

The Act is true to its object,—the work of destruction. It leaves not, so far as we can discover, a single judgment clause to tell the fate of its companions. It begins very naturally with the Court of Chancery, and with one stroke of the pen deprives parties of the power to enregister the decrees or orders of that court directing the payment of money so as to bind lands. It next turns its attention to the more humble but not less useful Division Courts, and deprives parties of the power of obtaining certificates of judgment for registration purposes from these courts. It

then deals with the Superior Courts of Common Law and County Courts in like fashion.

Having gone the circuit of the courts, one would fancy that the Act had exhausted itself. Not so; however, keen in the work of destruction, it peers through our statutes for stray sections, and fells them the moment they are discovered. It is found that a section giving power to the Court of Chancery to charge lands was snugly smuggled into the arrest and imprisonment for debt Act, (cap. 24,) and the "innocent" (s. 21) is accordingly slaughtered. Two clauses (secs. 12, 27) criminal enough to mention the word "judgment," are discovered in the Act respecting the partition and sale of real estate, (cap. 86,) and are accordingly silenced. Three clauses (secs. 1, 2, 3,) of the Act respecting mortgages of real estate (cap. 87) are emasculated for a like offence. Next the Registry Act (cap. 89), the dupe of the courts in this nefarious business, is discovered, and made largely to suffer. Many sections in the heat of the moment are completely obliterated, but on reflection are restored, purged of the obnoxious references to everything in the shape of a registered judgment decree or order. A section (11) of the Act respecting the transfer of real property (cap. 90) actually used the words "shall be bound by judgments," and paid the penalty of death in consequence; but by the omnipotence of Parliament is restored to life, on condition that it shall never again use such words. No more offending clauses could be discovered, but lest any should have escaped destruction we have the declaration that "All other statutes, parts and clauses of statutes, authorizing the registration of judgment decrees and orders for the payment of money in Upper Canada are hereby repealed."

Here one would suppose that the Act quite exhausted would rest and be as silent as the grave. Utterance, however, is subsequently given to two incoherent sections, the construction of which will, we fancy, puzzle the courts as they now puzzle us.

Here they are :—

10. "Nothing in this Act contained shall be taken, read or construed to affect any suit or action on or before the 18th day of May, 1861, pending in any Court in Upper Canada, in which any judgment creditor is a party."

11. "This Act shall take effect on the 1st of September next, and in case of judgments heretofore registered all writs of executions against lands issued before the said first day of September shall have priority according to the respective times of the registration of the judgments on which they have issued or shall issue respectively."

We confess we find a difficulty in construing these clauses separately, and a still greater difficulty in construing them collectively. By reading the latter clause we learn that "the Act shall take effect on 1st September next," by which we understand that it is not to take effect before that day. Then what is the meaning of the former clause, "that nothing in this Act contained shall be taken, &c., to affect any suit, &c., on or before 18th May, 1861, pending," &c. Surely if the Act is not to take "*effect*" till 1st Sept., 1861, it can very well "*affect*" suits pending on or before 18th May, 1861! If we were to read the latter clause alone we should say certainly not, but reading the two together we find it difficult to come to any other than an affirmative conclusion. The object designed was probably to prevent the filing of bills in Chancery on judgments after 18th May, 1861, but how far that object is expressed we must leave the courts to decide.

Again: what is the meaning of the latter part of the latter section, which declares that "in cases of judgments heretofore (before 18th May, 1861,) registered, all writs of execution against lands issued before the said first day of September shall have priority according to the respective times of the registration of the judgments on which they have issued or shall issue respectively?" It certainly intends that executions against lands may be issued between 18th May and 1st September, 1861. It certainly intends that some of these executions may be issued on judgments which have been registered. But does it allow judgments to be registered between 18th May and 1st September, 1861? It certainly makes no provision for judgments registered after 18th May, 1861, and from this circumstance it may be argued that the intention is, none shall issue after that day. If this be the correct conclusion what becomes of the first part of the clause which declares that the Act shall take effect "on the 1st September next?" The meaning of this, if it has any meaning at all, must be, that for some purposes the Act shall take effect on 18th of May, but not for all purposes till 1st September, 1861.

These questions of construction suggest themselves to our minds, and we are much mistaken if they do not give trouble to other minds than ours. *Nous verrons.*

ADMISSION AS AN ATTORNEY.

The mode of obtaining admission as an Attorney and Solicitor of the Courts of Law and Equity in Upper Canada, is regulated by Consol. Stat. U. C., cap. 35, as amended by Statute 23 Vic., cap 48, and the Rules of the Law Society, passed in pursuance of the powers conferred on the Society by the former Statute.

Each applicant is expected to be well read in statute and common law, and more especially the statute law of Upper Canada, and is required to undergo an examination in these subjects, in order that his fitness may be tested.

It has been remarked to us, that if the subject of examination were restricted to the statutes regulating the mode

of admission scarce one in one hundred applicants would pass a satisfactory examination.

Now, surely, this should not be so. The first thing necessary is to comply with the terms of these statutes, and in order to do so, a thorough knowledge of their provisions is essential. It is singular that men will leave untouched those statutes and rules, an understanding of which, and a compliance with which, is a condition precedent to all that is expected to follow.

The consequence is, that many have great difficulty in scrambling through at the appointed time, while others, owing to unpardonable neglect, are thrown back from term to term, for no other reason than supreme indifference to the strict injunctions of the Legislature and the Law Society.

In this number two cases will be found reported of interest to those for whom these observations are intended.

Our object is in time to direct the attention of all concerned to what is required of them, in the hope that the number of those who display ignorance where knowledge should prevail may be from term to term made "beautifully less."

We must not be understood as casting any blame upon either of the gentlemen whose respective names head the reported cases to which we refer. Though it was in the power of both, by proper foresight, to have prevented the disappointments which they encountered, yet they were the first of their kind, and now stand as beacons to all who are following in their course.

To use the language of the court in one of the cases, "In view of the possible loss of a term, care should be taken to enter into the contract of service a sufficient number of days before the term to escape the difficulty of not having fourteen clear days between the expiration of the articles and the term that will follow next after;" so we may add, "In view of the possible loss of a term care should be taken to leave with the Secretary of the Law Society all necessary documents at least fourteen days before the term in which applicants intend to seek admission."

LAW SCHOLARSHIPS.

In England the study of the law is very expensive, and in consequence the majority of those called to the bar or admitted as attorneys are the sons of well-to-do parents.

In Canada, though not so expensive as in England, yet in order to be called to the bar or admitted as an attorney considerable expenditure is necessary.

The expense is not in either country simply the actual disbursements for fees to the Inns of Court or Law Society, but rather the cost of living while under apprenticeship.

In Upper Canada, before any person can be admitted an attorney, it is necessary for him, if the graduate of a recognized University, to serve at least three years under articles of clerkship; and if not a graduate, a term of five years' service is required. In addition to this is the cost of keeping terms in Toronto, and other expenses of minor importance.

Very few articled clerks are in receipt of salaries sufficient to support them while serving under articles, and by far the greater proportion are not in receipt of any salary whatever. Payment during service is certainly the exception in Upper Canada, not the rule.

In order, therefore, to enable a young man to prosecute his studies under such circumstances, the aid of his parents or of friends is in general necessary. Some young men of extraordinary energy do manage to struggle through in spite of difficulties, but the effect is in general to discourage the son of the poor man—the young man who is left to depend entirely on his own resources.

Hence it has always been the desire of the philanthropic as much as possible to remove, in the case of really deserving young men bent on professions, the inequalities caused by differences of birth, station, and family connexions. This desire in the several Universities and Colleges has led to the establishment of exhibitions. The same desire has induced particular individuals in various scholastic institutions to establish scholarships. And we are glad to see that a corresponding desire has prompted the Law Society of Upper Canada to institute a system of scholarships, open to the son of every man in Upper Canada, no matter how lowly his station or straitened his circumstances.

The Law Society, during last Easter Term, ordained that there shall be four scholarships awarded annually in Michaelmas Term to students standing on the books of the Society, of the respective annual values of £30, £40, £50 and £60, and open for competition as follows:

£30 scholarship to students under one year.

£40 scholarship to students over one year and under two years.

£50 scholarship to students over two years and under three years.

£60 scholarship to students over three years and under four years.

Each scholarship to be tenable for one year only, but the holders of £30, £40 and £50 scholarships to be eligible for a higher scholarship in the succeeding year.

Any degree entitling to a call in three years to be considered as equivalent to two years on the books.

The establishment of scholarships will not only be an encouragement to the son of the poor man, but an incentive to honorable ambition to all young men emulous of

distinction. The sons of rich and poor will in this respect stand on equal ground—*Palmam qui meruit ferat.*

If the only object of the scholarships were to aid the sons of poor men in Upper Canada in being admitted as attorneys or called to the bar, and so increase the number of those who embrace the law as their profession, we should hesitate to endorse the movement. As it is, the number of those who term after term present themselves as students is calculated to excite apprehension. The profession of the law, like other professions, is governed by well-understood rules of political economy—the law of supply and demand. The moment the supply exceeds the demand the surplus must try some other calling, wherein their exertions to serve their fellow men will be better requited. We cannot help feeling that the supply is beginning to exceed the demand, and would ask parents about to embark their sons in the profession, before doing so, calmly and considerately to weigh their prospects, judged by all the surrounding circumstances.

The fact is that too many young men are now being admitted as students of the Law Society, and this either because of the facilities for admission or because of a blind infatuation as to the prospects in the profession itself—perhaps a combination of both these motives. While offering facilities in a pecuniary point of view to the son of the poor man, we incline to think the society might with advantage to the public and to the profession increase the standard for admission as to subjects of examination and as to the amount of fees payable on admission. We throw out the hint for the consideration of those with whom the power rests of making any necessary amendment or regulation of the kind indicated.

The first examination for scholarships will be during Michaelmas Term next. Owing we presume to the shortness of the time allowed for preparation, the subjects chosen for examination are not either very numerous or very difficult. They are as follow:

For £30 scholarship.

Stephens' Blackstone's Commentaries, vols. 1 and 4.

For £40 scholarship.

Stephens' Blackstone's Commentaries, vol. 2; Smith's Manual of Equity Jurisprudence; and the Real Property Statutes of Upper Canada.

For £50 scholarship.

Stephens on Pleading since Common Law Procedure Act; Smith on Contracts; Story's Equity Jurisprudence; Watkins on Conveyancing.

For £60 scholarship.

Smith's Mercantile Law; Taylor on Evidence; the Public Statutes relating to Upper Canada Pleadings, and Practice of its Courts of Law and Equity; Williams on Real Property; and Dart on Vendors.

Candidates for scholarships are required to send in their names to the Secretary of the Law Society, by the 1st November next.

DAYS FOR JUDGMENTS.

QUEEN'S BENCH.

Monday .....June 17th, at 10 o'clock.
Saturday ....June 22nd, at 2 "

COMMON PLEAS.

Monday .....June 17th, at 2 o'clock.
Saturday..... .....June 22nd, at 10 "

STATUTES OF LAST SESSION OF PARLIAMENT.

CHAPTER VI.

An Act to amend chapter eighty-nine of the Consolidated Statutes of Canada, respecting the Extradition of Fugitive Felons from the United States of America.

[Assented to 18th May, 1861.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. The first, second and third sections of the eighty-ninth chapter of the Consolidated Statutes of Canada, intituled: "An Act respecting the Treaty between Her Majesty and the United States of America, for the apprehension and surrender of certain offenders," are hereby repealed.

2. The following section or paragraph, shall be substituted for the first section hereby repealed, and shall, in lieu thereof, be read as the first section of the said act:

"Upon complaint made under oath, or affirmation, (in cases where affimations can be legally taken instead of oaths) charging any person found within the limits of this province, with having committed, within the jurisdiction of the United States of America, any of the crimes enumerated or provided for by the said Treaty, it shall be lawful for any judge of any of Her Majesty's Superior Courts in this Province, or any Judge of a County Court in Upper Canada, or any Recorder of a city in this province, or any police magistrate, or Stipendiary Magistrate in this province, or any inspector or superintendent of police, empowered to act as a justice of the peace in Lower Canada, to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or other officer, and upon the said person being brought before him, under the said warrant, it shall be lawful for such judge or other officer, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as according to the laws of this province, would justify the apprehension and committal for trial of the person so accused, if the crime of which he shall be so accused had been committed herein, it shall be lawful for such judge or other officer to issue his warrant for the commitment of the person so charged, to the proper gaol, there to remain until surrendered according to the stipulation of the said treaty, or until discharged according to law; and the said judge or other officer shall thereupon forthwith transmit or deliver to the governor, a copy of all the testimony taken before him, that a warrant may issue upon the requisition of the United States for the surrender of such person, pursuant to the said treaty."

3. The following section or paragraph, shall be substituted for the second section hereby repealed, and shall, in lieu thereof, be read as the second section of the said act:

"In every case of complaint as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which the original warrant may have been granted in the United States, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

4. The following section, or paragraph, shall be substituted for the third section hereby repealed, and shall, in lieu thereof, be read as the third section of the said act:

"It shall be lawful for the Governor, upon a requisition made as aforesaid, by the United States, by warrant under his hand and seal, to order the person so committed, to be delivered to the person or persons authorized to receive such person, in the name and on behalf of the said United States, to be tried for the crime of which such person stands accused, and such person shall be delivered up accordingly; and the person or persons, authorized as aforesaid, may hold such person in custody, and take him to the territories of the said United States, pursuant to the said Treaty; and if the person, so accused, escapes out of any custody to which he stands committed, or to which he has been delivered as aforesaid, such person may be retaken in the same manner as any person accused of any crime against the laws of this Province may be retaken upon an escape."

CHAPTER IX.

An Act to abolish the mode of procedure in Criminal cases called Recording Sentence of Death.

[Assented to 18th May, 1861.]

Whereas it is expedient to abolish the mode of procedure in Criminal cases, by which Judgment or Sentence of Death is entered of record in certain cases: Therefore, Her Majesty, &c., enacts as follows:

1. The ninety-first and ninety-second sections of the ninety-ninth chapter of the Consolidated Statutes of Canada are hereby repealed.

CHAPTER XIV.

An Act to abolish the right of Courts of Quarter Sessions and Recorder's Courts to try Treasons and Capital Felonies.

[Assented to 18th May, 1861.]

Her Majesty, &c., enacts as follows:

1. All powers and jurisdictions to try Treasons and Felonies, for conviction whereof the punishment of death is imposed, and which powers and jurisdictions are, by any law or statute whatsoever, granted or confirmed, or which are in any other manner vested in or exercised by any court of Quarter Sessions and Recorders' Court of this Province, are hereby absolutely revoked and determined, and every such law and statute is hereby repealed, so far as it may confer such powers and jurisdictions.

CHAPTER XLI.

An Act to repeal the Laws relating to the Registration of Judgments in Upper Canada.

[Assented to 18th May, 1861.]

Her Majesty, &c., enacts as follows:

1. The sixty-sixth, sixty-seventh and Sixty-eight sections of Chapter twelve of the Consolidated Statutes for Upper Canada, intituled: *An Act respecting the Court of Chancery* are hereby repealed.

2. The one hundred and forty-sixth section of Chapter nineteen of the said Consolidated Statutes, intituled: *An Act respecting the Division Courts*, is hereby repealed.

3. The two hundred and forty-fifth section of Chapter twenty two of the said Consolidated Statutes, intituled; *An Act to regulate the procedure of the Superior Courts of Common Law and of the County Courts*, is hereby repealed.

4. So much of the twenty-first section of Chapter twenty-four of the said Consolidated Statutes, intituled: *An Act respecting arrest and imprisonment for debt*, commencing with the words, "and no writ shall issue" to the end of the section, is hereby repealed.

5. The twelfth and twenty-seventh sections of Chapter eighty-six of the said Consolidated Statutes, intituled: *An Act respecting the partition and sale of Real Estate*, shall be read and construed as if the word "Judgment" were omitted therein.

6. The first and second sections of Chapter eighty-seven, of the said Consolidated Statutes, intituled: *An Act respecting Mortgages of Real Estate*, shall be read and construed as if the words "or registered Judgment creditor" were omitted therein; and the third section of the last recited Act shall be read and construed as if the words "or judgment creditor" were omitted therein.

7. The fourth, fifth, seventh, eighth and ninth sub sections of section seventeen, sections eighteen, thirty-six, thirty-seven, thirty-eight thirty-nine, forty-one, forty-two, forty-seven forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty-eight, sixty, sixty-one, sixty-two, sixty-three, sixty-four, seventy-one and sub-section four of section seventy-four of Chapter eighty-nine of the said Consolidated Statutes, intituled: *An Act respecting the Registration of Deeds, Wills, Judgments, Decrees in Chancery, and other instruments*, are hereby repealed.

1. The following sections and sub-sections or paragraphs shall be respectively substituted for the repealed sections and sub-sections in the last preceding section of this Act mentioned, and shall respectively, in lieu thereof, be read as the corresponding sections and sub-sections of the said last recited Act, that is to say:

2. In lieu of fifth sub-section of section seventeen: "Decrees of Foreclosure, and all other Decrees affecting any title or interest in land."

3. In lieu of seventh sub-section of section seventeen: "Satisfaction of Mortgages."

4. In lieu of eighteenth section: "Deeds, Conveyances, Powers of Attorney and Wills are to be registered through memorials thereof, and Sheriff's Deeds of Lands sold for taxes, decrees of foreclosure and proceedings in Chancery, or of a County Court on its equity side, through certificates thereof.

5. In lieu of forty-seventh section: "The registry of any instrument, will or decree affecting any lands or tenements registered under this or any former Act, shall, in equity, constitute notice of such deed, conveyance, will or decree, to all persons claiming any interest in such lands or tenements subsequent to such registry."

6. In lieu of fifty third section: "After any Grant from the Crown of lands in Upper Canada, and Letters Patent thereof issued, every deed, devise or other conveyance executed after the First day of January, one thousand eight hundred and fifty-one, whereby the said lands, tenements or hereditaments may be in any wise affected in Law or equity, shall be adjudged fraudulent and void, against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such deed, devise or conveyance be registered as by this Act is specified before the registering of the memorial of the deed, devise or conveyance under which such subsequent purchaser or mortgagee claims, subject nevertheless as to devisees, to the provisions contained in the forty-sixth section of this Act; but nothing herein contained shall affect the rights of equitable

mortgagees as now recognised in the Court of Chancery in Upper Canada."

7. In lieu of fifty sixth section: "The doctrine of tacking having been found productive of injustice: therefore every deed executed subsequent to the first day of January, one thousand eight hundred and fifty one, a memorial whereof has been or may be duly registered, shall be deemed effectual both in Law and in Equity, according to the priority of the time of registering such memorial; and when no memorial of such deed has been duly registered, then such deeds shall be deemed effectual both at Law and in Equity, according to the priority of time of execution."

8. In lieu of fifty-eighth section: "When any Mortgage has been satisfied, the Registrar or his deputy on receiving from the person entitled to the amount of such Mortgage, or his Attorney, a certificate in the form A. duly proved by the oath of a subscribing witness in the same manner as herein provided for the proof of deeds and other instruments affecting lands."

8. The eleventh section of chapter ninety of the said Consolidated Statutes, intituled: *An Act respecting the transfer of Real Property and the liability of certain interests therein to execution*, is hereby repealed and the following substituted therefor: "Any estate, right, title or interest in lands which, under the fifth section of this Act, may be conveyed or assigned by any party, shall be liable to seizure and sale under Execution against such party, in like manner and on like conditions as lands are by law liable to seizure and sale under execution, and the Sheriff selling the same may convey and assign the same to the purchaser in the same manner and with the same effect as the party might himself have done."

9. All other Statutes, parts and clauses of Statutes authorising the Registration of Judgments, Decrees and Orders for the payment of money in Upper Canada, are hereby repealed.

10. No judgment, rule, order or decree for the payment of money of any Court in Upper Canada, shall create or operate as a lien or charge upon lands or any interest therein.

11. Nothing in this Act contained shall be taken, read or construed to affect any suit or action on or before the eighteenth day of May, one thousand eight hundred and sixty-one, pending in any Court in Upper Canada, in which any Judgment Creditor is a party.

12. This Act shall take effect on the first day of September next, and in cases of Judgments heretofore registered all Writs of Execution against lands issued before the said first day of September, shall have priority according to the respective times of the registration of the Judgments on which they have issued or shall issue respectively.

CHAPTER XLV.

An Act to remove all doubts as to the validity of certain Certificates issued by Judges of the County Courts to Insolvents, under the Act of 1856.

[Assented to 18th May, 1861.]

Whereas under the authority of an Act of the Parliament of this Province, passed in the session held in the nineteenth and twentieth years of Her Majesty's reign, intituled: "An Act to extend the provisions of the Insolvent Debtors' Act of Upper Canada, and for the relief of a certain class of persons therein mentioned," many persons obtained from the several judges of the County Courts in Upper Canada the final order and discharge in the said act mentioned; And whereas many of the said persons so discharged, have again entered into business, and on the faith of such orders and discharges being effectual and final, have obtained credit, and therefore it is but right and just that any and all doubt should be removed as to the effect of such orders and discharges: Therefore, Her Majesty, &c., enacts as follows:

1. Each and every order made by any judge of any County Court in Upper Canada, while the said act was in force, which in effect purports to discharge any debtor to whom the same was granted, from his debts contracted up to or before the date of the presentment of his petition under the provisions of the said act,—as also any certificate so granted which on the face of it professes to have been made under the said act and in pursuance of its provisions,—shall be valid and is hereby declared to have the effect of discharging such debtor from all liability for or in respect of any debt mentioned in the schedule of the said debtor, filed on the presentation of the petition upon which such certificate was granted; but this act shall not apply to any certificate which may have been rescinded by any such judge before the passing of this act, or to any certificate to rescind which proceedings had been instituted before the judge who granted the same, on or before the second day of April, in the year of our Lord one thousand eight hundred and sixty one.

SELECTIONS.

THE EXPEDIENCY OF ABOLISHING THE PRACTICE OF OPENING BIDDINGS IN THE COURT OF CHANCERY.

[*Read by* Mr. Serjeant Woolrich *at a General Meeting of the Society for Promoting the Amendment of the Law, on Monday, January* 14*th*, 1861.]

From very early times, certainly for more than a century, it has been the practice of the Court of Chancery to direct the re-sale of an estate, although an actual purchaser may be in existence. The estate having been sold under the order of the court, this practice is denominated; "opening the biddings." There are undoubtedly instances where a purchase effected through fraud or collusion has been set aside by a court of equity, but it is peculiar to that court to set aside a *bona fide* purchase upon an advance of price (which is the staple of the new bidding), to open the sale after the purchase has been confirmed by the master, or, as at present, after eight days succeeding the judge's certificate. The latitude allowed is considerable, and the discretion absolute. It is immaterial, with regard to the principle, whether the disappointed claimant were present or not at the sale, nor is any advanced sum in particular, as £10, to be considered as conferring any certain right to the privilege, nor even after the eight days, can a purchaser be entirely sure whether some sinister suggestion may not, at least embarrass him with an uncertain litigation, the court having, on the one hand, the unction of keeping faith with purchasers, and on the other, an anxiety to help suitors by shielding them from the remotest chance of collusion. It may be said that these difficulties, which occasionally beset the purchaser in chancery, may have operated to throw a shade over the value of the property offered. By analogy to the case of copyholds, the price of which is calculated with reference to the expected fines and other burthens, it might be supposed that the buyer of a chancery estate would likewise make his tender in conformity with the prospects he might entertain of future disappointment or litigation. Hence on the other hand, the court might have interposed its anomalous jurisdiction in order to protect property from undue depreciation. It must however, be remembered, if any weight be assigned to this argument, that there is always a paper containing a reserved bidding, which remains in the hands of the auctioneer, until the close of the sale of each lot; so that it would seem to be a sufficient protection to produce this reserve without calling in aid the additional power which the courts have so long assumed. The question is, whether there are any claims on behalf of an intending purchaser in the Court of Chancery of a superior character to those of a person who has been disappointed of his wishes at an ordinary auction. There have been three elements in the consideration of this matter—the state of things before the confirmation of the report by the master; the position of vendor and purchaser after that approval; and the condition of the same parties under the

modern usage of allowing biddings to be opened within eight days next after the signature of the judge's certificate of sale.

The first point has been productive of many discussions, the second and third must be viewed within a much narrower circle. Under the first head, a reasonable proposal of augmentation was generally deemed sufficient to warrant the success of the application for a new sale, as in the case of a price wholly inadequate to the value of the estate.(a) There is no rule as to 5 per cent. or 10 per cent. The discretion of the judge under each peculiar concern is employed. Where a sum of £350 was offered as an addition to £5,300, it was not accepted, being too small, and the judge took occasion to observe that the court does not confine itself to a particular rate per cent., although 10 per cent. is a sort of general rule. (b) But £500 added to £12,010 were permitted. (c) So £500 on £8,950. (d) Under any circumstances, an advance of less than £40 will not be received. (e)

A larger sum seems to have been expected from a person present at the sale than from a stranger; (f) indeed a struggle was made to hinder a person present at the sale from any interference, as to future views upon the estate. The principle enunciated by Sir John Leach was, that the sales by the court would not in that case have the full benefit of the spirit of competition, and the cases were *Somner* v. *Charlton* (g) and *McCulloch* v. *Cotbatch* (h) and another case, as it seems, before Lord Kenyon. (i) But these authorities have not survived in that character, although Lord Eldon was much disposed, using his own words, "To discourage a person present at the sale, and lying by, speculating upon the event, and afterwards coming forward with an advance." (j) Yet he gave way, upon being informed that in the only case to the contrary the person seeking to open the bidding was a party to the cause. (k) Lord Loughborough had previously sanctioned such an opening, although it was said that the estates had been sold above the value. (l) It does not follow, nevertheless, that a chancellor considers himself bound by the decision of another chancellor. And the second bidding was allowed, at the instance of a person who had attended the former sale by an agent. (m) So again, the only doubt was as to the amount of the advance in such a case; and that amount having been increased, the order was made. (n) It is no objection that a party interested as a residuary legate, seeks to have a second sale; (o) still, the right rule is, that the opening of biddings is not so much intended for the purchaser or persons desirous of a fresh sale, as for the owners of the estate, especially creditors, infants, and persons who are not acquainted with the value of property. (p)

After the confirmation of the report of the sale by the master it was certainly most unusual to interfere. (q) Mere overbidding was not deemed sufficient. (r) There was some collusion in Gower's case; (s) and, on that ground, the biddings were re-opened, but after the second sale, an advance of £2,000 in order to a third sale was rejected, for this was overbidding alone. This denial, however, as to overbidding, must not be confounded with overbidding alone *before* the confirmation of the report or the certificate. The principle is quite different.

A fault on the part of the purchaser will produce this alteration, as fraud. So fraudulent negligence in another person, an agent, for example, would have the same effect, for it is against conscience that the purchaser should take advantage of such misbehaviour. Yet so precarious were the proceedings of courts of equity, that in cases where Lord Eldon would decline to interfere, Lord Loughborough, even after the confirmation of the report, hesitated simply upon the amount of advance, "They must bid more," said the chancellor. They bid more, and the offer was accepted. (t)

Upon one occasion the vendor was in prison, and before the confirmation of the report, he had a promise from two persons that they would instruct their agents to open the biddings, but they failed in their engagement. There was an overbidding of £4,000, the largest sum ever known in that character. Nevertheless, the lords commissioners would not have accepted that sum as an overbidding without more, but they yielded to the circumstance of duress, requiring from him, the vendor, a deposit of the full sum of £4,000. (u) Yet, strong as this case appears, Lord Eldon said he never would have made these orders. He disapproved strongly of *Watson* v. *Birch*. There was neither fraudulent conduct in the purchaser, nor fraudulent negligence in any other person. (v)

Fraud, therefore, is decisive upon the point. A survey was made of an estate, and by collusion with the tenants (who would pay so much less rent), the value and quality of the estate were underrated. It was then sold for the benefit of creditors, and fetched £27,500. £800 were then offered in advance, the report not having as yet been confirmed, and a second sale took place. The sum of £28,500 was then offered, and the master reported in favour of the bidder. The report was then confirmed, upon which all these facts of collusion and depreciation were revealed, and £2,000 more being tendered, the sale was again opened, it being positively affirmed by the chanceller (Lord Northington) that the overbidding alone would not have sufficed. The estate brought £38,000 and £2,000 still in increase being pressed forward, the court declined to interpose after the confirmation of a fresh report.(w) Thus the principle of overbidding and fraud were clearly distinguished.

Surprise was scarcely held to be an ingredient upon the discussion of the master's report, nor is it now under the certificate. At all events, where the applicant was present at a sale, and was informed, in common with the rest of the company, by the auctioneer, that any one might come within eight days after the report, but failed to appear, no allegation of surprise was allowed to be entertained, (x) and a mistake as to the day of sale will require a *strong* advance.(y)

We have said that the certificate of eight days is equivalent to the old confirmation of the report by the master, therefore within that time the biddings will be opened, (z) and it is worthy of remark that the modern judges of the Court of Chancery are quite prepared to support the practice which is now under discussion, notwithstanding the force of prior decisions. Very special circumstances might even induce them to yield to an application made at the end of eight days from the certificate of sale. There appears to be some colour for this in a case where the purchaser bought a lot for £2,770, and signed the contract. It was on the 2nd of August. On the 4th the certificate was settled, and was approved on the 9th by the judge. Eight days clear were then allowable for any one to apply for an order to open the biddings. That period having expired during the long vacation, the purchaser required the

(a) By Lord Langdale, 17 L. J. Ch. 486, in *Mangers* v. *Furze*.

(b) 1 Sim. & Stu., 20, *Gardiens* v. *Edwards*. 2 Madd. Ch. Pr., 656, *Bridges* v. *Philips*, M. S.

(c) 2 Russ. 606, *Lefroy* v. *Lefroy*. (d) 1 M'Cl. 82. *Pearson* v. *Collett*.

(e) 4 Madd. 460. *Furlow* v. *Weildon* and *Gilbert* v. *Withered* was cited, S. P. Ibid. See some Irish cases. £40 at the least, £10 per cent. in advance. Rule refused. cor. *Hart.* v *C.* 2 Moll. 510, *Leland* v. *Griffith*. See Ibid. 506, *Aubrey* v. *Denny*. £10 per cent. required upon a larger sum, Ibid. 508, *Chester* v. *Gorges*. Costs of former purchaser to be paid, See several other cases. Dart's Vend. & Purch., 3rd ed. 55.

(f) Jac. Rep. 526, *Tyndall* v. *Warre*. (g) 5 Ves. 655. (h) 3 Madd, 314, Ibid.

(i) 16 Ves. 140, by Benyon. amicus curiæ, Lord Eldon apparently acc. in *Preston* v. *Barker*. (j) 6 Ves. 117 *Rigby* v. *Macnamara*.

(k) 2 Jac. and W. 347. *Thornhill* v. *Thornhill*, 1 Ch. P. Coop. 330, *Shallcross* v. *Hobertson*. (l) 5 Ves. 655, *Tait* v. *Ld.* Northwick. (m) Ibid.

(n) 5 M'Clelland 82, *Pearson* v. *Collett*.

(o) G Coop. 95, *Hooper* v. *Godwin*. (p) 2 Russ. 606, *Lefroy* v. *Lefroy*.

(q) 3 Bro. C.C. 475, *Scott* v. *Nesbit*. 1 Ves., jun. 2 7. *Prideaux* v. *Prideaux*. 11 Ves. 57, *Morise* v. *Bishop of Durham*. 14 Ves. 151, *Watts* v. *Wilson*. 1 Kay & J. 28.

(r) 3 Anstr. 656, *Bayer* v. *Blackwell*. (s) 2 Eden. 348.

(t) Ves. 86, *Chetham* v. *Grugeon*. (u) 2 Ves. jun., 61, *Watson* v. *Birch*.

(v) In *Morice* v. *The Bishop of Durham*, 11 Ves. 57.

(w) 2 Eden. 348, *Gower* v. *Gower*.

(x) 2 Jac. & Walk. 347, *Thornhill* v. *Thornhill*.

(y) 1 Ves., jun. 453, Anon.) (z) 1 Kay & J., 28, *Bridges* v. *Philips*, Ibid.

abstracts of title, and these he got, together with the valuation of the timber on the estate on the 21st of August. The business then proceeded; but on the 29th, a summons was served upon the purchaser, to the effect that if all his costs should be paid, another person having offered, an advanced bidding should be substituted in his room. The Vice-Chancellor stating that the increase of price amounted to £300, granted the prayer, and made the order; whereupon the purchaser appealed. Now, there were some singular facts in this case. The agent for the person who had been so far successful in opening the biddings, had actually declared that he would bid no longer, since the biddings had gone far beyond the value of the property. The land, as valued, was worth £1,400, whereas, £2,270 were offered for it at the sale. Of course, according to the most ordinary rules of common sense, the appeal succeeded; but the L. J. Knight Bruce used these equivocal expressions—"Glad as he would have been to give the applicant relief on a substantial advance of price, he thought it would be dangerous to the general practice of the Court to grant the application. *The case however was not one for costs.*" (*a*) If I read this decision rightly, it holds that an individual who has offered £1,300 more than the value of an estate, and who has, to all intents, been declared the purchaser, and who has duly awaited the time prescribed by law for the ratification of his purchase, may be suddenly invaded by a new claimant, narrowly avoid the consequences of the claim, and be saddled with his own costs of a most righteous appeal. So closely pressed were the counsel against the purchaser, that they first objected to the counting of any part of the vacation in the eight days; and, secondly, they called this a case of great hardship, because the interests of infants were concerned.

This event occurred in 1856. Some months afterwards another case arose of equal hardship, if we regard the principle of the subject now under consideration. (*b*) A property had been put up for sale, but the reserved bidding was not reached. Upon this, it was settled that a sale with sealed tenders should be attempted. There were two candidates; one offered £36,500, the other £34,000. On the 8th of February, the chief clerk found in favour of the higher sum. On the 12th, the certificate was signed and approved by the Vice-Chancellor; but on the 11th the day previous, a summons had been taken out by the person who tendered the lowest sum, *i. e.* £34,000, and upon the hearing, he having then proposed to give £38,000 was declared the purchaser. It must be understood that he undertook to replace the stock which had been sold out for the purpose of fulfilling the contract for £36,500. From this decision, the original purchaser appealed. He did not dispute the power of the court to open the biddings, had the sale been carried on by auction, but he said that this was a sale by private contract. In fact an opportunity was afforded for the court to escape from the principle of destroying the good faith of an accomplished contract, by likening it, as it really was, to the matter of a private transaction. Not so was the opinion of the court. They did not even hear the counsel for the new claimant. They dwelt upon the condition of sale, that it was to take place with the sanction of the Vice-Chancellor, and they held that all the incidents of days must apply as in the case of an auction. Of course, there being one day short, there was, in their view, time to disturb the certificate. But Lord J. Knight Bruce, who had, on the former occasion declined to give costs, here said, "I concur with regret, Mr. Barlow's costs of the appeal ought to be provided for;" and they were immediately promised under an arrangement. (*c*) Now it seems rather strange that the Lord Justice who had previously withheld costs from a party who was truly and justly successful, should here have recommended the payment of them to one who was unsuccessful. The judge must have thought it inequitable that a purchaser who by, what was in reality a private contract, had offered more than £30,000 for an estate, should have been suddenly supplanted by a buyer who had deliberately sent, in writing, to the proper authority, the amount which he was prepared to give. It is presumed that the successful appellee in this case might, in his turn, have been deprived of his bargain by the tempting tender of £40,000 by another aspirant. Particular reference was made in *Osborne* v. *Foreman* to a decision of the Vice-Chancellor Wood, then recently delivered by that judge. Lord Justice Turner seemed anxious to avoid a collision between the authorities, or to establish a diversity of opinion between himself and the very eminent person just mentioned. "But," said the Lord Justice "this case, in the opinion of their lordships, turned on different grounds from those in that case." (*d*)

Now that case was *Millican* v. *Vanderplank*; (*e*) that was also a case of private contract, but there were no sealed tenders, and the ground upon which it was sought to be distinguished was, no doubt, because the purchaser had entered upon the property and expended money upon it, and had incurred liabilities in respect of it, not merely at his own instance, but with the approval and acquiescence of all the parties interested. Both vendor and purchaser had so agreed as to prevent their being again placed respectively in their original positions. So far their seems to be a fair distinction. But the Vice-Chancellor laid down the principle rather more broadly. For he said, that—"When the master has approved of a sale by contract in the presence of the parties, no stranger can intervene to prevent the confirmation of the report; nor will the sale be disturbed by the court on the mere ground that a larger price has been offered subsequently, and before such confirmation, unless there be some error or miscarriage in the proceedings, or the contract price be grossly inadequate." These remarks are of a very strong character. They point at a clear distinction between the sale by auction and by private contract, and can hardly be reconciled with the opinions expressed in *Osborne* v. *Foreman*, however ingeniously it was endeavoured upon that occasion to preserve the alliance. The only argument which has been advanced assumes a distinction between a sale with sealed tenders and one by private contract. It is not necessary to discuss the point here, because we pretend to higher ground, the absolute extinction of this equity custom.

Notwithstanding all these cases, you are not to suppose that the tide of judicial opinion has been uniform in favour of the custom. Lord Thurlow declared that he would not open at all after confirmation of the report. (*f*) Mr. Maddock in his chancery practice, asserts on the authority of an anonymous M. S., that "By some judges it has been thought that the permission to open biddings does more harm than good." (*g*) Still it is but fair to say that he adds; "by others, that the right to open biddings should not be so much restrained as it is," (*h*) and he cites Vice-Chancellor Leach as his authority, from an M.S. (*i*) But Lord Eldon, whatever his doubts, which have descended to posterity, may have been, was strong upon this point.

In 1809, his lordship remarked upon the bad effect of opening biddings in general, from the uncertainty attending purchasers in this court. (*j*) Again, in 1820, he said, "I believe that the rule of opening the biddings, which was intended to protect, has frequently been very pernicious to the interests of the suitors in this court, and that their estates have sometimes sold for next to nothing in consequence of it." (*k*)

"For many years," he said again in 1822, "that I have been here, I have heard the practice of opening biddings lamented, and I cannot therefore account for it having continued a rule of the court, except upon a notion which I believe to be

(*a*) 25 L. J Ch. 201. (*b*) *Osborne* v. *Foreman*, 25 L. J. Ch. 340.
(*c*) This case was confirmed by the House of Lords.

(*d*) 25 L. J., 341. (*e*) 11 Hare, 136. (*f*) 3 Bro. Ch. c. 475, *Scott* v. *Nesbit*.
(*g*) Vol. 2, p. 655. (*h*) Ibid. (*i*) Vol. 2, p. 666.
(*j*) In *Preston* v. *Barker*, 16 Ves 160.
(*k*) In *Thornhill* v. *Thornhill*, 2 Jac. & W. 343.

well founded, that there is in general more real wisdom in adhering to the old practice than in adopting new rules." (*l*) Here the groundless apprehension of change was exhibited in high relief by the great lawyer. It was in a case indeed, where the appellant was present at the sale, but the observations were general. If it were necessary to make a change he would consult the Master of the rolls and the Vice-Chancellor. Again, in 1822, Lord Eldon said, "During a period of nearly half a century which I have passed in this court, and in which Lord Apsley, Lord Thurlow, the Lords Commissioners, with Lord Loughborough at their head, have presided here, I have heard one and all of them lament, that the practice of opening biddings was ever introduced. I confess that I have great doubt myself upon the subject; but after a practice so long established, is not for me to disturb it." (*m*) Lord Redesdale likewise observed in his court, "It is a general complaint that estates sold under decrees of the court, go at considerable under-value; the cause of this is the trouble purchasers are put to, in completing their purchases. If greater strictness were preserved in opening the biddings, it would have the effect of producing better sales." (*n*)

Lord Cranworth also made an ominous remark in *Barlow* v. *Osborne*, (*o*) which, had he been quite content with the exising practice, he might have forebore. "These are all discussions which are proper to be addressed to the Legislature which has the power of altering the law;" (*p*) and again, "it does seem to me most unreasonable that a vendor should, in cases of this kind, when his property is sold under a decree of the court, be protected at both ends, as it were, both before and after the purchase is made. It seems to me to furnish the strongest grounds for thinking that a general order should be issued by the Court of Chancery for the purpose of altering the present practice." (*q*) And in 1817, Macdonald, C. B., thus expressed himself; "If one who has given a fair price and is confirmed purchaser before the master, is liable at the distance of several months, and after he has arranged his affairs upon the faith of the purchase, to have it set aside, upon the mere circumstance of another person offering a larger price, it must necessarily affect all sales under the authority of the court, by deterring purchasers from bidding. It is thereupon, the general interest of the suitors to discourage the opening of biddings, unless upon peculiar circumstances in the first sale. As no such circumstances appear in this case, the order cannot be granted." (*r*)

There is another principle not a little important, when we come to investigate the subject. The court will suffer a third sale, if there be found a candidate equal to the mark, (*s*) and upon an application by the same person. (*t*) However, in ordinary cases, the sale will be received. £1,050 were bid, and there was an order to open the biddings upon a deposit of £300. The second sale took place, and £1,338 were bid; but another offer of £160 was made by the same person who had opened the biddings. The Lord Chancellor said he remembered no such application, but as the purchaser did not appear to object, he made the order. (*u*)

I may just mention as matter of legal history, that when a buyer has taken several lots, and as to one of these, the biddings are opened, it is the rule to give him the option of retiring from the remainder. Macdonald, C.B., thought this a reasonable request; (*v*) but the Vice-Chancellor (Leach) upon a subsequent occasion made a distinction between lots purchased before the lots which are the subject of the application and those after. He said, "Where a person became the purchaser of a subsequent lot, in consequence of his being declared the best bidder of a prior lot, it was reasonable that he should have the option of retaining or retiring from the subsequent lot. (*w*) In another case the same Vice-Chancellor required an affidavit from the purchaser "that he had bid for the lot in consequence of having been declared the best bidder for the prior lot." (*x*)

It is obvious that, from the details and observations which have been submitted to the Society, the object intended in these papers is to prepare the way for an Act of Parliament, or, it may be, a rule of the courts, to assimilate the sales directed by the Court of Chancery with other contracts between buyer and seller. It seems better to return to that ordinary commercial dealing which has so long established good faith and right assurance between man and man. Undoubtedly, the equity judges have endeavoured to preserve, as far as possible, the fair balance between buyers and sellers; but of a practice what can be said commentatory, when the great oracles which have the administration of it are by no means agreed as to the propriety of its continuance? No sooner will the Court of Chancery forbear or be restrained from this method of conducting sales, than the same confidence will arise in the market of that court which obtains in the great market of the world.

(*l*) In *Tyndale* v. *Warre*, Jac. 526.
(*m*) In *Williams* v. *Attenborough*, Turn. and Russ. 75.
(*n*) 1 Sch. & L. 350. (*o*) 4 Jur. 367. (*p*) Id. 368. (*q*) Id. 369.
(*r*) In *Boyer* v. *Blackwell*, 3 Anstr. 657. (*s*) Bro. Ch. Ca. 475, *Scott* v. *Nesbit*.
(*t*) 8 Beav. 352, *Walrond* v. *Walrond*, see the cases of Colliery Shares, 8 Ves. 502, *Wren* v. *Kirton*. (*u*) 16 Ves. 140, *Preston* v. *Barker*.
(*v*) Anstr., 656, *Boyer* v. *Blackwell*.
(*w*) 1 *Sim* v. *Sta.*, 386, *Price* v. *Price*.
(*x*) Ibid *Fielder* v. *Fielder*. See 4 Madd. 227. *Roffey* v. *Shallcross*, and note (C there. As to timber, see 6 Sim. 380. *Bates* v. *Bonner*, 10 per cent. advance; and for other cases, Dart on Vendors, p. 756.

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 112.)

In appointing or altering divisions, "the limits and extent" of every court division must be ascertained and fixed with precision. This may be done by tracing the outer boundary in each case, or by setting out the towns, townships, or detached parts thereof, intended to be within the division; but whatever mode of description be adopted, the established territorial divisions of the country and the authorized subdivision and description should be followed. Thus a division may be composed of so many townships, or of one or more townships, and so many concessions or lots from another township; and that is the usual method taken for fixing "the limits and extent," and the one evidently contemplated by the Legislature; for if we look at the 121st and 122nd sections of the act, we see at once a difficulty in carrying out their provisions unless the established and recognized divisions are adhered to. The jurors are to be taken from the collectors' rolls for the townships and places wholly or partly within the division, and for this purpose "the collector for each place, wholly or partly within any division, shall furnish the clerk" of the court with a

list of jurors; and, under the consolidated Assessment Act, the number of concession, lot, or other authorized designation of the local division is shown on the roll, in connection with the name of the party assessed. Moreover, in reference to the execution of process from the courts, the lot or concession, &c., where a party resides being known, mere inspection of the order appointing court limits should show the court that has cognizance where residence enters into the question of jurisdiction.

Under these considerations it seems that justices would act without authority in separating a county by arbitrary lines, or even by taking physically distinguished boundaries, as a river or creek, unless agreeing with recognized territorial divisions.

Every division, when appointed, is to be numbered—1st, 2nd, 3rd, and so on. There is no clue given in the act as to which should be "*the first*" or *number one* division, but in practice the division including the county town is generally named the first division, and the others follow either in the order of importance or extent, or arbitrarily, as the justices may determine, the numbers being consecutive from number one.

Under the general provisions of law, counties united for judicial and other purposes may be separated, and after the dissolution of the union both counties occupy an independent position, each having its own judicial and municipal establishment.

To meet cases of this kind, and to avoid confusion on the separation of counties, the following provision has been made by the 10th section of the act, viz.:

When a junior county * separates from a senior county or union of counties, the Division Courts of the united counties, which were before the separation wholly within the territorial limits of the junior county, shall continue Division Courts of the junior county, and all proceedings and judgments shall be had therein, and shall continue proceedings and judgments of the said Division Courts respectively; and all such Division Courts shall be known as Division Courts of such junior county by the same numbers respectively as they were before, until the justices of the peace of the junior county, in general quarter sessions assembled, appoint the number, limits and extent of the divisions for Division Courts within the limits of such junior county, as provided in the 8th section of this act.

(*To be continued.*)

* In every union of counties, the county in which the court-house and gaol are situated is the "senior county," and the other county or counties the "junior county" or "counties" thereof.—*Mun. Act*, sec. 36.

CORRESPONDENCE.

St. Catharines, May 14, 1861.

To the Editors of the Law Journal.

Gentlemen,—Might I trespass on your space by asking you to answer through the *Law Journal* the following?

Is it necessary, in suing on an attorney's bill in the Division Court, to attach to the summons a copy of the bill in detail, in accordance with sec. 74, Division Court Act, or would it be sufficient to state the clause as follows?

To amount of attorney's bill; rendered in detail, on —— day of ——, A. D. ——, in accordance with the statute in such case made and provided..... $00 00

A bill has to be delivered in detail one month before action brought, and it seems to be unreasonable and troublesome to state the account in full with the summons, when it is not necessary for plaintiff to prove contents of bill, but only to prove compliance with the act, and amount of bill rendered.

By answering the above, you will much oblige

Yours truly, D. C.

[It is not necessary to attach to the summons a copy of the bill in detail, in any case where it has been already served on the defendant. The only difference between an attorney's bill and any ordinary account, in this respect, is, that by a special provision of law the former has to be rendered at least a month before being placed in suit, and this irrespective of the court in which the action for its recovery must be brought. We believe our correspondent's form of statement in the case put to be the proper one.—Eds. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., *Reporter to the Court.*)

In the matter of Frederick Stewart MacGachen, applying to be admitted as an Attorney and Solicitor.

Articled clerk—Service—Expiration of Articles less than fourteen days before term.

The time of a clerk articled after the first of July, 1858, must expire fourteen days before the term in which he seeks to be admitted, for the affidavit of due service cannot be accepted at a later period, though before his examination.

Where M., therefore, entered into articles for a year on the 25th of January, 1860, and Hilary term began on the 4th of February, 1861.

Held, that he could not be admitted in that term. Hilary Term, 1861.

Mr. MacGachen, who was called to the bar in England by the society of the Inner Temple on the 8th of June, 1849, entered into articles on the 25th of January, 1860, with a practising attorney in this province, binding him to serve as a clerk for one year, in order that he might, after completing such service, be admitted an attorney, under Consol. Stats. U. C., ch. 85, sec. 2.

These articles expiring on the 25th of January, or rather, perhaps, on the 24th of January, 1861, there were not fourteen days between the time of service being completed and the commencement of Hilary Term, 1861, which began this year on the 4th of February, and it was therefore not in the power of Mr. MacGachen to comply with the third section of the act, which requires that such candidate for admission shall, at least fourteen days next before the first day of the term in which he seeks admission, leave with the secretary of the Law Society his contract of service, and an affidavit of due execution thereof, and of due service thereunder. See also secs. 5, 10, 24.

The society in consequence hesitated to grant him the certificate provided for in the tenth section, and made a special note of the facts in a certificate which they did grant of his having passed an examination as to fitness; and requested the consideration of the court upon the point whether M. MacGachen could be legally admitted.

The certificate stated that fourteen days before the commencement of the term the said articles, with an affidavit by Mr. MacGachen of due service thereunder up to the 19th of January, 1861, were left with the secretary of the Law Society; and that subsequently, but less than fourteen days next before the first day of the term, and after the expiration of the term mentioned in said articles, and before his examination, affidavits of himself and of the attorney to whom he was bound, proving that he had actually served and been employed by such practising attorney during the whole of his term of service, were presented to the convocation.

Read, C., appeared for the Law Society, and *C. S. Patterson*, for the petitioner.

Robinson, C. J., delivered the judgment of the court.

We think the statute does not authorise the admission during the present term, since Mr. MacGachen could not make and has

not made an affidavit fourteen days before the term of having duly served under his articles, which must be taken to mean that he had completed his service for a year.

If it occurred to the legislature when they were passing the act that by requiring such affidavit to be furnished fourteen days before the term they would in some cases be exposing the candidate for admission to the loss of a term, they might perhaps have provided against that by allowing that affidavit to be filed at any time before he presented himself to be sworn in; but the act does not so provide; it rather affords evidence that the legislature was disposed to guard against this inconvenience, except in cases of persons who had entered into articles before the 1st of July, 1858. See sec. 54.

There is no room for any latitude of construction in regard to this requisition of the statute, as there necessarily must be in some degree with respect to what constitutes service within the meaning of the act. It is quite clear that consistently with the statute, so far as regards the year's service being duly completed, the candidate must be in a situation to make the affidavit fourteen days before the term begins.

It will only be necessary that hereafter, in view of the possible loss of a term, care should be taken to enter into the contract of service a sufficient number of days before the term to escape the difficulty of not leaving fourteen clear days between the expiration of the articles and the term that will follow next after.

Harrison v. Brega.

Registrar—Omission of mortgage in certificate—Action therefor—Notice of action and limitation—Consol. Stats. U. C., chaps. 126, 89—Damages—Costs of suit by first Mortgagee.

A registrar being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for $600, prior to that which the plaintiff purchased, suppressing it from the certificate, to be a first encumbrance. The first mortgagee obtained a decree for sale, and the plaintiff purchased the land at less than would satisfy the two mortgages, but he soon afterwards sold at a considerable advance, so that in the end he would receive all that he had paid for his mortgage. In an action against the registrar for this omission in his certificate, the jury gave $500 damages.

Held, that the registrar was not entitled to notice of action, and that the six months' limitation clause did not apply, for though an officer within the meaning of the act, Consol. Stat. U. C., ch. 126, this was not an act committed, but a negligent omission.

Held, also, that the damages were moderate, the plaintiff having in fact sustained loss to the full amount of the first mortgage.

The plaintiff having been made a party to a suit in chancery on the first mortgage endeavoured to obtain priority, but failed in his defence, and was compelled to pay costs. Whether these costs could be recovered from the registrar was a point raised, but not decided, as it was uncertain whether they were included in the verdict. [H. T., 24 Vic.]

The plaintiff sued defendant, who was registrar for the county of Peel, for damages which he alleged he had sustained from the defendant having given an erroneous certificate as registrar of the state of the title to a certain parcel of land, upon which a mortgage had been given, and which mortgage the plaintiff proposed to purchase, and did purchase, relying upon the accuracy of the registrar's certificate.

The declaration contained two counts, but the first only was relied upon at the trial, and the other was abandoned.

The first count stated in substance that on the 15th day of July, 1857, one Robert Campbell had made a mortgage of certain 175 acres of lot 6, in the second concession south of Dundas street, in the township of Toronto, to James Farrell and his assigns, to secure £600, with interest, which mortgage was registered by defendant on the 15th of July, 1857: that the plaintiff agreed afterwards to purchase the said mortgage from Farrell, for a certain sum of money to be paid for the same, provided it should be found by search at the registry office that this was the first incumbrance upon the land, as Farrell had represented it to be: that on the 1st of September, 1857, the plaintiff required the defendant, as registrar, to search into the title, and to send a certificate, and paid him therefor; and the declaration charged that the defendant did not carefully search, and did not send a true certificate of the state of the title, but neglected his duty in that behalf, and erroneously and untruly certified that the mortgage to Farrell was the first undischarged mortgage or incumbrance created by Campbell on the land, or any part of it, which had been registered in his office: that the plaintiff relying upon this, and having no knowledge to the contrary, bought the mortgage from Farrell, and paid for it the price agreed upon, and took from him an assignment, which was duly registered on the 29th of September, 1857, whereas in truth Campbell, before he gave the mortgage to Farrell, had, on the 21st of August, 1854, made a mortgage on the same land to one James Spurrill, for £150, payable with interest, which mortgage was on the 29th of August, 1854, duly registered by defendant, as registrar, but all mention of it omitted in the certificate given by the defendant to the plaintiff of the state of the title.

The plaintiff then averred that that the debt of Campbell to Spurrill not being paid when due, Spurrill, after the assignment had been registered, filed a bill in Chancery to obtain a sale of the land: that the plaintiff, being made a defendant in that suit, endeavoured to make good his claim to priority as a *bonâ fide* purchaser of the second mortgage for value without notice of the first, but failed in his defence: that the land was ordered to be sold to pay Spurrill's debt, interest, and costs, in the first place, and that when this was done, and the surplus of the proceeds applied towards the satisfaction of the plaintiff's mortgage, interest, and costs, which then amounted to £749 19s., it left a deficiency of £238 19s 11d., and the plaintiff averred that he had thereby lost that amount, and interest from the 12th of October, 1860.

The defendant pleaded not guilty, by statutes, Consol. Stats. U. C., ch., 126, secs. 9. 10, 11, 20, and ch, 89, secs. 9 to 13 inclusive, and sec. 67.

At the trial at Toronto before *McLean*, J., the plaintiff produced defendant's certificate, as registrar, dated the 23rd of September, 1857, in which there was no mention made of the mortgage to Spurrill, and it was proved that long afterwards, when the plaintiff was informed of that mortgage, and of the intention of Spurrill, to file a bill, his son, who transacted business for him as his attorney, wrote again to the registrar to request another search and certificate, and on the 11th of February, 1859, the defendant sent him another certificate in which also Spurrill's mortgage was omitted.

To both papers the registrar certified at the foot that they were correct to the best of his knowledge and belief.

A few days after the last certificate was received the plaintiff's son saw the mortgage given to Spurrill in the hands of his Solicitor, and wrote again to the defendant stating this; and he then received from him a statement of the registry of Spurrill's mortgage on the 29th of August, 1854, with the remark, "The above was overlooked in consequence of not having been marked in the index.

It was proved at the trial that the plaintiff, when he bought Farrell's mortgage, did not give him the full £600 and interest for it: that Farrell's mortgage contained the usual covenant by Campbell to pay the money, but that Campbell was now insolvent: that when the land was sold by decree of the court of Chancery it brought £760: that the plaintiff afterwards bought it of the gentleman who had bid it off, giving him £25 for his purchase, and paying the price bid himself, and that he soon afterwards disposed of the land for £1.000, of which £600 had been paid, so that the plaintiff would probably at least have received the full amount of the mortgage money, without bringing this action, but he would have paid more for it than he contemplated, and more that he would have had to pay if the defendant had done his duty accurately.

The defendants counsel moved for a nonsuit on the grounds that no notice of action had been given, and that the action should have been brought within six months.

The learned judge reserved leave to move afterwards on these exceptions, and told the jury that the defendant was liable for the damages occasioned by his mistake or omission: that by the sale which took place under the decree in Spurrill's suit, the lands passed into the hands of a stranger, at a price which would have left the plaintiff's debt unsatisfied to the amount of £238 10s., and that the plaintiff having idemnified himself to a great extent, if not fully, by his subsequent purchase of the land from another, and his resale of it an advanced price, was not a matter of which the defendant was entitled to take advantage. He held that the plaintiff was entitled to recover the costs of his defence in the Chancery suit, but desired the jury to give such amount of damages as they might think reasonable upon the evidence.

The jury gave a verdict for the plaintiff, and $500 damages.

M. C. Cameron obtained a rule *nisi* for a nonsuit on the leave reserved; or for a new trial on the law and evidence, for excessive

damages, and for misdirection, contending that unless the plaintiff had sustained damage he was not entitled to recover, and at any rate not for more than his actual damage from the whole transaction, and that the true estimate of damage was the amount by which the two mortgages exceeded the actual value of the land. He contended also that as the mortgage given to Campbell contained a covenant to pay the money, and as Farrell in his assignment to the plaintiff had also covenanted with the plaintiff that the mortgage debt should be punctually paid, it was incorrect to charge the jury that those covenants did not affect the plaintiff's right to recover substantial damages. He objected also that the plaintiff had no claim to recover his costs in Chancery in the foreclosure suit brought by Speers.

Eccles, Q. C., and *R. A. Harrison*, shewed cause. They cited Consol. Stats. U. C., ch. 126, secs. 1, 9, 10, 11, 20; ch. 89, secs. 9 to 13 inclusive, sec. 67; Common Law Procedure Act, secs. 3, 4; *Mc Whirter* v. *Corbett*, 4 U.C C.P. 208; *Wallace* v. *Smith*, 5 East 115; *Greenway* v. *Hurd*, 4 T. R. 553; *Umphelby* v. *McLean*, 1 B. & Al. 42; The *Queen* v. *Kelk*, 1 Q B. 660: *Davis* v. *Curling*, 8 Q. B. 286; *Carque* v. *The London and Brighton R. W Co.*, 5 Q. B. 747, 754; *Kennet and Avon Canal Navigation* v. *Great Western R. W. Co.*, 7 Q. B. 824; *March* v *Port Dover and Otterville Road Co.*, 15 U.C Q.B. 138; *Fletcher* v *Greenwell*, 4 Dowl 166; *Waterhouse* v. *Keen*, 4 B. & C. 200; *Shatwell* v. *Hall*, 10 M. & W. 523; *Palmer* v. *Grand Junction R. W. Co.*, 4 M. & W. 749; *Atkins* v *Banwell*, 8 East 92; *Henly* v *The Mayor &c., of Lyme*, 5 Bing. 91, 107; *Gibbs v. Trustees of the Liverpool Docks*, 8 H. & N. 164; *Sutton* v. *Clarke*, 6 Taunt. 29; *Gladwell* v. *Stegall*, 5 Bing. N. C. 733.

M. C. Cameron, contra, cited, *White* v. *Clarke*, 11 U C.Q.B. 137; *Smith* v. *Shaw*, 10 B. & C. 277; *Hodge* v. *Earl of Litchfield*, 1 Bing. N. C. 492; *Joule* v. *Taylor*, 7 Ex. 58.

Robinson, C. J., delivered the judgment of the court.

The first question to be determined by us is whether the defendant, as a registrar, was entitled under the Statute Consol. Stats. U. C., ch. 126, sec. 20, to the protection given to justices of the peace and other officers as to notice of action, and the time within which actions should be brought. No doubt the registrar is a public officer, and if, after carrying out or attempting to carry out any powers given to him by the act, he should be charged with malfeasance, we do not at present see how it could be denied that he would be entitled to the protection given by that act, not merely to justices of the peace, but to every other officer fulfilling a public duty. But we think the statute is not to be extended to cases of mere neglect or malfeasance. Secs. 9 and 10 of the act indicate that, we think, plainly.

The case of *Davis* v. *Curling*, 8 Q. B. 286, is different in its nature from the present, and does not support the defendant's claim to notice. The court there said that the defendant, a road surveyor, was charged with the positive act of laying gravel upon the road, and they did not consider that his doing so, and allowing it to remain there incumbering the road, could be reasonably regarded as a mere omission of a duty, as negligence or nonfeasance, and nothing else. They thought that the officer must be regarded as having committed a wrong in executing the authority given to him by the act, and so came within the words of the clause, which gives the protection where a person is sued for an act *committed* by him in pursuance of the statute, or under the authority of the statute.

The principal cases which bear upon this question were cited in the argument of this case. We have looked into them all, and in our opinion none of them goes so far as to hold a notice of action necessary in this case, or that the limitation of time for suing applies. Both points in fact turn upon the same question of construction.

We do not think that we can hold that registrars are not officers within the act, but what this registrar is charged with is not an act *committed* in carrying the law into effect according to his erroneous idea of his duty, but a negligent omission to do what he had been called upon to do, by a person who had employed his services in his official situation, and paid him for the duty required of him. The late Chief Justice of the Common Pleas rightly stated the distinction, we think, in *Mc Whirter* v. *Corbet et al.*, 4 U.C.C.P. 208, when he said that though the sheriff in acting upon a writ of *fieri facias* was fulfilling a duty imposed upon him by the court under the common law, yet it was in a private matter, and that if it was intended to be included in the protection to public officers given by statute 14 & 15 Vic., ch. 54, it wanted explanation, by which he meant that the language of the statute did not make the application sufficiently clear.

As to the unfortunate omission in this case giving a good ground of action to the individual who has suffered damage by it, there can be no doubt we think on that point. A case like this must clearly come within the language used by the Court of Common Pleas in England, in their judgment in the case of *Henly* v. *The Mayor of Lyme*, 5 Bing. 107, 108; and it does not appear to us that there is any legal objection to the amount of damages. The jury were in fact not disposed, it would seem, to bear hard upon the defendant. Their verdict shews that, and they were right, for in the multitude of entries to be made by a registrar there is always a possibility of error. The mortgage to Spurrill, it has been stated, escaped observation in the searches made, from the accident that the entry in the index was made in a wrong column, being included in entries of lots on the south side of Dundas street instead of on the north side. This might well happen, though it cannot be denied that it was an error which implies negligence, and that the person suffering from it has a claim to be made good.

No doubt it was pressed upon the consideration of the jury, as it reasonably might and naturally would be, that notwithstanding the plaintiff had his incumbrance to pay off, of which he had no knowledge, though he had taken the proper means to ascertain the truth, yet that he was after all in fact no loser by the whole transaction, for that he sold the property at last for an advanced price, which saved him from all loss and did even more than that. If the jury, in view of that circumstance, had given even less damages than they did, we should not have been surprised; but they took a reasonable course in giving the moderate amount which they did, though it was probably more than the defendant under the circumstances expected he would have to pay; and we cannot interfere on the ground that in fact the plaintiff sustained little damage, if any, or in fact he did suffer damage just to the extent of the incumbrance of the first mortgage, in this sense, that but for the defendants mistake his bargain would have been so much more profitable to him than it turned out to be.

As to the defendant's costs in the Chancery suit, we cannot tell that the jury allowed them, but must rather infer that they did not, since they gave little more than half the amount of the first mortgage, which had to be paid out of the proceeds of the sale of the property.

Rule discharged.

In Re Allan, &c.

Articled Clerk—Application for admission as an Attorney.—Requisites.

An applicant for a certificate of fitness prior to admission as an attorney and solicitor of the courts of law and equity in Upper Canada must leave with the secretary of the Law Society, not only the documents mentioned in sub. sec. 4 of sec. 3 of Con Stat. U. C., cap. 35, but also his own affidavit of due service, at least fourteen days next before the first day of the term in which he intends to seek admission.

Where therefore an applicant neglects to make his affidavit of due service until after the first day of the term in which he sought admission, his application failed.

(E. T. 1861.)

Mr. Allan during the present term made application to be admitted an attorney and solicitor of the different courts of law and equity in Upper Canada.

He left his contract of service, affidavit of execution, and with one exception all other papers necessary under the statute, and rules of the law society prior to admission, with the secretary of the Law Society, at least fourteen days before the first day of term.

The exception was his own affidavit of due service which he did not file until after the commencement of term. The question then arose whether or not this affidavit should not have been filed with the other papers mentioned at least fourteen days before the term as a necessary part of his application to be admitted an attorney and solicitor.

The society, in consequence, instead of granting him the ordinary certificate, gave to him a certificate setting forth the special circumstances, which certificate he presented to the court of Queen's Bench. Whereupon the following judgment was delivered by

McLEAN, J., The affidavit of service of the master is sufficient if the affidavit of the clerk was made and presented at the time of the clerk's application for examination.

The time of such application is not mentioned in the statute and must depend on the rules of the Law Society, and if by those rules the application for examination is considered as made on the first day of term, then Mr. Allan should receive the usual certificate, but if it is considered as made fourteen days before term, then the statute is imperative, and the affidavit of Mr. Allan on the first day of this term is too late.*

REGINA V. THE TRUSTEES OF SCHOOL SECTION NO. 27, IN THE TOWNSHIP OF TYENDINAGA, IN THE COUNTY OF HASTINGS.

School Trustees—Mandamus—Attachment—Practice.

A mandamus *nisi* having been issued to school, trustees to levy the amount of a judgment obtained against them, no return was made, and a rule *nisi* for an attachment issued. In answer to this rule one trustee swore that he had always been and still was desirous to obey the writ, and had repeatedly asked the others to join him in levying the rate, but that they had refused. Another swore that owing to ill health, with the consent of his co-trustees and the local superintendent, he had resigned his office before the writ was granted.

The court, under these circumstances, discharged the rule *nisi* as against these two, on payment of costs of the application, and granted ad attachment against the other trustee, who had taken no notice either of the mandamus or rule.

(H. T., 1861.)

On the 18th of October, 1860, a writ of mandamus was issued from this court, directed to these school trustees, commanding them to levy and collect, or cause to be levied and collected, from the freeholders and householders of the school section No. 27, in Tyendinaga, a sum of money sufficient for the payment and satisfaction of two certain judgments recovered against the trustees of the said school section by one John Waterhouse, for the building the school-house for the said school section, or to show cause to the contrary on the first day of Michaelmas Term then next The writ had been ordered in Trinity Term, 1860.

Copies of this writ, it was sworn, personally served on the 23rd of October last, upon William Cross and James Glass, two of the trustees of the said school section, and upon Robert Gillespie, another of the trustees, the original writ of mandamus being shewn to each at the time of service.

In Michaelmas Term 1860, an affidavit was made that on search in the Crown office in Toronto, on the 26th of November, it did not appear that the writ of mandamus had been returned as filed. And the court, upon application of Mr. *Sisson*, the counsel for Waterhouse, ordered a rule to issue upon the trustees to shew cause why an attachment for contempt should not issue against them for not returning the writ.

In answer to this rule, during this term, Cross, one of the trustees, made an affidavit that he had always been and still was willing and desirous to levy the money necessary for satisfying the judgments obtained by Waterhouse, as commanded by the writ of mandamus, and had repeatedly requested Glass and Gillespie the other trustees, or either of them, to unite with him in making a rate for that purpose: that he had done this both before and after the mandamus came to him, but that they had always refused, and that he could not alone impose and levy the necessary rate. He made a return also to the writ, under the corporate seal, referring to his affidavit for his reason for not executing the command of the writ, and his affidavit and return were annexed to the mandamus.

James Glass, another of the trustees, in answer to the rule *nisi* for attachment, filed an affidavit to the effect that, being in very ill health at the time of the election of school trustees in January, 1860, he declined the office, protesting that he could not serve in it on account of the state of his health, but that he was nevertheless chosen: that his ill health continuing, he solicited permission to resign, not being able to discharge any of the duties; and he annexed a letter received from his co-trustees, Cross and Gillespie, dated the 9th of February, 1860, and allowing him to resign for the reasons given, and another letter from the local superintendent, dated the 14th of March, 1860, consenting to his being released from his duties as school trustee.

Mr. Glass, however, took no notice of the writ of mandamus till he made his affidavit on the 4th of February, 1861, nor Mr. Cross till he made his affidavit on the 9th of February, 1861.

Mr. Gillespie did not appear to have taken any notice of either the mandamus or the rule *nisi* for attachment.

Crombie appeared for the defendant Glass. *O'Hare* for defendant Cross.

ROBINSON, C. J., delivered the judgment of the Court.

Both Cross and Glass failed to pay due obedience to the writ by returning to the court the reasons which had prevented their doing what they been directed to do. This may have arisen from their relying on the sufficiency of the reasons, and not being advised of the steps on which it was still incumbent on them to take.

As to them, therefore, we may discharge the rule *nisi* for attachment, on their paying the costs of the application.

As to the other defendant, Gillespie, we grant the attachment ment. We might have ordered a peremptory mandamus, when no return had been made in due time to the first; but an attachment being moved for it is proper to grant it against the member of the corporation (Gillespie) who has been guilty of the contempt of wholly disobeying the mandamus, neither doing the act, nor manifested any readiness to do so, nor assigning any cause for not doing it.

CHAMBERS.

(*Reported by* ROBT. A. HARRISON, Esq., *Barrister-at-Law.*)

HENRY MCDERMOTT *v.* JOHN STANLEY KEELING.

Ejectment—Appearance of persons other than named in writ—Mortgage.

Held, that a mortgagee out of possession is entitled, under sec. 9 of Con. Stats. cap. 27 (the act respecting ejectment), to be admitted to defend an action of ejectment brought against his mortgagor. (April 21, 1861.)

This was an action of ejectment. *Mr. Harrison* obtained a summons calling on the plaintiff, under and pursuant to sec. 9, cap. 2, of Con. Stats. of Upper Canada, to show cause why Alex. Thomas Montgomery should not have leave to appear and defend the action.

By sec. 8, cap. 27, of Con. Stats. of Upper Canada (the act respecting ejectment), it is provided that "the persons named as defendants in the writ, or any of them, may appear within the time appointed;" and by sec. 9 of the same act, that "any other person, not named in the writ, may, by leave of the court or a judge, appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant."

The summons was obtained upon affidavit of Montgomery, in which he stated that the action was brought by the plaintiff, claiming title under a deed from Mary Gale, to recover possession of the rear part of lot 6, in the Maitland concession of the township of Goderich; that he (Montgomery) bought the land at sheriff's sale, under an execution against the lands of one William Mathieson, in or about the year 1854; that Mathieson bought the land from said Mary Gale; that there was some defect in the deed from Mary Gale (a married woman) and her husband to Mathieson; that on the 14th February, 1860, he (Montgomery) sold and conveyed the land to defendant Keeling, who went into possession; that defendant executed a mortgage on the land in favor of him (Montgomery), for £1,316, balance of purchase money; that at the time of the sale of the land from Montgomery to defendant, the plaintiff, McDermott, who is an attorney, acted as solicitor for himself (Montgomery) and defendant; that while so acting as such solicitor, he (McDermott) became aware of the defect in the deed from Mary Gale to Mathieson; that subsequent to the mortgage from defendant to Montgomery, plaintiff took and received from defendant a mortgage on the land; that some time after he took the last mentioned mortgage, he obtained from Mary Gale a deed of the land to himself, for the nominal consideration of four dollars, on which deed the action was brought; that he obtained the deed from Mrs. Gale by fraudulent misrepresentation; and that defendant was acting in collusion with plaintiff, in order to cut out his (Montgomery's) mortgage, and so destroy his security on the land.

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* It is by rule of the Law Society expressly declared that "all *applications* for certificates of fitness for admission as attorney or solicitor, shall be by petition in writing, addressed to the Benches of the Society in convocation, and every such petition, *together with the documents required by*, and fees payable to this society, shall be left with the secretary of the society at Osgoode Hall, *on or before the third Saturday next before the term in which such petition is to be presented.*" Mr. Allan's application, therefore, for admission during the present term failed.

Plaintiff, in reply, filed an affidavit contradicting the assertion that when Montgomery sold the land to Keeling and took back a mortgage, he (plaintiff) acted as solicitor for Montgomery, alleging that he acted for the defendant alone; contradicting the assertion that while acting as solicitor for defendant, he became aware of the defect in the title of Montgomery; alleging that he did not discover the defect until a considerable time after the sale of the land from Montgomery to defendant, and until long after he had advanced to defendant the amount for which defendant gave plaintiff a mortgage; that upon the representation of Montgomery, to the effect that the title was perfectly clear, defendant dispensed with an examination of title; that for the purpose of protecting his own interest, he (plaintiff) procured a deed of the property from Mary Gale; that he never, to his knowledge, saw Mary Gale, or had any communication with, or made any representation to her, directly or indirectly; that immediately on receiving a deed from Mary Gale, he made it his business to see Montgomery, and offered, in order to guard against the accident of his (plaintiff's) death, to execute any document necessary to protect his (Montgomery's) mortgage; and denying collusion between himself and defendant. An affidavit of defendant, and another of Bouchier Eaton, an articled clerk in the office of plaintiff, corroborating the affidavit of plaintiff in different particulars, were also filed.

McBride showed cause, and contended, first, that as Montgomery's affidavit was contradicted by those of plaintiff and defendant, his summons must be discharged; and, secondly, that Montgomery was not sufficiently in possession to be entitled to make the application. On the latter point, he referred to the language of the section, which required an affidavit from applicant "showing that he is in possession of the land either by himself or his tenant;" and cited *Thompson* v. *Tomkinson et al.*, 11 Ex. 442. He also submitted, that a mortgagee out of possession is not entitled to the benefit of the section, as he cannot be said to be in possession either by himself or his tenant.

Harrison, contra, submitted, first, that sec. 9 of Con. Stat. U.C. cap. 35, under which the application was made, is in substance the same as the former act, 11 Geo. II. cap. 19, sec. 18; secondly, that in the construction of the latter act, the word "landlord" was held to extend to all persons, including mortgagees out of possession, claiming title under or in privity with defendant (*Doe dem. Hebblethwaite* v. *Roe*, 8 T. R 783; *Lovelock dem. Norris* v. *Doncaster*, 4 T. R. 122; *Doe dem. Tillyard* v. *Cooper*, 8 T. R. 645; *Doe dem. Pearson* v. *Roe*, 6 Bing. 613); third, that the possession now necessary need not be more actual than that formerly required, but the contrary, the former statute using the word "landlord," while the present act uses the expression "any other person" (*Butler* v. *Meredith*, 11 Ex. 93; *Croft* v. *Lumley*, 4 El. & B. 608); fourth, that the court will not try questions of title on affidavit, especially if collusion suggested, but allow applicant to defend where he is really much interested in the result of the suit (*Harrington* v. *Harrington*, 8 U. C. L. J. 30; *Webster* v. *Horsburgh*, 8 U. C. L. J. 32).

Draper, C. J.—I think the order should go to allow Montgomery to defend. The defendant may be treated as in possession under Montgomery, and as between *them* a tenant to him. Then the defendant seems to be willing to aid the plaintiff, which will unavoidably be a detriment to Montgomery's interests. The application is plainly that of Montgomery, who appears to be the first mortgagee of defendant, the plaintiff having taken a subsequent mortgage from him.

I therefore grant the order, on payment of costs; Montgomery to appear forthwith, and take short notice of trial if necessary.

Summons absolute.

Robert A. Land v. Jasper T. Gilkison and Humphrey Arthur.

Ejectment—Writ of injunction refused.

Held, that the Common Law Procedure Act does not authorize the issuing of a writ of injunction in an action of ejectment. The law is now settled. Decisions to the contrary in Upper Canada are no longer to be followed.

(April, 1861)

This was an action of ejectment. It appeared that defendant Arthur executed a mortgage to the defendant Jaspar T. Gilkison, on certain land in the township of Barton, which mortgage defendant Gilkison subsequently assigned to the plaintiff.

Default having been made in the payment of the mortgage money, this action was brought.

Plaintiff, on an affidavit that the defendant threatened to remove the buildings, dwelling houses and fences off the mortgaged land, applied for a writ of injunction.

Harrison, in support of the application, cited *Robins* v. *Porter*, 2 U.C. L. J. 280; *Bell* v. *White*, 8 *Ib.* 107; *Fraser* v. *Robins*, *Ib.* 112.

Burns, J.—It is not now the practice to allow the issue of writs of injunction in actions of ejectment. At one time I held differently; but since *Baylis* v. *Le Gros*, 2 C. B. N. S. 318, I have always refused applications for writs of injunction in actions of ejectment. That case decides that the Common Law Procedure Act does not authorize the issue of the writ in any such action. Most, if not all of my brother judges concur with that decision.

Boulton v. Ruttan.

23 Vic. Cap. 42 s. 4.—Reference for Trial to County Judge—When.

Held, that under statute 23 Vic., cap. 42, sec, 4. to warrant a judge of the superior courts in referring a cause for trial to a judge of the county court, the writ must not only be issued from, but venue laid in the county to which the reference for trial is required.

Where a defence is one not merely for time, it may be doubtful, particularly if the amount is large, if a judge would direct the trial of the issue before a county court judge against the consent of the defendant.

(May 29, 1861.)

O'Brien obtained a summons to shew cause why this case should not be tried before the judge of the county court of Northumberland and Durham. The writ was taken out at Cobourg but the venue laid in Norfolk. The defendant pleaded a special plea, which plaintiff in his affidavit in support of the summons stated was not true.

Beaty shewed cause, filing an affidavit of the defendant. He objected to the summons on the ground that the venue being laid in Norfolk the cause must, could not be referred to a judge of another county; and further, that on the facts and pleadings, as appeared by the papers filed, the cause was not such a one as came within the meaning of the statute.

O'Brien, contra, contended that the statute provided that the cause should be referred to the judge of the county court where action was *commenced*; that the suit was commenced when writ was issued; that the statute in cases of this sort did away with the rule of law as to trying a cause where the venue is laid; that the plea even if true, shewed no defence to the action; and that the cause could be more satisfactorily tried before the judge of county court. He also applied to amend, if necessary, the summons by referring the cause for trial to the county judge of Norfolk, or by changing venue to Northumberland.

Richards, J.—The statute requires that the issue shall be tried by the judge of the county where the action was commenced, "and such action shall be tried there accordingly, and the record shall be made up as in other cases."

I take it for granted that the issue must be tried in the county where the venue is laid, unless it appears from the statute that the legislature intended some other course should be taken. It is doubtless requisite that the issue should be tried in the county court of the county where the action was commenced, but as the venue here is not in that county, it seems to me that the case cannot properly be tried there, whilst the venue is laid in another county.

The plaintiff asks me now to make an order to amend the declaration by changing the venue to the United Counties of Northumberland and Durham, and then to make his summons absolute. It is not desirable at any time to make an order for a different object than that sought in the summons, though it is sometimes done when it is with a view to carry out the same purpose that the summons seeks to accomplish. In this case, however, the only object to be gained is to get down the trial sooner than would be the case if the action were tried in the superior court.

The plaintiff sues on a note which he apparently acquired after it became due. The defendant entertains a strong opinion that the plaintiff is not entitled to recover, and is most anxious to

have the cause tried before a judge of one of the superior courts, and swears that difficult questions of law and fact are likely to arise.

Under these circumstances, without expressly refusing to grant the order because the case can be more satisfactorily tried before a judge of one of the superior courts, I shall refuse to amend the declaration by changing the venue to Northumberland and Durham; and in the view I take of the statute and the rule of law as to trying a cause in the county where the venue is laid, I must refuse to make the order.

As the point is new the summons will be discharged without costs.

Where a defence is one not merely for time, it may be doubtful, particularly if the amount is large, if a judge would direct the trial of the issue before the county judge against the consent of the defendant.

Summons discharged without costs.

ELECTION CASES.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

(Before His Honor A. LOGIE, County Judge of the County of Wentworth.)

THE QUEEN ON THE RELATION OF HENRY LUTZ AGAINST JOHN W. HOPKINS.

Municipal Election—Duty of Returning Officer—Alteration of Vote—Qualification of Voters—Court of Revision—Power to alter Roll—Close of Poll—Tie—Duty of Returning Officer—Scrutiny.

If a Returning Officer, upon discovering an error in the entry of a vote has the power to make the necessary correction, he must make it promptly, and only in a case where the mistake in making the entry is beyond a doubt.

It is the duty of the Returning Officer at the close of the poll to add up the number of votes given for each candidate, and publicly to declare the state of the poll and if there is a tie or equality of votes to declare his intention to vote, and the name of the candidate for whom he gives his vote.

Quære, did the Returning Officer under the circumstances stated in this case properly discharge that duty?

Where the watch of the Returning Officer was used on the first day to open and close the poll, and again to open it on the second day without objection as to its correctness, the time marked by his watch may be properly taken as the correct time at the close of the poll.

If a voter in good time present himself at the poll for the purpose of voting he has a right to have his vote recorded, though by the delay of the opposite party in obstructing his purpose it may be a minute after the hour appointed for the close of the poll when the vote is recorded.

Where a voter had parted with the property in respect to which he voted before the time of the election, held that he had no legal vote.

A Court of Revision has no power by mere motion, at the instance of a member of the court, to order any names that they think are omitted or wrongly inserted, to be added or struck out. In order to give them jurisdiction a complaint must be made, and that complaint they are required to try.

Names improperly added to an assessment roll by a Court of Revision will, in the event of a scrutiny after an election be struck off.

A person otherwise duly qualified to vote at a municipal election is not disqualified by the simple fact of a change of residence from one ward to another in the same Township.

Quære, as to the distinction between mere "householders" and "tenants," for the purpose of voting at a Municipal election?

[23rd February, 1861.]

The relator in his statement set forth, that defendant had not been duly elected, and unjustly usurped the office of Township Councillor for ward number four of the Township of Saltfleet, in the County of Wentworth, under the pretence of an election held on the seventh day of January, one thousand eight hundred and sixty one, and following days, at Burlington Beach, in the said ward number four, in the Township of Saltfleet, in the said County of Wentworth; and that the relator was duly elected thereto, and ought to have been returned at such election, and declaring that the said relator had an interest in the said election as a candidate, stated the following causes why the election of defendant to the office should be declared invalid and void, and relator only elected thereto.

First. That said election was not completed according to law in this:

1. That the returning officer for the said ward (Wilber W. Waterbury) at the close of the poll for the election of councillor for the said ward number four, did not add up the number of votes set down for the relator and defendant, the respective candidates for councillor for the ward, and publicly declare the same, and in case of an equal number of votes give the casting vote for one of the said candidates so as to decide the election; but on the contrary entered his own name as an elector, and then declared defendant councillor for the said ward, without first adding up the number of votes set down for relator and defendant or either of them.

2. That the last vote, other than that of the said returning officer as set down for the defendant, was so set down after the hour of four of the clock in the afternoon of the eighth day of January last, being the second and last day of the said election.

3. That the said returning officer in his certificate attached to his return of the said election to the clerk of the Municipality of Saltfleet, did not state for what ward or for what year the said John W. Hopkins was elected.

Second. That the defendant was not duly or legally elected or returned as councillor for the said ward in this:

1. That at the instance of the defendant there was illegally and fraudulently entered upon what purports to be the last revised assessment roll for the said ward number four, as electors, the names of seven unqualified persons, namely, Chas. Bates, Robert Fletcher, Ashman P. Coombs, Samuel Bateman, Philip Beal, Geo. Snook, and John Forbes; and that three of the unqualified persons, namely, Robert Fletcher, Ashman Coombs, and Thomas Bateman, tendered their votes at the election for the said ward number four, and that the returning officer set down their names and votes for the defendant, although the votes were duly objected to previous to the same having been entered or given.

2. That the list of qualified electors furnished by the clerk of the said Township to the returning officer contained the names of of several persons who were not rated for ratable real property upon the last revised assessment roll as the same was passed by the Court of Revision, and three of the said parties, namely, the parties last aforesaid, gave their votes for the defendant, and the same were so set down by the returning officer, although duly objected to previous to the same having been entered.

3. That the said returning officer, upon the application of the defendant, erased the vote of one Thomas Armstrong which had been set down in the poll book for the said Henry Lutz, and entered the same for the defendant, although the vote had been so entered for the relator the day previous to the same having been erased, and without application having first been made by the elector to have the same so altered as aforesaid.

4. That the defendant did pay, or caused to be paid, or promised to pay, to one or more of the electors who voted for him at the said election, a consideration or reward for the vote he or they tendered and gave at the said election.

5. That the defendant was appointed by the Municipal Council of the said Township of Saltfleet, an officer or commissioner for expending and paying certain monies belonging to the said Municipality, and that a portion of the monies was still retained by the defendant, and that he was at the time of the said election, and still is liable to the said Municipality, for the payment of the monies.

6. That the defendant can and may claim a remuneration from the said Municipality for his services as such commissioner or officer as last aforesaid.

Third. That the relator should be declared duly elected to the said office of township councillor for the said ward number four in the said Township of Saltfleet, because he had a majority of the legal votes set down for the respective candidates at the said election.

The evidence given was oral, and briefly as follows:

FOR RELATOR.

1. *George Lotteridge.*—Was present at the close of the election on the second day, and was near the returning officer; did not hear him declare there was a tie before he, the returning officer, voted; heard parties say before one Declos voted that it was four o'clock, and that the poll should be closed.

2. *Robert R. Waddell.*—Saw the name of Thomas Armstrong entered as a voter for relator; by the clock in the house it was after four o'clock when Declos voted; immediately afterwards the returning officer, without making any declaration of the state of the poll, wrote his own name and declared defendant elected; on the second day heard the returning officer had changed the vote of Thomas Armstrong; his father died intestate as to lands in

the ward; his name and that of his brother were entered on the assessment roll as owners of the land; the land had been previously sold by a decree of the Court of Chancery under a judgment against him, but no conveyance settled at the time of the election.

3. *Patrick Crawford.*—Was close by the returning officer on the second day of the election and did not hear him declare the state of the poll before voting; several parties declared it was after four o'clock before Declos voted.

4. *William Clarkson.*—Did not own the property in respect to which he voted; was not living on the lot at the time he voted; was not tenant to any one of the lot in respect to which he voted.

5. *Robert Fletcher.*—Did not own the property in respect to which he voted; did not lease it from any one; lived with his father; his father professed to own the house; had no share or interest in it.

6. *Matthew Davis.*—Was Township Clerk of Saltfleet in 1860; at a meeting of the Court of Revision in May, 1860, the names of Ashman Coombs, Robert Fletcher, Robert Bateman, and some others, were put upon the assessment roll; produced the original motion moved and seconded for the purpose of adding the names; no application in writing was made by them or any other person to have their names put on the roll; added the names to the roll in accordance with the resolutions.

7. *William Spear.*—Was assessor of the ward in 1860; did not put the names of Coombs, Bateman and Fletcher on the roll, because they were not living in the ward at the time.

8. *Joseph Declos.*—Had sold the property in respect to which he voted about two months previous to the election; was jostled at the poll, and an attempt made to prevent him reaching the poll.

9. *William Ansley.*—Was present at the close of the election; there was a watch on the table from which the returning officer kept time; heard the returning officer say before Declos came that it only wanted a quarter of a minute to four o'clock; afterwards the name of Declos was put down, when the returning officer made the remark looked at the watch and saw the hand just at four o'clock.

10. *John Taif.*—Voted on Government property, paid no rent, lived on Burlington Beach, paid taxes, occupied a house.

11. *John Livingstone.*—Similar evidence in regard to property as that of last witness.

12. *Frederick Cary.*—The same.

13. *Mortimer Cary.*—Was at the election at the close of the poll; was there when Declos voted, it was then four o'clock or as near to it as could be, there was noise and confusion.

For Defendant.

1. *W. W. Waterbury.*—Was returning officer; recorded Armstrong's vote, his vote was for defendant but by mistake recorded for relator; mistake discovered shortly after; afraid at the time to alter it, next day did so; just before close of poll had a watch in his hand, observed that it wanted 1½ minutes to four o'clock; recorded Declos' vote before four o'clock. At the close of the poll declared a tie, and recorded his vote for defendant; did not previously add up the votes but knew the state of the poll; great noise in the room at the time.

2. *Henry Waterbury.*—Heard the returning officer declare a tie before he voted.

3. *Thomas Armstrong.*—Voted for defendant, heard that vote by mistake recorded for relator, had left polling place at the time.

4. *Alva G. Jones.*—Was a member of the council when the names were added, such additions are often made, the names were put on with the view of making the parties liable to pay taxes.

5. *Horace Coombs.*—Ashworth Coombs, his brother, came to live on the place for which assessed about the last of April or first of May.

6. *James Williamson.*—Know Francis Lewis; he did not own land for which assessed either as freeholder or householder.

7. *William Spera.*—Andrew Murray not a resident of the Township at time of assessment, William McDowell not a resident at time of assessment.

8. *Eben zer Jones.*—Know McDowell, he lives in Ramellin; know Andrew Murray, he lives in Township of Barton.

9. *Robert Crosthwaite.*—Corroborated last witness.

For Relator.

1. *John Martin.*—Saw Declos go in to vote; just before he passed was asked what time it was, looked at his watch and found that it was eight minutes past four o'clock.

2. *George Snook, jun.*—Brother owns the house at Burlington Beach, boarded with him; was assessed with his father for property of which afterwards dispossessed.

3. *Henry Pollard.*—Self and father joint tenants of property in respect of which voted.

4. *James Gage.*—Know Michael Connoly, jun., know his father; think there is some arrangement between them by which the son has an interest in the lease.

5. *Hervard Heales*—Know Samuel Lewis, he lives with me; has a separate part of the house.

6. *Robert Crosthwaite.*—Know the Connolys, father and son; they removed from the ward in the fall; they live in another ward of same Township.

7. *Ashman Coombs.*—Moved to ward number four from ward number one in May last, was assessed in ward number one for a house.

8. *Samuel Bateman.*—Took five acres from Mr. Nash, went to live there on 1st May; did not make application to any one to have name placed on the roll.

9. *Thomas Cross.*—Know James Waddell, John Livingstone, W. Johnston, Robert Brult, Wm Andrews, John Taif and Alexander Brown; they live on Burlington Beach, are all fishermen except Johnston, who is ferryman at the canal, it is a Government ferry.

10. *David McRae.*—Lives on the beach; has a lease from year to year from Mr. Lotteridge.

11. *John McQuaig*, Superintendent of fisheries for Upper Canada.—James Waddell has no lease; same of Livingston, Johnston, Brult, Andrews and Taif. Brown was in treaty for a lease, but transferred his right to one Perry. Did not take leases until after May, 1860. Believe that John Dynes is a freeholder. None of the others are freeholders. Have a mere right of fishing. The beach belongs to the government. Benjamin Sherman, Charles Cary, Frederick Cary, and Nehemiah Cary have leases. Zacharia Cary and William Snook have no leases. The leases were all granted in May last.

12. *Mortimer Cary.*—Know James Waddell, John Livingston, Wm. Johnston, Robert Brult, Wm. Andrews, John Taif and Alex. Brown; all lived on the beach at the time of the election.

For Defendant.

1. *Gearge Crosthwaite.*—Know James McCroon, a young man living with his father; has no interest in the property.

2. *Wm. Spera.*—Assessed James McCroon by his request; did not tell me how to assess him, whether as a freeholder or householder.

3. *Ebenezer Jones.*—Know James McCroon; he told me he had no lease, said he meant to get on the assessment roll that he might have a vote.

Sadlier for relator. *Freeman, Q.C.*, for defendant.

Logie, Co. J.—The first point to be decided is as to the right of the returning officer to alter the vote of Thomas Armstrong in the poll book. The cases of *Regina ex rel. Mitchell* v. *Runkin et al.*, 2 U. C., Ch. R. 162, and *Regina ex rel. Acheson* v. *Donoghue*, 15 U. C. Q. B., 545, do not in my opinion decide that a returning officer cannot under any circumstances change the entry of a vote in the poll book, but they do shew that the returning officer, if he has the power to make the alteration, must make it promptly and in a case where the mistake in making the entry is beyond a doubt.

I do not think this is so clear a case of an erroneous entry as would justify the returning officer in making the change. The returning officer did not discover the error for some time after the vote was given, until Mr. Waddell observed that he had voted for the relator, when a dispute seems to have arisen about the vote and the right of the returning officer upon his own recollection to alter the entry. It is as probable that the returning officer may have been mistaken in his recollection of the vote as that he made a wrong entry of it when it was given. The only evidence given to corroborate the returning officer's evidence is that of Armstrong himself. His conduct at the time was rather equivocal, so as to leave it a matter of doubt for whom he gave his vote.

Although he was present when the entry of the vote was observed by Mr. Waddell, he did not apply to have the vote changed or apparently say that it was wrong; but on the contrary appeared to assent to the correctness of the entry of the vote by saying that he supposed it was all right. The law very properly will not permit a returning officer to change the entry of a vote except in a very clear case of a mistake. I do not think this is such a case, and that the vote of Thomas Armstrong must be struck off.

Had the alteration not been made the returning officer could not have voted, as there would not have been a tie, and therefore his vote must also be struck off. It is the duty of the returning officer at the close of the poll to add up the votes given for each candidate and publicly declare the state of the poll, and if there is a tie or equality of votes to declare his intention to vote and the name of the candidate for whom he gives his vote (*Regina ex rel. Coupland* v. *Webster*, 6 U. C. L. J. 39). In this case the returning officer did not add up the votes, but there is evidence that he declared that there was a tie, although few in the room seem to have heard it, nor does it appear that he declared for whom he intended to vote; his vote, however, having already been disposed of, it is not necessary to say whether or not he complied sufficiently with the requirements of the law in the way he made the declaration of the state of the poll and gave his vote.

As to the alleged keeping open the poll after four o'clock on the second day of the election, I could not on the evidence hold that it was after four o'clock when Declos presented himself at the poll to give his vote. The returning officer's watch was used on the first day to open and close the poll, and again to open it on the second day. No objection seems to have been made to its correctness then, and I think the time marked by his watch was properly taken as the correct time at the close of the poll. By his watch it was not quite four o'clock when Declos presented himself at the poll to vote. I think also, that if a voter presents himself at the poll for the purpose of voting he has a right to have his vote recorded, though by the delay of the opposite party in pushing him about and requiring the oath to be taken, in this case it may be a minute after the hour before his vote is recorded.

It is admitted that Robert Fletcher and Henry Pollard, who voted for Hopkins, were not householders at the time, and therefore had no votes, their votes must therefore be struck off.

I think that Joseph Declos had no vote, he voted on property which he had sold and conveyed away some months before the election. The statute requires that the voter should be a freeholder or a householder at the time of the election. The 75th section of the Act declares that the electors of the Municipality shall be the male freeholders thereof, &c., *and* who were severally rated, &c. The electors must be freeholders of the Municipality at the time of the election, and also rated upon the last (revised) assessment roll,—both conditions are necessary to give a good vote.

The name of Joseph Declos must therefore be struck out, and the name of George Snook, the younger, for the same reason that he was not a householder at the time of the election.

Michael Connelly, the younger, was not at the time of the election a householder, and his vote should therefore be struck out. I think that William Clarkson had no vote, he was neither proprietor nor tenant of the property for which he was rated, his vote must be struck out.

I consider that the names of Ashman Coombs and Samuel Bateman were informally and wrongfully put upon the assessment roll As the assessment roll is taken as the list of those who are entitled to vote not only at Municipal but also at Parliamentary elections, and as those whose names are upon the roll have *prima facie* a right to vote, it is of great importance to the purity of elections that no tampering with or alterations of the roll should be permitted, except in the way pointed out by the statute. The assessment Act, section sixty, points out the way by which any omission in the roll can be supplied, and the mode pointed out by the statute must be strictly followed. Written notice must be given to the clerk of the municipality, whose duty it is to put up in a public place a list of all appeals. Then when the court sits the several appeals are tried. Everything is required to be done openly and publicly. The Court of Revision have no power by mere motion at the instance of any member of the court to order that any names that they think are omitted or wrongly inserted or assessed, be added or struck out. In order to give them jurisdiction a complaint must be made, and that complaint they are required to try. The County Judge to whom there is an appeal might as well take the roll after it had passed through the Court of Revision and add or strike out names without any complaint made to him as pointed out by the Act, as that the Court of Revision should assume a jurisdiction without a complaint made to them.

I think then that the names of Ashman Coombs and Samuel Bateman, having been irregularly put upon the assessment roll, should be struck out of the poll book.

Michael Connelly the older, whose vote is objected to by the relator on the ground, that at the time of the election he was not a householder in the ward, though a householder in the Municipality (and the case of *Regina ex rel. Totten* v. *Benn*, 4 L. J. U. C., 262, is relied on) had in my opinion a good vote. The case cited was decided upon the construction of the statute 16 Vic. cap. 181, sec. 10, which is very different from the Municipal Act now in force. The act 16 Vic. gave votes to the freeholders and householders of the township or *ward*, who at the time of the election should be resident in such township or *ward;* whereas the present municipal act gives votes to the freeholders and householders of the municipality who were rated on the last revised assessment roll for real property in the municipality. In the interpretation clause of the statute, the word municipality is defined as "any locality the inhabitants of which are incorporated under the act, but it does not mean a police village." A rural ward is not incorporated under the municipal act, the act does not recognize anything less than a township as a corporate body. And again, by sec: 78 of the municipal act it is provided that no elector shall vote in more than one ward, and if intitled to vote in the ward in which he resides, he shall not be entitled to vote in any other ward." That clause being formed apparently to meet the case of a tenant being assessed in one ward but who has afterwards moved into another ward in the same municipality in which he would have no vote because he could not be on the assessment roll of that ward. I hold then, that Michael Connolly, the elder, who removed from the ward in which he was assessed, to another in which he is a house-holder, had a good vote.

The votes of Robert R. Waddell and Dr. McKay, given for the relator, must be struck out for the same reason that the vote of Joseph Declos was struck out, namely, that at the time of the election they did not own the properties for which they were respectively assessed. In the case of R. R. Waddell, although the property had not been conveyed at the time of the election, it had been sold by the court of chancery; Waddell was bound to carry out the sale, and he had not, therefore, at the time of the election such a legal or equitable interest in the property as would entitle him to vote.

I think that Howard Heales, Francis G. Lewis, and James McCrone, the younger, were not householders within the meaning of the act, and that their votes should be struck out. And it is admitted that W. McDowell and Andrew Murray had no votes.

The poll, therefore, after deducting the bad votes on both sides would stand thus: for the defendant, forty-seven votes stand recorded in the poll books, from which number the votes of Thomas Armstrong, the Returning Officer, Robert Fletcher, Henry Pollard, Joseph Declos, George Snook, the younger, William Clarkson, Michael Connoly, the younger, Ashman Coombs and Samuel Bateman, in all ten, must be deducted, reducing the number of votes to thirty-seven. And for the relator forty-six votes were recorded, from which seven votes, namely, those of R. R. Waddell, Dr. McKay, Howard Heales, Francis G. Lewis, James McCrone, the younger, W. McDowell, and Andrew Murray, must be deducted, reducing the number of votes given for the relator to thirty-nine and leaving him in a majority of two votes.

My judgment therefore is, that the defendant, John W. Hopkins be removed from the office of councillor for ward number four of the township of Saltfleet, and that the relator, Henry Lutz, having a majority of legal votes, be adjudged entitled to the said office of councillor, and under the circumstances of this case I do order that each party pay his own costs.

On the part of the relator, the votes given by the fishermen at the beach for Hopkins, were objected to on the grounds, that although they were householders, they were not tenants. The

land on which they live being government land, and as they have not paid any or agreed to pay any, and have no lease or license of occupation from the government, it was contended that they had no votes. As it is a matter of some doubt whether or not they have good votes, and I have some difficulty in arriving at a conclusion satisfactory to myself, and as without striking out their votes the relator has a majority of good votes, and is entitled to take his seat as councillor for the ward, I do not consider it necessary that I should decide the matter. I would merely state the view that I took of the matter when evidence was taken as to the nature of their occupation. In the case *Re Charles* v. *Lewis*, 2 U. C. Ch. Rep. 172, Mr. Justice Burns says that the words proprietors and tenants in the end of the clause are used synonymously with freeholder and householder, in the former part of the section, that case was decided upon the construction of 13 and 14 Vic., chap. 109, and although similar words are used in the late municipal act, it would perhaps be going further than the words would warrant were I to hold that in this case they are synonymous, and besides as was decided in the same case, the judge upon a scrutiny of votes is not concluded by the assessment roll, but may go behind it and try whether the votes were properly assessed in the character in which they appear on the roll. I hold then if the fishermen could shew any thing by which their occupation of the beach was with the assent of the Crown expressed or implied; though they had no lease, and did not agree to pay any rent, they might be considered tenants at will to the Crown, which would be sufficient to give them votes. As to what is sufficient to create a tenancy at will, see *Rex* v. *Fillongly*, 1 T. R., 458; *Rex* v. *Collett*, R. & R. C. C., 498; *Rex* v. *Joblin*, R & R. C. C., 525; *Richardson* v. *Langridge*, 4 Taunt., 128, and *Doe Hall* v. *Waod*, 14 M. & W., 682. Nothing more could be proved with regard to these fishermen than that they had occupied the portion of the beach on which they lived, some of them for many years, without being disturbed in their occupation by the Crown. It is difficult to arrive at the conclusion that such a permissive occupation by the Crown, against whom time would not run and who cannot be charged with laches, would make the parties tenants to the Crown.

(Before his Honor the Judge of the County Court of the County of Essex.)

THE QUEEN ON THE RELATION OF WILLIAM FLANAGAN V. JOHN MCMAHON.

Municipal Elections—Qualification of Candidate—Innkeeper—Contract with Corporation as Surety for Treasurer of Municipality.

Held, that it is not necessary under the seventy-third clause Consolidated Statutes Upper Canada, chapter fifty-four, to constitute an innkeeper that he should be licensed.

Held, also, that where a candidate for councillor was an innkeeper, but sold his interest as such the day on which the election took place, but there was no actual change of possession, he was still an innkeeper within the seventy-third clause, chapter fifty-four, Consolidated Statutes for Upper Canada, and as such disqualified.

Where the defendant was surety for the treasurer for the municipality for 1858, and the same treasurer was re-appointed from year to year during 1859 and 1860, the acceptance of fresh bonds by the municipal corporation for the latter years did not release the sureties to the bond of 1858, and that it being a *continuing security* was not necessarily released by the acceptance of new bonds.

Held, that to entitle a relator (who was a candidate) to a seat declared vacant, he must have notified the electors that the defendant was disqualified, and the grounds of such disqualification.

(March 2nd, 1861.)

The statement of the relator set forth the following causes why defendant's election should be declared void.

1st. That the defendant was an innkeeper at the time of his election.

2nd. That the defendant, at the time of his election, had a contract with the corporation of the township of Rochester, in this that he was one of the bondsmen or sureties for one John Mullins, treasurer of the said township, not discharged or released; and,

3rd. Claimed to have been duly elected, and ought to have been returned as councillor in place of the defendant.

The relator put in affidavits shewing that the defendant had for six years previously kept a tavern in the township of Rochester, and was keeping tavern at the time of the election; that there was no alteration in the conduct or management of the business of the tavern, from the time he commenced to keep a public house up to the time of and since the election; that defendant's family and himself continued to occupy the whole of the house and premises in which he and they had resided for the last six years, being the place where the inn was kept.

It was also shewn that the defendant became surety for the treasurer of the municipality of the township of Rochester in the year 1858.

That upon the auditing the treasurer's accounts for the year 1858 there appeared a balance of $542 94 against the treasurer; that since that time the balance in the treasurer's hands has not been paid over or accounted for; that an application was made to the municipality of Rochester for the surrender of treasurer's bonds for 1858, but that the application had been refused, on the ground that the treasurer and his sureties were still liable, on the bond, to the municipality; that at a meeting of the council of the township of Rochester on the 16th March instant, the bonds in question were ordered to be delivered up on motion of one of the councillors, seconded by the defendant, and that the reeve was only induced to give the casting vote in favor of the motion through the threats of the bystanders.

No objection was taken to the defendant until half an hour after the polling had commenced, and after eight or nine votes had been polled.

For the defence, the defendant filed an affidavit, stating that he leased the inn formerly kept by him, in the township of Rochester, to one Ellen Mullins, a spinster, in the year 1859, and that she continued to be the lessee of the premises till 5th January last; the agreement being that she was to pay $30 per month, and he was to attend to the business for her, and she was to receive all the profits; that this arrangement was in good faith and carried out; that the licence was issued to Ellen Mullins; that for some time previous to the seventh of January last, the day of the election, he (the defendant) had concluded to sever his connection altogether with the inn, and on that day leased the same to one Mathew Butler, for the period of two years, at the rate of $240 per annum, payable monthly, reserving to himself a room and the kitchen; and it was then also agreed that a proper lease should be drawn up between them; that on the eighth day of January a proper lease was drawn up and executed, (the lease was produced); that the lease was in good faith: that at the time he (the defendant) became security for the treasurer it was understood that he was only to be surety for one year; that new sureties were accepted by the council for the years 1859 and 1860; that he had never heard of any claim or demand having been made. or any dispute having arisen between the council and John Mullins.

Mathew Butler corroborated what the defendant stated as far as the lease to him was concerned. John Mullins, treasurer, swore that when his bonds were executed to the municipality, in 1858, it was understood that his sureties were only responsible for the fulfillment of his duties for the year 1858; that he was re-appointed in the years 1859 and 1860, and gave new sureties each year; that his accounts were audited and accepted.

In another affidavit he (Mullins) showed how the balances against him were accounted for.

In the affidavits filed on the part of the relator it was shewn that Ellen Mullins is a sister-in-law of the defendant (McMahon) and that she was since May last in Detroit, out at service as a house servant.

This fact has not been contradicted by the defendant, and there was no affidavit by Ellen Mullins as to the lease to her.

Macdonell, for relator, contended,

1st. That the restriction of the legislature in excluding the persons named in the seventy-third clause of the Municipal Act, was on grounds of public policy, in this that their vocation gave them considerable influence that might be unduly excited at elections.

2nd. That the disqualification clause must be taken in its most comprehensive sense; and to escape the effect of it, those exercising any calling mentioned in it must show the most absolute and complete abandonment of the calling previous to the election.

3rd. That the existence of the bond given by the treasurer to the municipality, in the year 1858, (of which the defendant was one of the sureties) and its non-annullation by the council previous to the election disqualified the defendant. For that the mere fact

that other bonds were executed or even accepted by the council would not involve the satisfaction of this, and the court cannot presume that a dispute may not arise on the bond given in 1858.

He cited *Reg. ex rel Davis* v. *Carruthers*, 1 U. C. Prac. Rep. 114; *Reg. ex rel. Crozier* v. *Taylor*, 6 U. C. L. J. 60; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44.

Shiel, for the defendant, contended,

1st. That the defendant was not keeper of the inn for more than a year previous to the fifth day of January last, but only attended for lessee; and it being positively sworn to by himself that he did not intend to keep the inn, it must be presumed that he was not the keeper of the inn.

2nd. That the lease made to Butler—though on the eve of the election, even if it was made for the purpose of enabling the defendant to become a candidate—removed the disqualification, if any there was.

3rd. That an actual and continual change of possession was not necessary.

4th. That the defendant remaining at the inn was only as the occupier of a particular part, and that only for a certain period under the lease; and also that the defendant was not an innkeeper when elected a township councillor. (*Reg. ex rel. Crozier* v. *Taylor*, 6 U. C. L. J. 60.

5th. That the re-appointment, by the council of 1859, of Mullins to the office of treasurer, was a discharge and termination of his appointment by the council of 1858, and consequently a discharge of his sureties for any time subsequent.

6th. That the annual appointment of treasurer, coupled with the fact of the acceptance of new sureties, shows that the council only considered the office an annual one, and that the treasurer's sureties were only liable for one year.

7th. That unless there is really existing between the council and the treasurer a claim or demand *bona fide* in dispute, for which the defendant is responsible, his being a surety on the bond is not a disqualification. (*Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. page 44.

8th. That if defendant is disqualified, relator is not entitled to the seat; he (the relator) not having notified the defendant and also the electors, previous to the election, of his (the defendant's) disqualification and the grounds thereof. (*Reg. ex rel. Coleman* v. *O'Hare*, 2 U.C. Prac. R. 18; *Reg. ex rel. Clark* v. *McMullen*, 9 U. C. Q B. 467.)

LEGGATT, Co. J.—The first point to be determined in this case is, whether or not the defendant John McMahon was an innkeeper on the seventh day of January last, the day upon which municipal elections were held for 1861. Innkeepers are specially disqualified as members of a municipal council by the 73rd clause of the act relating to municipal institutions; and it is not material, I presume, whether they are licensed innkeepers or not. If the Legislature intended that licensed innkeepers alone should be ineligible, there would have been no need of mentioning them by name among those who are disqualified, as the mere fact of their taking out a license would make them incompetent under the latter part of the same clause. The defendant contends that he has not been an innkeeper since the latter part of 1859, he having then leased the tavern stand to one Ellen Mullins.

The only evidence of this first lease that we have is that of McMahon himself, uncorroborated by the affidavit of any other person. Some evidence is required other than that of the party himself, where the truth of the case does not appear, as it frequently does, in the affidavits filed in answer by the opposite party.

Now, the fact of this lease having been made is contradicted, or rather, circumstances are shown in the affidavits of the relator which are incompatible with such a statement, viz., that Ellen Mullins, the person to whom McMahon alleges he leased the tavern stand, was away in Detroit, out at service as a hired servant, since the month of May last, and that the business of the tavern since it was first opened by McMahon to the present time has been conducted by McMahon personally. The facts in this case, so far as the lease to Mullins is concerned, are very similar to the case of *McKay* v. *Brown*, decided by Judge McKenzie, and reported in 5 U. C. Law Jour. 91. As, in that case, among other things, as in this, there was no actual change of possession, McMahon remained in possession the whole time. The learned judge's remarks, and the cases cited by him, in *McKay* v. *Brown*, relative to change of possession, apply forcibly to this case.

So far, then, as Mullins's lease is concerned, I am of opinion that it was not *bona fide*, and that up to the day of the election McMahon was an innkeeper within the meaning of the statute.

We have next to examine the effect of the lease to Butler. The lease is dated and was executed on the eighth day of January, 1861, and the term is to take effect and be computed from the seventh day of January, or the day before. From the affidavits of McMahon and Butler the tenant, it appears that they had had several conversations together in the month of December last, about leasing the tavern stand;—and here I must remark that McMahon treated his former tenant, if so she was, Ellen Mullins, rather cavalierly, for it does not appear that she was consulted in the matter, or that her former lease was terminated by a notice to quit or otherwise. On the seventh day of January, the day of the election, they, McMahon and Butler, came to an arrangement as to the terms of a lease, and agreed that a formal lease should be drawn up and executed the day after, viz., the eighth day of January, which was done. Although Butler swears that he took possession of the premises on the 7th January, I do not think it was of such a nature as to make the lease binding, because it was not an exclusive possession, the defendant McMahon still remaining to all intents and purposes with his family in the house; and I am of opinion that the lease or agreement was not consummated or perfected until the 8th January, when a written lease was executed.

The lease to Butler may be *bona fide;* but I think I can come to no other conclusion, from all the evidence in the case, than that McMahon had been, for some time previous to the execution of the lease to Butler, sole manager and proprietor of the inn known as the "Belle River Hotel," entertaining travellers and strangers; and that if he ceased to have any connection with the hotel as proprietor or manager, he did not so cease to be connected therewith until the execution of the lease in question to Butler; and that on the 7th January, 1861, the day of the election, he was an innkeeper within the meaning of the statute, and therefore disqualified as a councillor.

As to the second objection taken to the defendant McMahon, viz, that at the time of the election in January last he was security for the treasurer of the municipality of Rochester, having decided that the defendant is disqualified as an innkeeper, it is unnecessary to determine the second objection; nevertheless, since the question has been brought up, I do not hesitate to express an opinion upon it.

In 1858, one John Mullins was appointed treasurer of the municipality of Rochester, and the defendant and one Robinson became his securities, by entering into a bond with the corporation, conditioned that if (among other things) John Mullins should well and truly perform all and singular the duties of treasurer of said municipality for and during his official term, and until he should deliver all the property which he might receive as such treasurer to his successor in said office, and should keep just and true accounts of all property belonging to said municipality that might come into his hands, &c., then to be void; otherwise, to be and remain in full force and virtue, &c. The argument that at the time this bond was signed it was understood by all the parties executing it as sureties that they were only to be held responsible for the due discharge of the treasurer's duties during the year 1858, has no weight. The bond is a sealed instrument, and we must look to the wording of the document itself, and not to anything that may have been understood at the time, for a proper construction of its terms. The bond itself is not limited to 1858, but the parties are bound for the faithful discharge of the duties of the treasurer during the term of his office. He is still treasurer of the municipality, having been reappointed from year to year. The fact of the treasurer giving other securities in the two following years, does not, in my opinion, necessarily release his first sureties. I am inclined to think that the bond signed by McMahon is a continuing security

Assuming, however, that it was confined, in as many words, to the year 1858. At the end of that year the auditors found a balance of $685 85c. against the treasurer. This the defendant

contends, however, was paid during the succeeding year 1859; but at the end of that year a still greater balance was found against the treasurer.

The bond is binding against the sureties until the balance against the treasurer for the year 1858 is accounted for to the municipality, or until they choose to release or surrender it. (See in the matter of arbitration between *The Corporation of Eldon and Daniel Furguson and Israel Furguson*, 6 U. C. Law Jour. 207.) Of course my decision does not determine this point; but if I am satisfied that there is a claim in good faith subsisting—a matter of contract really to be settled between the municipality and their treasurer, it is sufficient. (See *Reg. ex rel. Bland* v. *Figg*, 6 U. C. Law Jour. 44.) Now I think that at the time of the election there was something to be settled by the treasurer; and that therefore, the treasurer's bond for 1858, not being yet discharged, released or cancelled, the defendant must be held to be disqualified on that ground also.

No stronger evidence of the necessity of such a provision in the statutes, which disqualifies a person as a councillor who has at the time of his election an interest in any contract with or on behalf of the corporation, can be found than this very case. Application had been made to the corporation in 1860, for Mullins's bond for the year 1858, and the council then refused to give them up; but no sooner does McMahon get in, than it is ordered to be delivered up, on a motion seconded by the defendant himself, and carried by the casting vote of the reeve.

Before I can declare the relator elected in the place and stead of the defendant, I must be satisfied that the electors were notified at the commencement of the election that the defendant was disqualified, and the grounds of disqualification especially pointed out to them. No evidence to that effect has been produced on the part of the relator. He did object to the defendant as a candidate, but not till after eight or nine votes had been polled, and he did not then state the grounds of objection. (See *Regina ex rel. Dexter* v. *Gowan*, 1 U. C. Prac. R., 104; and *The Queen ex rel. Davis* v. *Carruthers*, Ib. 114.

My judgment is, that a writ do issue declaring that the defendant was disqualified; that there be a new election for the office; and that the defendant do pay the relator's costs.

ASSESSMENT CASES.

In The Matter of the Appeal of the Sisters of Charity of the City of Ottawa.

Assessment—Exemptions.

Held that the Institution of the Sisters of Charity in the City of Ottawa is "a Public Hospital" within the meaning of the assessment Act.

Quære if a "Poor House" or "Alms House" within the meaning of the Act.

Semble even if so the parcels of land assessed in this case could not be deemed "real or personal property" "belonging to or connected with the same" so as to be exempt from taxation. (26 June 1859.)

The Corporation known as the Sisters of Charity of the City of Ottawa, appealed under the provisions of the 28th Sect on of the Assessment Act of 1858, against the decision of the Court of Revision, in the City of Ottawa, declaring that 26 town lots, the property of the said Sisters of Charity, are subject to taxation, whereas the Sisters of Charity contended that the property was exempt, under one or other of the sub-divisions of the sixth Section of the Assessment Law of 1858.

It appeared that the appellants were incorporated by an Act of Parliament, passed in 1849. The preamble of the act runs as follows:

"Whereas an association hath existed for several years in Bytown, in Upper Canada, under the name of *La Communauté des Reverendes Sœurs de la Charité*, and hath established an hospital for the reception, and care, of indigent and infirm sick, of both sexes, and of orphans of both sexes, to whom they impart a Christian Education in conformity with their condition in life, and, whereas the said ladies have, by their Petition, prayed that the Association may be incorporated, and in consideration of the great benefit which must arise from the said Institution, it is expedient to grant their prayer It is, therefore enacted, that Les Reverendes Sœur Elizabeth Bruyere, Elenore Thibodeau, and others therein named, be a body, politic and corporate, in deed and in name, of *La Communauté Des Reverendes Sœurs de la Charité*, with power to hold, possess and enjoy lands lying within this Province, not exceeding in yearly value £2,000."

The second Section of Act provides, "that the rents, issues, and profits of all property, real and personal, held by the corporation, shall be appropriated and applied, solely to the maintainance of the members of the corporation, the construction and repair of the buildings requisite for the purposes of the said corporation, and to the advancement of education, and the payment of the expenses to be incurred for objects legitimately connected with, or depending on, the purposes aforesaid."

This corporation has a building known as the General Hospital, erected upon an enclosure containing 14 Town lots, and which of course were not assessed. The 26 lots, which were assessed, and against which assessment the Sisters of Charity appealed, are situated upon different streets, and at some distance from the enclosure, upon which the Hospital stands, and are detached even from each other, and not forming one connected area in themselves. It appeared, however, that they are all enclosed and cultivated, and the produce of them used by the members of the corporation.

The sixth section of the Assessment Act* declares that the following property shall be exempt from taxation, viz:—All estate and property belonging to the Crown, or held in trust for any body or tribe of Indians, every place of Worship, every Churchyard, or Burying-ground, the real estate of any University, College, Incorporated Grammer School, or other Seminary of Learning, or real estate held in trust for the same, so long as such real estate is actually used and occupied by it, but not if occupied by others, or unoccupied, every Public School House, Town or City Hall, Court House, Gaol, House of Correction, Lock-up House, or Public Hospital, with the land attached thereto, or on which the same is erected, and the personal property belonging to each of them. Every Public Road and way, or Public Square, and the property belonging to any Township, Village, Town, City, or County, if occupied for the purposes thereof, or unoccupied: the Provincial Penitentiary and the land attacted thereto.

The fourth sub-section,† then declares that every Industrial Farm, Poor-House, Alms-House, House of Industry or Lunatic Asylum, and every house belonging to a Company for the reformation of offenders, and the real and personal property belonging to, or connected with, the same shall be exempt from taxation.

Armstrong, Co. J.—In approaching this case, it is, in the first place, necessary to see and determine what the corporation called the Sisters of Charity really is. The Assessors and the Court of Revision for the City of Ottawa, contend that it is a Public Hospital, as named in the second sub-division, of the 6th Section of the Assessment Act, and nothing more, and that the lots of land in question are not attached thereto, within the meaning of the statute, and, consequently, not exempt from taxation, while the Sisters of Charity contend, that the lands being occupied and cultivated by them, and the produce used in the establishment, they are, therefore, entitled to be exempt on the ground, that the Institution is not only an Hospital, but also a Seminary of Learning. They maintain that the Institution is also an Alms House or Poor House, within the meaning of the 4th sub-Division of the sixth Section of the Assessment Act.

After giving the matter all the consideration and attention in my power, I have arrived at the conclusion that the Institution is neither more nor less than a Public Hospital under the ordinary and popular sense of the term; for the Petition, on which the act of incorporation is passed, sets forth, that the Association under the name of *La Communaute des Reverendes Sœurs de la Charite* had established an Hospital, for the reception and care of indigent and infirm sick of both sexes, and of Orphans of both sexes, to whom they imparted a christian education, in conformity with their condition in life. The Sisters of Charity only pray to be enabled to do as a corporation, those things which they were doing as an Association: that is granted to them, and nothing more. The second section of the act of incorporation, in directing how the rents and profits of their real and personal property are to be

* Section 9 of Consolidated Statutes, U. C., cap. 35.

† Sub-sec. 9 of sec. 9, cap. 55.

appropriated, says that, they shall be expended solely in maintaining the members of the corporation, the construction and repairs of the necessary buildings, and the advancement of education and other objects legitimately connected with and depending upon the purposes of the Institution.

It is too much to say, that because the Institution imparts a Christian education to the inmates of the Hospital, as they state in the Petition, upon which the act of incorporation is passed, therefore they are a seminary of learning, within the meaning of the term, as used in the Assessment Act. The fact of educating the sick and infirm inmates of the Hospital and their orphans, cannot give the Institution the character of a seminary of learning —such education is merely incident to the general purposes of the establishment.

Then, can the Institution be called a Poor-House or Alms-House, such as are mentioned in the statute? That it is in some degree a Poor-House and an Alms-House too, must be admitted, for the poor are, to a certain extent, sustained in it, and no doubt alms are also distributed by the ladies who superintend the affairs of the corporation. But then, I cannot bring myself to the conclusion that it is entitled to the distinctive character of either a Poor-House or an Alms-House, such as the Assessment law exempts from taxation, but even supposing the establishment to be a Poor-House or Alms-House, still the lots of land in question are not connected with it, for the words "belong to," used with the words "connected with," at the conclusion of the fourth sub-division of the sixth section of the Assessment Act, must be construed to apply to the personal property, and the words "connected with," to the real property, or perhaps the word "or" may be read "and"—but in no other case can the lots in question be considered connected with the establishment.

The Legislature, in using the terms they do in exempting certain buildings, places of worship, Gaols, Court-Houses, and the like, and then exempting the real and personal property of certain institutions, must have had in view, the nature, object, and purposes of those buildings and institutions. Land as land, they did not imagine necessary for places of worship, Gaols or Court-Houses. Whereas, to a University, College, Incorporated Grammar School, or other seminary of learning, they contemplated lands, to a considerable extent, to be necessary either as a source of revenue or for the more immediate purposes of the institutions, for their lands, wherever situated, if actually used and occupied by them, are exempt from taxation. But, in regard to a Public Hospital, they declare that it is only the real estate, or land attached thereto, or on which the same is erected, which shall be exempt.

One may reasonably infer that the Legislature contemplated, also, that lands, to some extent, might be necessary for the immediate purposes of a University, such as, for botanical gardens for the advancement of science, for places of amusement for students and the like, and that lands might not, at all times, be found directly attached to such establishments. Therefore they exempt the lands of such institutions, wherever situated, if they be used and occupied by them. Had the Legislature taken the same view in regard to a Public Hospital, I presume they would have used the same terms in exempting its real estate. They may have considered that no more land is required for the purposes of an Hospital than sufficient space around the building for air and exercise for the inmates and members of the establishment. I am perfectly aware that the word "attached," as used in the statute, may mean more than being geographically joined to the Hospital, but then had the Legislature intended that lands merely used and occupied by the Hospital, as the lots in question are, should be exempt from taxation, I cannot understand why they should use the words "erected upon or attached thereto," with reference to a Public Hospital, and not make use of any such expression with regard to the lands of a University, College or Incorporated Grammar School.

The Legislature uses the same word "attached," in regard to the Penitentiary; the statute exempts from taxation the Penitentiary and the land attached thereto, which certainly means the land immediately connected with that institution.

The words "real estate" and "land" are used indiscriminately in the several clauses of the Assessment Act, but no stress can be laid on the fact. The term "Real Estate" and the word "land," are but one and the same thing by the express provisions of the statute.

Institutions such as the one mentioned and superintended by the Sisters of Charity of the City of Ottawa, are undoubtedly worthy of the most generous consideration, from the municipal authorities, and indeed the most liberal and extended construction should be given to any law or statute passed for the benefit of their establishment, but the city corporation owe a deep responsibility to their constituents, and are bound to see that all property within the city is fairly and equally taxed, unless the same be exempt by law. Unless Parliament come to the relief of the Sisters of Charity, I am unable to give any other construction to the Assessment Laws, with reference to this particular case, than that held by the Court of Revision.

I am very sorry that the matter could not have been referred to some authority, having more ample means to guide to a correct conclusion than I have had, for I must confess I am not free from doubts as to the correctness of the conclusion at which I have arrived.

The decision of the Court of Revision is confirmed, and the appellants to pay the costs.

COUNTY COURT CASES.

ABBOTT V. SKINNER ET AL.

Arbitration and award—Action—Pleading—Sufficiency of award.

Held in an action of assumpsit upon an award that the general issue of nunquam indebitatus puts in issue the submission to arbitration, the enlargement of the time, and the making of an award according to the terms of the submission.

Held also, that the award sued upon in this cause was not warranted by the submission, and that in making it the arbitrators had exceeded their authority.

(April 25, 1861.)

This was an action of assumpsit upon an award. The plaintiff declared against the defendant for and upon a certain award in writing, made the 24th March, 1860, by David Ford Jones, Isaac Briggs and Robert Brough, by virtue of a certain submission made by the plaintiff and defendants to the award of the said arbitrators of and concerning all matters in dispute then pending between them; and upon and by virtue of which said reference the said arbitrators did award, amongst other things, that the defendants should pay to the plaintiff one-fifth of all expenses that might by him, the plaintiff, be necessarily incurred after the first day of October, 1860, for the mutual benefit of the plaintiff and defendants, in renewing or repairing the water wheel, flume, bulk-head, gates, dams, or any other expenses that might be incurred for the mutual benefit of the plaintiff and defendants; that the plaintiff should have the right to say what repairs should be done, and that the plaintiff should render to the defendants monthly accounts, properly vouched for, of the expense of such repairs incurred as aforesaid, and that within one month from the time of rendering such account, the defendants should pay one-fifth of the amount thereof; and that the arbitrators, by their said award, further awarded that, should it be deemed necessary for the mutual benefit of the plaintiff and defendants to put in a new wheel, flume and bulk-head, or any of them, before the first day of October, 1860, then that the defendants should pay one fifth of the expenses incurred, upon an account of the same being rendered to the defendants and vouched for as was before stated in the said award, as hereinbefore stated for their proportion. With averments that it was deemed necessary for the mutual benefits of the plaintiff and defendants to put in a new wheel, flume and bulk-head before the first day of October, 1860, and that the plaintiff proceeded to put in a new wheel, flume and bulk-head, as by the said award he might do, and that, in accordance with said award, a monthly account of the expenses for the same, as far as they were incurred during the month of August, 1860, properly vouched for, amounting to the sum of $893 94 in the whole, was duly rendered by the plaintiff to the defendants, and that thereupon the defendants, by virtue of the award, became liable to pay to the plaintiff, in one month from the time of rendering such account, one-fifth of the amount thereof, to wit, the sum of $178 79, yet that the defendants have not paid the same.

Pleas—Never indebted; 2nd: That no monthly account has was rendered properly vouched for.

The cause was tried at Kingston, before Judge Mackenzie, at the last March sittings of the Court, when a verdict was taken by

consent for the plaintiff for $160 with leave reserved to the defendants to move in term to enter a nonsuit on three objections taken at the trial.

Articles of submission, dated 24th March, 1860, were put in at the trial, the material parts of which submission and award appear in the judgment of the court.

G. L. Mowat, in April term, obtained a rule first calling upon the plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered pursuant to leave reserved at the trial upon the grounds,

First, That assumpsit will not lie, as the submission and award are under seal.

Second, That the submission does not support the award in reference to the present cause of action as set out in the declaration, in this, that the submission gives the arbitrators power to direct that a lease should be made between the parties to define the conditions and stipulations of the lease, and to set forth in the lease what each party would be bound to do in the use and occupation of the premises, therefore that no cause of action like the present can arise out of the award itself, without the interposition of a lease.

Third, That the action, if any, should be upon a lease made in pursuance of the award, the submission itself not authorizing the making of an award to order work like that on which the present action is brought, though it may authorize an award directing such a stipulation to be inserted in a lease.

Britton shewed cause. He contended among other things that the defendants could not avail themselves of the points taken in the rule under the plea of Nunquam Indebitati, and even if they could, he contended that the award was well warranted by the submission.

G. L. Mowat, supported the rule.

The following authorities were cited, Russell on Awards, 502, 528, 535. *Hodgson* v. *Township of Whitby*, 17 U. C. Q. B. 230, Chitty's precedents, 254.

The counsel for the defendant abandoned the first point mentioned in the rule at the argument.

MACKENZIE, Co. J.—The general issue of Nunquam Indebitatus pleaded by the defendants, in my opinion, puts in issue the submission to arbitration, the enlargement of the time, and the making of an award according to the submission, in other words an award within the terms of the submission mentioned in the declaration is requisite to sustain the present action under that plea. I refer to the case of *Hodgson* v. *The Municipality of Whitby* 17 U. C. Q. B. R., 230, and to Bullen & Leake's Precedents, 288, note (*a*) in support of this view of the law.

As the learned counsel for the defendant has abandoned the first point taken in the rule, there is in reality but one question for the Court to decide. Have the arbitrators exceeded their authority in ordering the defendants to pay one-fifth of the expenses incurred by the plaintiff in the putting in of the new wheel, flume and bulk-head, as mentioned in the declaration, directly, without the interposition of a lease? To arrive at a correct understanding of the matter, each portions of the submision as relate to the subject matter of the present action must be examined.

It is recited in the submission. "Whereas disputes have arisen between the parties, as to the amount of rent the defendants shall pay to the plaintiff for the time they have occupied (a part of certain premises in the village of Gananoque) and to their right to receive from the plaintiff a lease of the premises they the defendants so occupied, and as to the terms of the said lease, it is desirable to refer the same to arbitration as after mentioned. And whereas it is desirable and has been mutually agreed between the parties to submit to the decision and arbitratement of the said arbitrators all other matters in dispute between them, it is hereby agreed that they, the said arbitrators, shall decide by whom the costs which have been incurred in the Court of Chancery and Division Court shall be paid. They shall also further determine the claim of the plaintiff with a contra account of defendant now pending in the Division Court; and shall also award what amount, if any, shall be paid by the plaintiff to the defendants in pursuance of their bill of items hereunto attached; the foregoing, together with the first named matter of dispute, as to a lease, being all matters in dispute between them" After a clause in the submission, agreeing to refer the matters in dispute to David Ford Jones, Isaac Briggs and Robert Brough, or any two of them, follows the agreement bearing principally on the present action; that is to say:—"And it is hereby further agreed that the said arbitrators or any two of them, may, if they think proper, by their said award, direct that the occupation, by the defendants, of the premises shall, at some short period thereafter, cease and determine, and that the same shall be delivered up by the defendants to the plaintiff in good order and condition, or that the plaintiff shall execute and deliver to the defendants or the survivor of them, etc., a lease of a part of the said premises, and they, or any two of them, shall, by their said award, direct who is to prepare the said lease, and within what time it is to be executed and delivered; what rent shall be reserved thereby, and the time of payment of the same, and the duration of the said lease (not to exceed, however, thirteen years), also what part of the said premises, including the use of the water wheel by the said contemplated lessees, and manner the same may be used, and such other regulations and stipulations as they, or any two of them, may think proper so as to prevent disputes afterwards arising as to the parts of the premises the lessees are to occupy, and the manner of using the water wheel and the machinery of the parties respectively, and what other covenants or stipulations they, or any two of them, may think proper, and also what shall otherwise be done by either of the parties respecting the matters in difference."

Mr. Britton has argued the case for the plaintiff with much point and intelligence in favor of the integrity of the award. He has contended that the words, "what shall otherwise be done by either party respecting the matters in difference,' are sufficiently comprehensive to embrace the groundwork of the present action as set out in the award, and its immediate subject-matter as disclosed in the declaration. The matters which were referred to the arbitrators were the matters in dispute between the parties at the time of the submission, which are specified with clearness and precision in the submission itself. It is declared in the submission that the matters in dispute are about the payment of certain costs incurred in the Court of Chancery, and not in the Division Court, a claim pending in the Division Court, and about a certain bill of items attached to the submission 'together with the first named matter of dispute as to a lease, being all matters in dispute between the said parties." The first named matters of dispute, as to a lease, are particularized in the submission as follows: "Whereas the defendants entered into possession of part of said premises under the plaintiff, and have put up certain machinery thereon, which has been worked by the water wheel on said premises, under the promise, as they allege, of obtaining from the said plaintiff a lease of part of the said premises and privileges for thirteen years, from the first day of October, 1857. And, whereas disputes have arisen between the parties as to the amount of rent the defendants should pay to the plaintiff for the time they have so occupied a part of the said premises, and to their right to receive from the plaintiff a lease of the premises they have so occupied, for the period of thirteen years, and as to the terms of the said lease." It certainly does not appear by the submission that there was any dispute between the parties in reference to the repairing or renewing of the water-wheel, flume and bulk-head, or as to the proportion of the expenses to be paid by each party for putting in a new wheel, flume and bulk-head, independent of the dispute about the lease and the terms of it. The dispute between the parties, over and above the costs in Chancery and Division Court and the account and bill of items, is restricted to the amount of rent to be paid by the defendants to the plaintiff for the time they had occupied the premises, their right to receive from the plaintiff a lease of the premises for 13 years, and the terms of the lease. The submission then gives the arbitrators power to direct who is to prepare the lease—within what time it shall be executed, what rent shall be reserved—its duration—what part of the premises should be demised to the defendants, including the use of the water-wheel, and the extent of that use, and the manner in which it might be used, and such other regulations and stipulations as the arbitrators should think proper, so as to prevent disputes afterwards arising.

As the matter of putting in a new wheel, flume and bulk-head, and the proportion of the expenses which should be paid by each party in the event of their being put in, was not referred to the arbitrators by the submission as a substantive dispute, over and above the dispute concerning the giving of the lease and the terms of it, they had no right to make a substantive order in their award, touching the same, or touching the work for which the present action is brought; or to give any independent directions out of the lease concerning the proportion of the expenses to be paid by each of the parties, as they have done according to the award set out in the declaration.

The submission does not support the award in respect of the presentation set forth in the declaration. The interposition of a lease is necessary before the defendants can become liable on a cause of action, like the present under the submission. The arbitrators according to the submission, I apprehend, could direct and order a clause or stipulation to be inserted in a lease to be made in pursuance of their award the alleged cause of action disclosed in the declaration, but they had no authority so far as I can see to order or direct it out of the lease, as a matter independent of, and besides the lease, as they have done according to the award declared upon. The submission contemplated that in the event of the arbitrators, ordering a lease to be executed between the parties in pursuance of the submission, that they should order and direct covenants, stipulations and regulations to be inserted and which would cover every matter in difference, and every matter which might become a source of dispute between the parties, thereafter during their joint occupation of the premises so as to prevent disputes afterwards arising between them as to the occupation of the premises and the manner of using and regulating the water-wheel, and the machinery during the term. Instead of directing such covenants, stipulations and regulations to be inserted in a lease, the arbitrators have by their award, as set out in the declaration, assumed the right to authorize the plaintiff if he thought proper so to do to put in a new wheel, flume and bulk-head, and o order the defendants to pay one-fifth of the expenses which might be incurred, in putting in the same independent of any lease and beside it.

The award set out in the declaration, is not warranted, in my opinion, by the submission produced at the trial. Under that submission, an action like the present cannot be maintained without the interposition of a lease made and executed in pursuance of an award founded on a submission. The rule for entering a nonsuit, therefor, must be made absolute.

Per Cur.—Rule absolute to enter a nonsuit.

GENERAL CORRESPONDENCE.

Contract—Decision—Sufficiency.

To the Editors of the Law Journal.

Gentlemen,—Will you oblige me with your opinion, in the next number of the *Law Journal*, on the following questions:

A. sells B. a pair of horses for $200, and takes a chattel mortgage to secure the amount. Before the mortgage becomes due, A. takes back the horses, with B.'s consent. There is nothing said about cancelling the mortgage. A. advertises the horses, and sells them by auction to C. for $117. A. then sues B. for $83, being the balance of the consideration.

It is not shown that B. had attempted to sell or dispose of the horses, or to remove them out of the county, nor that default had been made in payment.

1. A. having taken back the horses before the mortgage became due, could this be considered as satisfaction; or would A. have the same remedy under the mortgage as if the time for payment had expired, and default been made?

2. The contract being by specialty, could its terms be so varied, by parol, as to give A. the right to sell the horses before default had been made in payment by B, and to proceed for the balance?

Your obedient servant, S. P. Y.

Sarnia, 16th May, 1861.

[No satisfactory opinion can be given on a case so bald as that above stated. Everything depends upon the nature, form and contents of the chattel mortgage, and the intention of the parties when the horses were taken by A. from B. We have no copy of the former before us; the latter is a question of fact, to be submitted to the decision of a jury. A jury might find either that the contract was rescinded, or that there was a re-sale of the horses. If the latter, then a further question would be, whether they were re-sold at the original price of $200, or, in the absence of all stipulation as to price, *at a quantum meruit;* if *a quantum meruit*, then whether they were not worth more than $117, the price paid for them by C. to A, on a sale by public auction. It is certainly a rule at law that a contract under seal can only be discharged by an instrument of equal force and validity; but now that it is open to a party sued in a court of law to plead an equitable defence, we apprehend no practical difficulty would be found in defending an action at law on the chattel mortgage.—Eds. L. J.]

Attorney and clerk—Sufficiency of service.

London, C. W., 29th April, 1861.

To the Editors of the Law Journal.

Sirs,—In consequence of an article in a late number of your valuable journal, several discussions have arisen in regard to the service of students under articles.

I therefore request that you will give your opinion on the following question:

Is the service of an articled clerk, serving with an attorney to whom he is not articled, good? Or in other words, A. and B. are practising attornies, residing in the same place. A. has two articled clerks, but not sufficient practice to keep both employed. One of A.'s clerks, wishing to get a more extensive knowledge of the practice, serves, with A.'s consent, in the office of B., who has already as many clerks as the law allows. Is this service good, and will an affidavit of the facts be sufficient proof of his service under articles?

An answer in your next issue will greatly oblige

Yours, &c., A Student.

[Our opinion upon the facts stated by our correspondent, is decidedly against the sufficiency of the service. We refer to *Ex parte Hill*, 7 T. R. 456; and *Ex parte Brutton*, 23 L. J. Q. B. 290.—Eds. L. J.]

Interpleader—Security for costs.

Picton, 27th May, 1861.

To the Editors of the Law Journal.

Gentlemen,—An answer to the following question in your next issue will much oblige.

Has the judge power, under sec. 8 of Con. Stats. cap. 30, to order an execution creditor to give security for costs, upon an affidavit of the claimant stating that he believes the execution creditor (who resides in the county) is insolvent?

Yours truly, A SUBSCRIBER.

[The claimant, who is made a defendant under an interpleader rule or order, stands in the same position as any other defendant, and is entitled to security for costs, as in other cases (2 Archbold's Prac. 9 Edn. p. 1314); but mere insolvency is not in any case a sufficient ground for security for costs (*Ib.* 1329). We have known at least one learned judge of the Court of Common Pleas, to refuse to order security for costs, under a state of circumstances precisely similar to that stated by our correspondent.—EDS. L. J.]

Tariff of Costs—Fees to Clerks and Deputy Clerks of Crown.

TO THE EDITORS OF THE LAW JOURNAL.

London, May 7th, 1861.

GENTLEMEN,—May I trouble you for an opinion upon the following matters, which would be very interesting to many of your readers in this county:

There has been a new appointment of Deputy Clerk of the Crown and Pleas here, and the difference in the fees now and those formerly demanded by that officer, has given rise to a good deal of dissatisfaction and uncertainty; for instance, formerly five shillings was the fee upon a Certificate of Judgment, no matter when it was issued—one week or three years after the judgment was entered; now, in the latter case seven shillings and sixpence would be charged, as the present Clerk holds he is entitled to two shillings and sixpence for a search; even though he is handed a Præcipe containing all the particulars of the Judgment. Again, there is now a charge of fourpence made for filing every Præcipe, including a Præcipe for the Certificate; also a separate charge made for filing any document or paper and the affidavit of execution or service attached to it; also a fee of sixpence for every search in the Appearance books, which was never heretofore charged in this county.

As to the first charge of seven shillings and sixpence for a Certificate of Judgment, it seems to me the Clerk is obliged to furnish the Certificate for five shillings, and of course a correct one; now he could not possibly furnish a correct one from memory, after a lapse of time, so that to perform his duty he is compelled to refer to his books, and the search he charges two shillings and sixpence for is entirely for his own benefit, and to save himself from the consequences of any error he might otherwise make.

Your obedient Servant,

BONA FIDES.

[1. The Clerk is not, we think, bound to issue a certificate as to a judgment more than three years old upon a mere memorandum of amount furnished by plaintiff's attorney. A search therefore is necessary, and if "exceeding four terms," according to the Tariff the fee is 2s. 6d. Both the Masters of the superior courts of common law at Toronto are of this opinion. Such also is the opinion of more than one learned judge in Toronto. The question however is not now we apprehend of much consequence. The passing of the act abolishing the registration of judgments has rendered it of little account.

2. Though a præcipe is necessary for a writ, we never heard of one being necessary for a certificate of judgment. When filed for a writ we apprehend the Clerk is entitled to charge for it as for any "other proceeding," 4d. The old tariff read "all writs not special, except writs of execution, *including filing præcipe*, &c., 3s. The present tariff reads, "every writ, 2s. 6d.; "filing every affidavit, writ or other proceeding, 4d." The masters in Toronto are of the same opinion as ourselves on this point.

3. The right to charge for filing an affidavit and for each paper annexed and made part of it as a separate filing, is in our minds more doubtful but sanctioned by both the masters in Toronto.

4. As to searches the tariff is express. "*Every* search, if not more than two terms, 6d."—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. BARBER v. LAMB. *April* 30.

Plea, that judgment had been given in respect of the same cause of action in a foreign court—Demurrer to plea.

Where the plea to a declaration for money had and received, was that the plaintiff had impleaded the defendant for the identical causes of action as then sued for, and recovered from, and been paid by, the defendant the sum of £45 and costs, in the Supreme Court of Constantinople, established under 6 & 7 Vic., ch. 94.

Held, on demurrer to the plea, that a good answer was disclosed by it.

Ex. LEES v. SMITH. *May* 8.

Prochein Amy—Security for costs.

Without special circumstances, the Court will not allow an insolvent to sue as *prochein amy* to an infant.

B. C. JARDINE v. SMITH ET AL. *April* 30.

County Court—Verdict of Jury—Duty of Judge to receive it.

The plaintiffs brought an action in the County Court, to recover £6 10*s.* 0*d.* for wine supplied. At the trial he was non-suited, but at the next Court, having brought a fresh action, he obtained a verdict. A new trial was granted, and the jury were discharged without being able to agree upon a verdict. The action was tried a fourth time, when the jury returned their verdict as follows: "In the absence of any order in writing for the wine, we find a verdict for the plaintiff." The judge refused to receive the verdict, and ordered the jury to retire and re-consider it. They said they had considered all the evidence; that their unanimous opinion was, that there should be a verdict for the plaintiff; and that it was of no use their retiring. The judge refused to receive their verdict, and discharged the jury.

Held, that a rule *nisi* might be granted calling upon the judge, the registrar, and the defendants, to show cause why the verdict should not be received and entered upon the minutes; why judgment should not be given for the plaintiff; and why execution should not issue thereupon.

C. P. Brown v. Lymons et al. *April* 23.

Agreement for service and hiring for twelve months certain, the same to continue until three months' notice by either party—Construction of

Where the plaintiff was engaged as a commercial traveller for twelve months certain, at a salary of £150 per annum, and to continue as the same from time to time, until three months notice be given by either party to determine service.

Held, that the traveller could be discharged by a three months notice, expiring at the end of the year.

C. P. Amann v. Damm. *May* 22.

Slander—Privileged communication—Interest of the party so making it.

Where the plaintiff, who was a clerk to a firm, was in the habit for business purposes, of going to the defendant's house, and after one of his visits the defendant missed a box from a room into which the plaintiff went, upon which he went to one of the plaintiff's employers and told him that the plaintiff must have taken the box, as no one else had been in the room.

Held, that this was a privileged communication, and that the words were such as might reasonably be spoken to protect the interest of the party so making them, and that the circumstances were not such from which malice might be inferred.

Ex. Horton v. McMurtry. *April* 28.

Master and servant—Dismissal—Pleading over.

To an action for wrongful dismissal, one of the pleas was that the plaintiff did not serve faithfully.

Held, that after verdict the plea amounted to an allegation of misconduct, and was not a mere traverse of the service alleged in the declaration. The plaintiff, who managed a lard business for his master, the defendant, bought bladders from A. for B., and bought them again from B. for his master. The judge told the jury that, as far as it was a matter of law, the plaintiff had no authority to make the contract with A.

Held, that there was no misdirection.

Ex. Beatson v. Skene. *June* 2.

Slander—Privileged communication—Evidence.

A document in the custody of the head of a government department, suppressed by him on the ground of public policy at a trial to which he was supœnaed, is a privileged communication.

But *semble*, that where the objection is made according to his instructions by a subordinate, the judge has discretion to overrule the objection.

By Martin, B.—That where the judge is satisfied that no harm will ensue to the public service, he may compel the head of a department to produce a document.

Ex. C. *May* 13.

F. H. Collins, *by* H. Collins *his next friend* v. Brook.

Prochein amy—Infant—Attorney—Action for money had and received.

An attorney who, as attorney for the plaintiff in an action by an infant suing by *prochein amy*, has received the damages and costs recovered from the defendant in such action, is liable to the infant in an action for money had and received.

Judgment of Exchequer affirmed.

C. P. Keene v. Beard. *April* 30, *May* 1.

Banker's cheques—Chose in action—Liability of endorser.

Where a cheque on a banker was drawn, payable to A. or bearer, and afterwards endorsed by A.,

Held, that the holder could recover in an action against A.

Q. B. Philips v. Whitehead. *May* 1.

Demurrer—Distress for rent—Replevin—Avowry—Plea in bar—Separate holdings—Joint distress.

In an action of replevin for taking goods as a distress for rent in a dwelling house, and garden produce in a garden, and corn and manure in a close, defendant averred that as to the taking the said goods in the said dwelling house, and the said garden produce in the said garden, he took the same for the rent of the said house and garden then in arrear; and as to the taking the corn and manure in the close, he took that for rent then in arrear for the said close. The plaintiff pleaded in bar, that the defendant did not make a separate and distinct distress in and upon the said dwelling house and garden, for and in respect of the said rent due for the said dwelling house and garden, and also a separate and distinct distress in and upon the close, in respect of rent due for and in respect of the said close, but, on the contrary, made and took a joint distress as for and in respect of the several arrears of rent in and upon the said dwelling house and garden, and also in and upon the said close.

This plea was held bad on demurrer.

Q. B. *May* 17.

Potts v. The Port Carlisle Dock and Railway Company.

Master and servant—Injury to servant—Liability of master.

In order to render a master liable for an injury to his servant, caused by the breaking of a machine belonging to the master, it is not sufficient to shew that the machine was defectively constructed, but there must also be evidence that the master employed incompetent persons to construct the machine.

Q. B. Schlumberger and another v. Lister. *May* 7.

Equitable defence—Replication—Rejoinder—Bill in equity—Common Law Procedure Act.

A Court of law will not allow an equitable defence to be set up under the Common Law Procedure Act 1854, where the defendant has filed a bill raising the same question in a Court of Equity.

Q. B. Ex parte Arthur Thomas. *May* 28.

Attorney—Solicitor—Articled Clerk—Discretion of the Court.

The Law Society have been in the habit, latterly, of examining articled clerks in the term in which their articles expire, even though they expire on a day subsequent to that on which the examination is held.

T. entered into articles of clerkship, which expired two days after the last day of term. On an application to the Court for a rule directing the examiners to admit T. to be examined, on the ground that the attorney to whom he was articled was compelled by ill health to take a partner at once, and was desirous of taking T. into partnership. The Court directed T. to be examined *de bene esse*.

Ex. Swinfen v. Lord Chelmsford. *June* 9.

Counsel—Authority of—Negligence—Responsibility to client—Compromise by, without authority — Special damage — Pleading—Allegations of fraud where action maintained without.

An action will not lie against counsel acting honestly within the scope of his authority, although he pursue a mistaken course.

A barrister, retained by the plaintiff in an issue directed out of Chancery, to try the validity of a will under which the plaintiff in the issue claimed as devisee, without the authority of his client, but honestly believing that he was acting in the best way for her advantage, entered into a compromise with the counsel for the defendant, the heir at law, by which it was agreed that a juror should be withdrawn; that the estate should be conveyed in fee to the heir at law; and that an annuity should be settled on his client, the devisee. His client afterwards was put to costs in opposing an application for an attachment for disobedience to a

rule of court, founded on the compromise, and in proceedings to set aside the compromise, which were successful. In the former proceedings no costs were allowed; in the latter, costs were awarded the devisee.

Held, that no action was maintainable against the barrister for having compromised without authority—first, because, as regards the withdrawal of a juror, that was an act within his authority as counsel, and having been done honestly, although it might be mistakenly, he was not liable; and secondly, as regards the agreement to convey the estate, and accept an annuity, although that was beyond his authority under the retainer, yet, if actionable at all, it could only be so if damage ensued; but the damage alleged or shewn being the liability to costs in the proceedings for an attachment, and to set aside the compromise, that was no ground of damage, since the courts in which these proceedings were taken had adjudicated upon the costs.

Quære, whether, if damage was shewn, the action would lie?

If a declaration alleges a fraudulent breach of duty, and the circumstances are such that an action will lie for mere breach of duty without fraud, the allegations of fraud may be treated as surplusage, and the action maintained notwithstanding proof of fraud fails.

CHANCERY.

M.R. BOCK v. GORRISEN. *March* 16, *April* 23.

Principal and agent—Foreign principal—Agent in London—Purchase of securities—Lien—General balance.

Where a mercantile firm in London is employed by principals abroad as their agents to buy and sell securities in the London market, the London firm are entitled to a lien upon any securities which come into their possession as such agents, for their general balance in account with such principals.

A mercantile house in Hamburgh instructed a firm in London, with whom they had dealings, to buy for them £10,000 3 per cent Mexican bonds at a certain price. The London firm bought the bonds and drew bills on the Hamburgh house for the amount of their account in respect of this transaction, which bills were duly honored and paid at maturity. Before the bonds were handed over to the Hamburgh house, the London firm stopped payment.

Held, that the London firm were entitled to a lien on the bonds so remaining in their possession for the general balance due to them in account with the Hamburgh house.

V.C.W. RE CLINTON. *June* 2.

Practice—Investment—Paying of dividends.

Upon an investment of money paid into courts in respect of lands taken by a Railway company. Ordered that payment of the dividend might be made to the trustees "or either of them."

V.C.S. FOWLER v. ROBERTS. *May* 30.

Practice—Injunction—Garnishee orders—Common Law Procedure Act—Administration Decree.

Where, before an administration decree, the creditor of a deceased person had obtained judgment against the deceased's executrix, and a garnishee order *nisi* against a debtor to the estate, the court, after decree, refused to stay proceedings on the garnishee order.

M.R. NEVILL v. BODDAM. *May* 5, 7.

Will—Construction—Survivors—Period to which survivorship referred.

A testator by his will gave certain sums of stock to, and in trust for, and equally to be divided between his three grand-daughters and his grandson. By a codicil thereto, he revoked the bequests thereby made to or in favour of his three grand-daughters, and in lieu thereof, he directed his trustees to pay the dividends of each of their shares to them for their separate use during their respective lives; and in case any of his said grand daughters, should die without issue, he directed that the share of them so dying should accrue and survive to the survivors of all his said grandchildren including the grandson, in equal shares, the shares of the daughters to be subject to the same terms and conditions as the original share thereof, thereby given to or in trust for them. The grandson and two of the grand-daughters died, leaving the third grand-daughter their survivor. She afterwards died without issue.

Held, that the word "survivor" referred to the period of each share falling in, and that on the death of the last grandchild without issue, there being no survivor at that period, her share was undisposed of, and fell into the residue.

REVIEWS.

THE NORTH BRITISH REVIEW, for May, opens with an article upon "The present movement in the Church of England." The numerous papers which have appeared upon this subject, partake of the established character of the respective periodicals for which they were written; the reader of the *North British*, therefore, from the heading alone, can form a pretty correct idea of the nature of the article to which we have referred. The unhappy events now occurring in America, in turn, give an especial interest to a review of the writings of Alexis de Tocqueville, whose work upon Democracy in America has obtained a reputation rarely granted to productions upon similar subjects written in the early years of their authors. We next have a paper upon the poetry of Robert Browning, a writer whose merit is little appreciated in England, but whose depth of thought and feeling places him near to Tennyson in the scale of poets. Bishop Hurd and his Cotemporaries is followed by a concise statistical article on Railway Accidents. This is again succeeded by one of the numerous reviews which Motley's United Netherlands has called forth. A new edition of the Theory of Vision, by Bishop Berkeley, gives the reader a well written article upon the idealism of that author, calling to mind the days when that which is styled "sensationalism" and "idealism" by turns ruled the world of philosophy. But more pleasingly does it remind us of the kindness of heart which marked the man, as distinguished for his learning as for purity of life and benevolence of purpose. "American Cecession" is the heading of a paper upon the important occurrences on this continent, useful to the reader as being the opinion of a writer who treats of those occurrences at a distance, and with the ability expected from such a source.

THE LONDON QUARTERLY, for April (New York: Leonard Scott & Co.), is received. The first article, headed "The Pearls and Mock Pearls of History," is from the pen of an able writer. It contains more truth than poetry. It exposes the romance of history from the earliest time. The writer tears off the disguise of truth from many a falsehood that has hitherto been accredited as truth itself. The duty is an unpleasant one, but is unflinchingly performed. The second article, headed "Euphuism," brings to light the dramatic works of John Lilly, in his day a singular man, but at present little known. Euphuism is a by-word for literary affectation, and derives its origin from the word "Euphues," the name of a book written by Lilly, recently reprinted in London. The third article is concerning the late Lord Dundonald. The fourth, "Spiritual Destitution in the Metropolis," abounds with valuable statistics. The remaining articles—"German, Flemish and Dutch Art," "African Discovery," "Lord Stanhope's Life of Pitt," "Indian Currency, Finance and Legislation," and "Iron Manufacture"—no doubt will well repay those who have time or inclination to give them a careful perusal. We have not had at our disposal the time necessary to read these articles, but observe that several of them receive great praise from many of our cotemporaries.

THE EDINBURGH REVIEW, for April, is also received, from Leonard Scott & Co. It contains, as usual, some very able and deeply interesting papers. That "On the Essays and Reviews" is especially deserving of attention. This work, rendered famous by an attempt to crush it, is candidly reviewed. Its history is faithfully traced out, and its merits and demerits are also fairly exposed. It is shown that its entire importance has arisen from the onslaught made upon it by persons in high places, and by the wild condemnation of its contents by men who never opened its pages. To some it is infidel—to others too Rationalistic—to others Gospel truth itself. It is famous or infamous, according to the particular religious tenets of the reviewer. Men differ more widely upon theological points, than upon any other subjects of thought. Little (very little) throws the so-called religious world into a wild ferment. Hence it is that we have religious panics about—positively nothing; and hence the excitement about the Essays and Reviews. Were it not that such stupendous efforts were made to crush the volume, it would in all probability have fallen from the press still-born, or at all events powerless for good or bad. The contrary is now the case, and the actual consequence cannot be foretold by any one not gifted with powers of divination. The probability is, that the excitement will die away, and be succeeded by a dead calm. In "Dixon's Personal History of Lord Bacon," we have a surfeit as to this "wisest and meanest of men." Dixon, the author, labors hard to save the memory of his subject from reproach; but his labor is vain. As the problem of the union of high intellectual powers with acts of moral baseness is still attractive to the student of human nature, this review and the book reviewed will no doubt have many readers. "The Election of President Lincoln, and its Consequences," is a paper of the times, and must find many readers on this continent. The remaining papers in this number are, "The Republic of Andorre," "Political Diaries," "Eton College," "Remains of Alexis de Tocqueville," "Autobiography and Letters of Mrs. Piozzi," "The Fables of Fabrius," and "Forbes' Iceland."

THE LAW MAGAZINE AND LAW REVIEW (Butterworth's; 7 Fleet-street, London) is received. This well known and valued quarterly keeps pace in the legal world with all that transpires in the outer world. It is conscious of all that calls for the attention of its lay cotemporaries the *Edinburgh*, *North British*, *Quarterly* and *Westminster*, and occasionally reviews, through "legal specs," subjects which engage the attention of the secular periodicals. Very naturally, therefore, we find in the number before us an article headed "The Essays and Reviews, considered in relation to the legal liabilities of the writers." We also find an article on Lord Bacon, at the same time as we find a corresponding article in the *Edinburgh*. But of all the papers in the number before us, that of the most direct interest to us is the one on "The case of Anderson, the fugitive slave," from the pen of Tapping, the author of the standard work on Mandamus. The object of the writer is to prove that the Court of Queen's Bench in England, when, on the motion of Mr. Edwin James, it authorized the issue of a writ of *habeas corpus* to Canada to bring up the body of Anderson, exceeded its jurisdiction; and this we think he has established in a most able manner. Many of the views of the writer coincide with those previously expressed by us in the *Upper Canada Law Journal;* and it is no small satisfaction to us to find our views upheld by so good an authority on prerogative writs as Mr. Tapping, the author of a work which is *the* authority, at home and in Canada, on writs of mandamus. Our satisfaction is still more increased by finding that the Editors of the *Law Magazine* have seen fit to transcribe the whole of our paper on the Anderson case. In our next issue we intend, with the permission of our valued cotemporary, to make use of the article to which we have referred. We fancy that the precedent set by the English Court of Queen's Bench will never be followed by an English court of justice. It is, according to the universal opinion of all men whose opinion is worth having, bad law,—which means that it is not law at all.

BLACKWOOD'S MAGAZINE, for May, has a paper upon "The Ministry and the Budget." The particular purpose of the criticism is to show errors in the financial propositions of the minister of the Exchequer. Whether this purpose is accomplished or not will depend, as does the success of most political articles, upon the opinions of the reader. Portions of one or two continued stories fill up the number, which concludes with an extended notice of the Life of William Pitt. The high place which this statesman holds in the history of England, will render interesting every line written of one of the most remarkable men of his age.

THE ECLECTIC MAGAZINE, for June, is embellished with a tri-portrait engraving of Jackson, Webster and Clay, three very eminent men in the history of the United States. The present number of this magazine is filled with the usual quantity of matter of the varied and entertaining character which always adorns its pages. Made up of selections from the best current periodicals, the reader here meets the choicest thoughts of the most able writers, and thus reviews at a glance many of the finest papers of the literature of the day.

THE UNITED STATES INSURANCE GAZETTE, for May, is as successful as ever, in information given upon its peculiar subjects.

APPOINTMENTS TO OFFICE, &c.

SHERIFFS.

RICHARD CARNEY, Esquire, to be Sheriff of the Provisional District of Algoma. (Gazetted, April 27, 1861).

CLERKS OF COUNTY COURTS.

JOHN HARVEY GOODSON, of Brantford, Esquire, to be Clerk of the County Court of the County of Brant. (Gazetted, April 27, 1861.)

CLERKS OF THE PEACE.

JOHN D. ARMOUR, of Cobourg, Esq., barrister-at-law, to be Clerk of the Peace of the United Counties of Northumberland and Durham, in the room and stead of Thomas Ward, Esquire, deceased. (Gazetted, May 11, 1861.)

JOHN McPHERSON HAMILTON, of Kingston, Esquire, barrister-at-law, to be Clerk of the Peace and County Attorney, of the Provisional District of Algoma. (Gazetted May 11, 1861.)

NOTARIES PUBLIC.

MAITLAND McCARTHY, of Orangeville, Esquire, Attorney-at-law, to be a Notary Public in Upper Canada. (Gazetted April 27, 1861)

ISAAC PEMBERTON WILSON, of Thorald, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 27, 1861.)

ALEXANDER McNAB, of Toronto, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 27, 1861.)

DUNCAN SHADE GOODING, of Goderich, Esquire, attorney-at-law, to be a Notary Public in Upper Canada. (Gazetted April 27, 1861.)

WILLIAM WILLIAMSON, of Toronto, Esquire, to be a Notory Public in Upper Canada. Gazetted April 27, 1861.)

FREDERIC STEWART MAC-GACHEN, of Toronto, Esquire, barrister-at-law, to be a Notary Public in Upper Canada. (Gazetted May 11, 1861.)

GEORGE R. VANNORMAN, of Brantford, Esquire, Barrister-at-law, to be a Notary Public in Upper Canada.—(Gazetted May 18, 1861.)

PETER A. EGLESON, the younger, of Ottawa, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 25, 1861.)

CORONERS.

JAMES N. McRAE, Esquire, M.D., to be an Associate Coroner for the United Counties of Northumberland and Durham. (Gazetted May 11, 1861.)

JAMES HAY SIVEWRIGHT, Esquire, M.D., to be an Associate Coroner for the County of Kent. (Gazetted May 18, 1861.)

EDWIN GOODMAN, Esquire, M.B., and MICHAEL Y. KEATING, Esquire, to be Associate Coroners for the County of Lincoln. (Gazetted May 25, 1861.)

ARTHUR ARDAGH, Esquire, M.D., M.R.C.S.L., to be an Associate Coroner for the County of Simcoe. (Gazetted May 25, 1861.)

TO CORRESPONDENTS.

"D. C."—Under "Division Courts."

"S. P. Y."—"A STUDENT"—"A SUBSCRIBER"—"BONA FIDES"—Under "General Correspondence."

DIARY FOR JULY.

1. Monday ..... Long Vacation commences. Co. Court and Surrogate Court Terms begin. Recorder's Court sits. Heir and Devisee sittings commence. Last day for County Council to equalize Rolls of local Municipalities.
6. Saturday..... County Court and Surrogate Court Terms end.
7. SUNDAY..... *6th Sunday after Trinity.*
13. Saturday ..... Last day for Judges of Co. Courts to make returns of Appeals from Assessments.
14. SUNDAY..... *7th Sunday after Trinity.*
16. Tuesday..... Heir and Devisee Sittings end.
21. SUNDAY..... *8th Sunday after Trinity.*
28. SUNDAY ..... *9th Sunday after Trinity.*
31. Wednesday.... Last day for County Clerk to certify County Rate to Municipalities in County.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

JULY, 1861.

COLONIAL BANKRUPTCY LAW.

It is not often that we find decisions of English Courts of Justice of especial interest to the Colonies. When any such present themselves, we endeavour to make them known through the pages of the *Upper Canada Law Journal.*

The decision of the English Court of Queen's Bench, in the case of Anderson, is the latest case of the kind to which we have hitherto found it necessary to refer.

One of less exciting interest, but not of less direct effect upon colonial interests, is *Bartley* v. *Hodges*, reported in other columns. In it the Court held that a discharge to an insolvent or bankrupt, under a Colonial Statute, is not binding upon his English creditors not resident or domiciled in the colony.

The proposition, though startling, is not without some show of reason to support it. It is not however for us at present to argue the reasonableness or unreasonableness of the decision, but to announce the fact of the decision.

When we consider that colonial merchants are in general more or less indebted to English houses, the importance of the decision cannot be over-rated. The effect of it may be to render necessary an imperial bankruptcy or insolvency law.

The aim of every good system of bankruptcy or insolvency is to relieve the honest debtor from *all* his past liabilities. No colonial act can, according to the decision mentioned, have that effect as against English creditors resident and domiciled out of Canada.

It is well that this point of law has been at the present time determined. There is among us a strong desire for some effective system of bankruptcy and insolvency law; and the question at once arises, whether under existing circumstances we should be content with one enacted by our own Legislature merely.

In connexion with the case reported, we may mention that it has we believe been held in our Court of Chancery that a bankruptcy vesting order, granted by a subordinate judicial officer in Scotland, under an imperial statute, is effectual in Canada, so as to pass real estate, &c., situate in Canada, to an assignee appointed by such officer.

This state of the law is really vexatious. It is unjust that a sheriff or sheriff's deputy in Scotland, or any foreign dominion, should have power materially to effect the inte, rests of a great body of creditors in this colony in a matter where they are not consulted, and where it would be next to impossible to tender advice or offer opposition if deemed necessary, upon notice of the intended proceedings.

Legislation is much needed on bankruptcy and insolvency. The subject, though surrounded with difficulties might be satisfactorily handled by a person of competent skill and knowledge. Who shall be the person? He will earn a better and more lasting reputation than any advocate of mere theories, however attractive to the popular palate.

What we want is practical legislation, and this is the thing of all others that we have the most difficulty in obtaining.

NOTES ON THE PRACTICE OF BAILING IN CRIMINAL CASES UPON APPLICATION TO THE COUNTY JUDGE.

The preliminary investigation of nearly every indictable crime known to the law, takes place before Justices of the Peace. They either commit the alleged offender for trial before a jury, or they admit him to bail to answer to the charge preferred against him. Their power of bailing is restricted, and should in all cases be exercised with caution, —a Magistrate admitting a prisoner to bail in violation of law, would be liable to a prosecution.

The general duty as to bailing is laid down in the Consolidated Act of Canada, cap. 102, secs. 52 & 53. In cases of *misdemeanor* the party charged may be admitted to bail by one Justice, in cases of felony the order to bail must be made by *two* Justices at least.* The power of bailing may, in either case, be exercised if the Justices are of opinion

* By section 61, a Police or Stipendiary Magistrate may do alone what is authorised to be done by two Justices.

that the evidence adduced does not furnish such a strong presumption of the guilt of the accused as to warrant his committal for trial. Where the charge is murder or treason no Magistrate or number of Magistrates can admit to bail.

With a numerous body of Magistrates, very many of them imperfectly acquainted with the criminal law, an obviously safe general rule is to commit, if the facts in evidence establish a moral conviction in the Magistrate's mind of the guilt of the party accused—and this indeed is the course generally adopted in this country.

The law does not impose upon Magistrates the responsibility of accepting bail in doubtful cases, and does not contemplate their determining upon nice and critical questions of law, or accurately balancing a chain of circumstances *pro* and *con*. It leaves that duty to those who are trained to legal investigations and experienced in such matters.

It is not many years since prisoners could not be heard on an application to be bailed except before a Judge of the Common Law Courts in Toronto, which of course caused much delay and was a very expensive process. Latterly as the administration of the law has become more decentralized, various duties are made incident to the office of County Judge, and to obviate the delay and cost in applications from the outer counties of Upper Canada to Toronto, the County Judges in their several jurisdictions are authorised to bail prisoners committed for trial on criminal charges.

Section 54 of the act referred to—that is as substituted by the act 24 Vic., cap. 15, enacts as follows:—"In Upper Canada, in all cases of felony and of misdemeanor where the party accused has been finally committed as hereinafter provided, any County Judge who is also a Justice of the Peace for the county within the limits of which such accused party is confined, may, at his discretion, on application made to him for that purpose, order such accused party or person to be admitted to bail on entering into recognizance with sufficient sureties before two Justices of the Peace, in such an amount as the said Judge directs, and thereupon such Justices shall issue a warrant of deliverance as hereinafter provided, and shall attach thereto the order of the Judge directing the admitting of such party to bail."

A mode of procedure is not here traced out, but enough may be collected from the several enactments bearing on the subject, to shew the proper practice in such cases.

Suppose, then, a practitioner instructed to apply to the County Judge for an order to bail a party committed for a crime. The first step will be to procure certified copies of the examinations and papers upon which the Judge is to act. If the party charged be actually in gaol, it may be assumed that the papers are filed with the County Attorney; for section 39 of the Consolidated Act before referred to, and section 9 of the Local Crown Attorney's Act (c. 106, U. C.), require the depositions and papers to be "delivered to the County Attorney without delay," and so in respect to Coroners by section 62 of the first named act. The words "without delay" must be taken to mean without unreasonable delay, and in practice the papers are usually sent by the next mail, or are at once sent in an enclosed packet by the constable intrusted with the execution of the warrant of commitment, to be by him delivered to the County Crown Attorney, when he lodges his prisoner in gaol. But if on enquiry it is found that the committing Magistrate has not transmitted the papers to the County Attorney, that officer would doubtless call upon the Magistrate at once to forward them; and that without prejudice to any proceeding that would lie against the Magistrate, for default in not obeying the requirements of the statute. In some cases it may save time to apply directly to the committing Justices: but, unless in very urgent cases, it is better to obtain the certificate from the County Crown Attorney—for unless everything is in form the papers may require to be again sent to the committing Magistrate for correction, and in any case, notice will probably be required to be given to the County Attorney.

The notice of application should be personally served on the committing Justice who has the papers. The following form is suggested:—

To A. B. and C. D., two of Her Majesty's Justices of the Peace for the County of —— (or to A. B., Coroner, as the case may be).

(Consolidated Statutes of Canada, cap. 102, sec. 63.)

GENTLEMEN,—Take notice that so soon as counsel can be heard, His Honor the Judge of the County Court of the County of ——, will be moved to admit to bail —— —— of, &c., committed by your warrant to the common gaol of the County of ——, on a charge of *larceny (or as the case may be)*, and now a prisoner in the said gaol; and you are hereby required, in accordance with the statute in that behalf, to transmit to the Clerk of the said County Court, close under the hand and seal of one of you the said Justices, a certified copy of all informations, examinations, and other evidences touching the offence wherewith the said —— —— has been charged, together with a copy of the warrant of commitment.

Dated, &c.

—— ——

Counsel, or Attorney (*as the case may be*), for the said —— ——.

The Magistrate, on receiving the notice, makes a verbatim copy of the papers, so as to embrace *all* the evidence given, and of documents referred to in it.

All the papers copied, one of the committing Magistrates adds at the bottom the following *certificate*:—

In the case of The Queen v. —— ——, *committed for larceny (or as the case may be).*

I, —— ——, one of the committing Justices in this case, do, in pursuance of the statute in that behalf, certify that the above are

copies of the information, examinations, and other evidences taken before me and —— ——, J. P., touching the offence wherewith such prisoner has been charged, &c.,

Witness my hand and seal this E. F., J. P.,
—— day of ——, 1861. [Seal.] Committing Justice.

The package is then put in a sealed envelope and addressed and marked thus,

"The Clerk of the County Court, County of ——. Informations, examinations, &c., in the case of *The Queen* v. —— ——, charged with *larceny (or as the case may be)*."

If the papers are in the hands of the County Attorney, that officer makes copies and adds the certificate, which of course will be slightly varied from the above form: and he in like manner encloses them in an envelope similarly addressed to the County Court Clerk. The certified copies are in both cases handed to the party applying for them.

The County Judge would probably require notice of the application to the County Attorney, and where the papers are in his hands, the demand of a certified copy, and notice of application may be joined as in the following form:—

County of ——
To wit: } *To E. F., Crown Attorney for the County of*——.

Take notice that on —— next *at noon*, or so soon thereafter as counsel can be heard, His Honor the Judge of the County Court of this County will be moved to admit to bail —— ——, now confined in the gaol of this county, on a charge of ——, under a warrant of commitment by —— ——, Justice of the Peace. And you are required to transmit to the Clerk of the said County Court a certified copy of all the informations, examinations, and other evidences touching the offence wherewith the said —— —— has been charged.

Dated this —— day of ——

—— ——
Counsel (or Attorney) for the said —— ——.

The County Crown Attorney may allow the counsel for the prisoner to have copies made of the papers, adding the certificate merely—or make the copies himself; and the latter would seem in all cases the better course, for until used in court the papers should not be out of the hands of the proper officers. The Crown Attorney will be entitled to payment per folio for the certified copies. A copy also should be made of the warrant of commitment in the gaoler's hands, and verified by affidavit to be laid before the County Judge. At the time appointed, the County Judge hears the counsel for the applicant, and the Crown Attorney, if present, and acts as the case requires.

Notice of the application to the County Attorney should not be dispensed with by the Judge; for by the first sub-sec. of sec. 1 of the Local Crown Attorney's Act, that officer, after receiving the examination, &c., from the Magistrates, shall, "when necessary, cause such charges to be further investigated, and additional evidence collected if required." And it may be that he is about to have the matter further investigated, or is in course of collecting additional evidence, or that the person is charged or about to be charged with another crime. Therefore the necessity of the notice to him.

While the circumstances under which *Justices of the Peace* may bail are stated in the 52nd and 53rd secs. of cap. 102, Consol. Stat. Canada, there appears to be no restriction on the County Judge in the sec. 54 (as altered and recast by the act of last session), immediately following, which confers the jurisdiction. He may "in his discretion order such accused person" to be admitted to bail; but the crimes of treason and murder are expressly excluded from the County Judge's cognizance, and he has no power to admit to bail in such cases.

The amount of sureties in case of an order to bail is regulated by the Judge, and will of course depend on the nature of the crime and the position and circumstances of the party charged; and the Judge may require that the sureties shall justify, by affidavit, or that notice of the time and place of entering into the recognizance, and of the names of the proposed sureties, be given to the Crown Attorney, that he may be present on the occasion, and see that the sureties are sufficient.

The Judge's order may be in the following form:

The Queen v. *A. P., a prisoner in the gaol of the County of* ——
committed on a charge of ——

Upon reading a certified copy of the information, examinations and papers, touching the offence wherewith the said prisoner is charged—the notice of motion to the County Crown Attorney, and affidavits filed; and upon hearing the prisoner by his counsel, and the County Crown Attorney on the part of the Crown—I do order that the said —— —— be admitted to bail, on entering into a recognizance with two sufficient sureties (himself in the sum of $ —— and the sureties in $ —— each), before any two of her Majesty's Justices of the Peace, in the town (*or* city) of —— for his appearance at the next Court of Oyer and Terminer and General Gaol Delivery (*or as the case may be*), to be holden in and for the said county of ——, to answer to the Queen in respect to the said charge of ——, and not to depart the court without leave.

And I do further order that [notice of the time and place of entering into such recognizance, and of the names of the proposed sureties, be given to the County Crown Attorney, that he may be present, if he thinks fit, *or* that] the said Justices do examine such sureties upon oath, as to their sufficiency for the amounts for which they are respectively to be bound.

Dated at —— this —— day of ——

—— —— Judge.

Furnished with this authority, and notice if required being served on the Local Crown Attorney, the counsel for the prisoner proceeds to obtain his discharge, thus:—

The order is brought to two Justices of the Peace, who take the recognizance as required, and issue a warrant of deliverance in the form given on page 1080 of the Consol. Stat. of Canada, and annex to it the Judge's order. Both

documents are left with the gaoler, and will be his warrant for liberating the prisoner, if he stands committed on the particular charge only.—*Communicated.*

HABEAS CORPUS IN THE UNITED STATES.

The right to the writ of habeas corpus is deemed the bulwark of an Englishman's liberty. It is a right which in England can only be suspended under very extraordinary circumstances, and then only upon the recommendation of Parliament.

In the United States, during the present crisis, it appears an attempt was made by the President to suspend the right, or to authorize its suspension by a subordinate military officer. This attempted invasion upon the liberty of the subject has been boldly met and ably defeated by the much esteemed Chief Justice of the United States in a judgment reported in other columns.

The importance of the judgment, and the interest which it must excite in the breast of every friend to constitutional liberty, is our apology for its insertion in the columns of our journal.

In it we see strongly manifested the necessity of placing the judicial, beyond the influence of the executive power. The safety of the subject, his right to the enjoyment of rights most sacred and most dear in every system of constitutional government, must in a great measure, if not altogether depend on the independence of the judicial power.

AMERICAN LAW BOOKS IN ENGLAND.

In an article in No. 20 of the *Law Magazine and Law Review*, for February 1861, page 235, new series, headed "Pleading of the present day," a new edition of Mr. Stephens's work on Pleading is reviewed; and also a work intitled "The Practice in Courts of Justice in England and the United States," by Conway Robinson, 4 vols., Richmond, U. S.

The latter work, by Mr. Robinson, which is not yet complete, was presented by the learned author to the Law Society of Upper Canada, as the volumes came out; and it will be interesting to readers of this journal to notice in what terms it is spoken of by the Editor of the *Law Magazine*. We therefore extract a few passages of the review:

"We have placed at the head of this article the title of "another work, well known in America as Robinson's Practice, because the fourth volume of that work, which treats of "Declarations, has just been brought to our notice. It contains an ample collection of forms, which may be made "available by the modern English pleader. * * *

"It must not be supposed that Mr. Robinson is an advocate "for maintaining the declarations of the worst period of "pleading—the middle period—when language seemed to be "employed for the purpose of confusing thoughts, and enabling "lawyers to live by practising verbal tricks, and setting technical traps. It shews that the system of pleading has had "fictions and subtleties which might be lopped off without "trenching upon any principle of value. In modern times it "has been the aim of legislators and judges to get rid, on the "one hand, of what experience proved to be productive of inconvenience, and to retain, on the other hand, all that was "truly valuable. Even in New York, where common law "pleading on a system is supplanted, it is not considered that "every vestige of its valuable rules has been swept away. * *

"What is the necessary consequence of abolishing special "demurrers, we have already pointed out, and Mr. Robinson's "pages confirm our views. We recommend to the English "lawyer that part of the *third* volume which treats on pleading generally (Title 11), and the rules for framing the declaration (Title 12). He will find it very instructive to compare the nature of, and the delays effected in, pleadings in "other countries beside his own. In England we exclude too "much the benefits we might derive from the experience of "other countries; and for this reason (although we are aware "there are others more cogent to practical men), we should "advise to our readers a perusal of the above named divisions "of Mr. Robinson's work. It will then be seen that the various questions with which law reform here is familiar, are "not confined to one system, but are common to all. The use "and abuse of forms, and rules, of professional habits of accuracy on the one hand, and of affectation and circumlocution "on the other, belong not to one, but to every country and "period. * * *

"Mr. Robinson shews great knowledge of the best precedents of English books, and the principles of law upon which "pleading is based; and practitioners would not find it difficult to discover for themselves how far they could apply this "work in their daily avocations.

"We have spoken hitherto of those volumes only, of Mr. "Robinson, which relate to pleading, viz., part of the third "and the fourth volumes; but we would also desire to draw "the English reader's attention to the other volumes.

"The title of the work is '*The Practice in Courts of Justice in England and the United States*,' and so far is much larger "than what is embraced in ordinary 'books of practice.' It "is not a mere digest of cases, nor does it consist of mere instructions for carrying on a suit; but it contains a body of "law invaluable both in the amount of matter and the manner "of its arrangement.

"It will be found always useful to a member of a liberal "profession, if he follow it in a liberal spirit, to have the "opportunity of comparing the results of systems other than "his own, and to see a subject treated on an original method.

"We cannot pretend to review here all the volumes of Mr. "Robinson's work; but will briefly indicate the contents, "that our readers may be able to judge to some extent of its "character.

"Vol. I. deals with 'the place and time of a transaction or "proceeding,' treating chiefly of the conflict of laws, and the "Statute of Limitations. The second volume treats of the "subject matter of personal actions—in other words, 'of the "right of action.' The third volume treats of personal "actions, with respect to the parties who may sue and be "sued; the form of actions and the frame of the pleadings. "The fourth volume is concerned with pleadings in personal "actions, treating particularly of declarations, and giving "forms thereof.

"There is yet one more volume to follow, in completion, we "presume, of this important work, which has been both conceived and executed in a comprehensive spirit, deserving of "recognition in England."

The work which has called forth such remarks is one of no ordinary merit. Indeed it is not usual for English law periodicals to notice foreign and colonial publications; and when they do so, we may be certain that the work in favor of which the exception is made, is one really deserving of the recognition.

We have for ourselves examined Mr. Robinson's Practice, and can only say that it richly deserves all that is said of it by our London contemporary. The work is one which displays not merely great industry, but unusual ability. It is replete with knowledge. The writer is not content with the habit of too many legal writers, that of stringing cases together, without any attempt to investigate the principles which are imbedded in them. He goes to the root of the case. He gives us principles. His work might be appropriately entitled a work on "The principles of Practice."

Owing to its size, it is of course intended to be more than a mere *vade mecum*. It is a work of solid learning, elaborate and well written.

NEW MAP OF NORTH AMERICA.

Mr. Monk, map compiler and publisher, has issued a new edition of his well known Map of North America.

Extending several hundred miles farther north, it embraces about a million more square miles of her Majesty's dominions than shown on his former map. It gives a complete view of the great valleys of the Red River, Saskatchawan and Fraser's River, and, by showing them all on the same scale with Canada and the other better settled portions of the continent, conveys at once a more ready and correct impression of their vast extent than any map we have seen. It also gives the latest State and territorial boundaries in the neighbouring United States; and as three new Territories and one State were formed during the recent session of Congress, we find the form of nearly all the Territories west of the Missouri River much changed, and their physical features exhibited according to recent Government explorations. This map also shows much more of the divisions and sub-divisions of Central America and the West Indies, than we have seen on any former map.

A map of the World on the same sheet, which shows America in the middle and China in the east and west, by the location of the continents, gives both oceans entire, and demonstrates to the eye the vast importance of completing the great thoroughfare for the travel and commerce of the world across this continent. Toronto, we observe, is in the direct route between London (England) and Canton (China).

The map is conceived and executed in a style that does credit to both publisher and artists. It is useful for the office, as well as instructive for the family circle. The intelligent newspaper reader, having this map, will, at the present time, be able at a glance to trace the places of interest in the neighbouring Republic.

This map, however, must be seen, to be appreciated.

The Agent of the publishers for this Province, James D. Duncan, will, we are informed, be glad to wait upon any one addressing him through the Toronto Post Office. He will be in Toronto for a few days, in order if possible to ascertain the number of copies likely to be required in and about Toronto.

The price for the map, which is a very large one, mounted on rollers, is only $8 50.

JUDGMENTS.

QUEEN'S BENCH.

Present: McLean, J.; Burns, J.

June 17, 1861.

McInnes v. *Scott.*—Action for seduction. Motion for new trial on ground of excessive damages. Rule refused.

Nourse v. *Foster.*—Action for malicious arrest. At trial, plaintiff unable to produce original information, and nonsuited. Rule nisi granted to set aside nonsuit.

Frith v. *Nixon.*—Rule nisi refused.

Vidal v. *Donald.*—Rule nisi granted.

McGuire v. *Lang.*—Action for trespass. Rule nisi refused.

Cutting v. *Talcott.*—Interpleader. Rule nisi refused.

Howland v. *McNab.*—Action on promissory notes. Rule nisi refused.

Alexander v. *Case.*—Action on covenant for title. Rule nisi refused.

Shark v. *Smith.*—Action for a quantity of lumber furnished. Rule nisi granted.

McMurty v. *Swanston.*—Rule nisi granted.

Murphy v. *Case.*—Interpleader. Rule nisi granted.

Reid v. *Weir.*—Award as to amount due on a sub-contract for constructing portion of G. T. R. Arbitrator, in regard to one item, rock excavation, gave a large amount, as defendant asserts, owing to a mistake. Court do not think the arbitrator made a mistake per McLean, J. Burns, J.—The case of *Hodgkinson* v. *Fernie*, 3 C.B., N.S., 189, is explicit as to the propriety of refusing a rule. Rule nisi refused.

Carpenter v. *Henderson.*—Action against attorney for negligence. Verdict for plaintiff. Rule nisi refused.

The Queen v. *Fitzgerald.*—Rule nisi on defendant to show cause why second trial should be set aside, refused, although the proceedings of Quarter Sessions somewhat irregular in granting new trial on affidavit of defendant.

New Brunswick Oil Company v. *Parsons.*—Trial at Toronto, before Robinson, C. J. Verdict for plaintiff. Motion for new trial. Rule discharged.

Meagher v. *Ætna Ins. Co.*—Action on an insurance policy on the steamer Boston; value of vessel $15,000. The insurance company has its chief or head office in Buffalo, New York. *Held*—1st. That the law of Upper Canada must govern the contract. 2nd. That the clauses in the policy as to total loss or partial loss are inconsistent, but held that the contract was for insurance against a total loss. Rule absolute for nonsuit.

Merritt v. *Nevin*.—Rule to reduce verdict without costs.

Thompson v. *Sherwood*.—Verdict for plaintiff at trial, with $10 damages. Leave reserved to enter verdict for defendant. Rule nisi discharged.

Lucas v. *Gzowski*.—Action for digging well in London, on G. T. Railway. It was proved at trial that the work was badly done, and that the defendants had to reconstruct a well at a cost of over $400. Nevertheless the jury found for plaintiff. New trial, costs to abide event.

In Re Hughes, Judge Co. Court, Elgin.—Rule for mandamus calling upon a County Judge to issue an attaching order. It appeared that, on making the application, the attorney for the claimant swore that certain parties, one of whom was the Ju ge, were interested in the money. The Judge requested the affidavit to be withdrawn, which at first was refused, but afterwards withdrawn, and the name of the Judge altered to "another person." The Judge still refused; but afterwards it was shown that he had no interest. He was again applied to; but it appearing to him that his brother-in-law claimed the money, he then declined to interfere. Per Burns, J.—The proper remedy is by certiorari, which is *ex debito justitia*. See Tidd's Practice and cases cited. Rule discharged.

Bellhouse v. *Teguron*.—Interpleader. Application as to the costs of the action. Rule absolute, and each party to bear his costs of application.

Corporation of Cayuga v. *Corporation of Haldimand*.—Mandamus nisi quashed, with costs.

Powell v. *Hyde*.—Rule discharged.

Murray v. *Brydges*.—New trial without costs.

Boardman v. *Gage*.—Rule nisi refused.

Saulter v. *Carruthers*.—Rule nisi to refer back award to arbitrator. Nothing appeared on face of award as a ground for sending back award, or for setting it aside. Rule discharged with costs.

Present: McLEAN, J.; BURNS, J.

June 22, 1861.

Vance v. *King*.—Postponed.

Henderson v. *G. T. R.*—Appeal from County Court of Counties of Frontenac, Lennox & Addington. Appeal dismissed with costs.

In Re Harris and School Trustees.—Motion for mandamus, calling upon trustees to levy a rate to pay an award in favor of teacher. Rule discharged with costs.

Reg. v. *Savage*.—Motion for attachment for wrong return to writ of habeas corpus. It appeared that parties not in custody, and rule discharged with costs.

In Re Hagerman v. *Corporation of Owen Sound*.—Motion to quash by-law. Rule absolute, except as to secs. 9 and 10, with costs.

Bradley v. *Terry*.—Ejectment. Motion for new trial. Rule nisi discharged.

Tabor v. *Corporation of Scarborough*.—Motion to quash a by-law levying a school rate. Rule nisi discharged.

Keachie v. *Burns*.—Rule nisi refused.

Reg. v. *Gillespie*.—Motion to discharge prisoner from contempt. Prisoner to be discharged on payment of all costs, and on filing affidavit of compliance with mandamus, to satisfaction of a Judge in Chambers.

COMMON PLEAS.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

June 17, 1861.

Tisdale v. *Dallas*.—Demurrer. Judgment for plaintiff, with leave to defendant to apply to a Judge in Chambers, within ten days, for leave to amend.

Street v. *County of Kent*.—Special case. Judgment for plaintiff on first point.

Lloyd v. *Clark*.—Demurrer. Judgment for defendant, with leave to plaintiff to amend on payment of costs within a month.

Campbell v. *Erie*.—Rule nisi to enter nonsuit made absolute.

Muir v. *Lawrie*.—Demurrer. Judgment for plaintiff on demurrer.

Joseph v. *Stirling*.—Leave to amend on payment of costs.

Wilson v. *Bleker*.—Rule nisi for new trial refused.

Back v. *Whitney*.—Rule absolute to set aside judgment for irregularity, with costs.

Atkinson v. *Beard*.—Rule nisi discharged with costs.

Hammond v. *Heward*.—Rule discharged, and plaintiff to have judgment on demurrer.

Abbott v. *Skinner*.—Appeal from County Court Frontenac, Lennox and Addington. Dismissed with costs.

Thayer et al. v. *Street and Fuller*.—Judgment for plaintiff on demurrer.

Smith v. *Burton*.—Judgment for plaintiff on demurrer.

Davis v. *Levey et al.*—Appeal from a county court dismissed with costs.

Preston v. *Twigg*.—Motion to set aside verdict, and enter nonsuit. Rule discharged.

Alderdice v. *Distin*.—Rule discharged.

Scripture v. *Curtis*.—Rule nisi discharged.

Mickle v. *Oliver*.—New trial on payment of costs. If plaintiff elect to discontinue as to defendant Storey he may do so, and retain his verdict against the other defendants.

Howland v. *Jennings*.—Question as to whether 20 per cent. interest on a note could be recovered on note after dishonor up to judgment. *Held*, it could. Rule nisi discharged.

Cooper v. *Ewart*.—Rule absolute to enter nonsuit.

In re Abbott.—Rule refused.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

June 22, 1861.

Harvey v. *Pridham*.—Judgment for plaintiff. Richards, J., *dissentiente*.

Meagher v. *Home Insurance Company*.—Rule absolute for nonsuit.

In re Cotter et al. and the Municipality of the Township of Darlington.—Rule nisi to quash by-law discharged with costs.

Dohn v. *Tier et al.*—Postea to plaintiff.

Spry v. *Mumby*.—Judgment for defendant on demurrer, with leave to apply to a Judge in Chambers for leave to amend within a month.

Allnutt v. *Ryland*.—Rule absolute to enter verdict for £255 15s. 9d.

Powell v. *Bank of Upper Canada*.—Rule nisi discharged.

Corbett v. *Johnson*.—Postea to defendant.

Corporation of Essex v. *Park*.—Stands for counsel for plaintiff to say whether he will reduce amount of award to the amount received by the treasurer for Lunatic Asylum tax, otherwise award to be set aside.

Corporation of Essex v. *Prince et al.*—Unless plaintiff elect to accept nonsuit by four days of next term, verdict to be entered for defendant.

Gildersleeve v. *Hamilton*.—Rule nisi discharged.

Kerr v. *Fullarton*.—Rule absolute without costs.

Purdie v. *Watson*.—Rule absolute to amend judgment roll and *fi. fa.* goods on payment of costs and of all costs consequent on the issuing of the writ and *fi. fa.* residue lands set aside.

SELECTIONS.

THE CASE OF ANDERSON THE FUGITIVE SLAVE.

The application for the Writ of Habeas Corpus and Judgment considered; by THOMAS TAPPING of the Middle Temple.

(*From the Law Magazine and Review.*)

The application for the rule in Anderson's case has raised the most important point of colonial law that has occurred within modern times; viz., whether the Queen, by her Court of Queen's Bench at Westminster, has power to issue her prerogative *Writ of Habeas Corpus ad subjiciendum* into Canada, in respect of a matter arising entirely within that province, and over which the Canadian courts have jurisdiction?

The counsel for the applicants had to make out the affirmative of this very important question, and, in doing so, their argument would have been much more lucid, and better arranged, had it commenced with the most recent statute and authority, and worked chronologically back upon the older statutes and authorities, until all that was relevant had been exhausted, and all the observations necessary for the information of the court had been made. Such a course would have been not only in accordance with the practice of our best-trained and most eminent advocates, but have also had the paramount advantage of putting the court in possession of the latest judicial tests, whereby it could accurately ascertain the present legal value of the earlier cases.

But the argument addressed to the court in Anderson's case, was differently cast. It commenced with irrelevant authorities, nearly five hundred years old, about Calais, and, after discussing whether the English Court of Queen's Bench had power to issue a *certiorari* to Berwick, or a *habeas corpus* to Ireland, Guernsey, or Jersey, or other prerogative writs to the Isle of Man, and other British dependencies, this important case was left by counsel for the decision of the court. Not a single act of parliament either of the imperial parliament relating to Canada, or of the Canadian legislature, as to the constitution, jurisdiction, or procedure of its courts of justice, was cited; omissions the more remarkable as their citation would have saved the Court of Queen's Bench at Westminster a great deal of unnecessary doubt and difficulty, and prevented it from assuming a jurisdiction which, it is feared, will be not only opposed by the Canadians, but establish an evil precedent, and tend to unsettle the amicable relations which at present exist between this country and her North American possessions.

The argument had not, however, proceeded far before that very learned judge, Mr. Justice Hill, wishing to rightly direct it, called counsel's attention to the stats. 14 G. III. c. 83, "An Act for making more effectual provision for the Government of the Province of Quebec, in N. America," and the 31 G. III. c. 31, which divides the province of Quebec into Upper and Lower Canada; the citation of which by the learned judge, showed clearly that he wished to be informed how far recent statutory enactments had affected the jurisdiction of his court. But all the information he got from counsel was, "that the latter statute treated the province of Quebec, which comprehended both Upper and Lower Canada, as a colony and possession of the crown of England:" Not a very profound observation, and certainly one not at all complimentary to the judge, who had the act of parliament before him.

After the customary pause that usually follows the answer of a judicial question, the counsel, still persevering with the original scheme of their argument, cited Watson's case, 9 A. & E. 731; Vattel's "Law of Nations," B. I. c. 18, p. 210; 2 P. W. 75; 3 Bac. Ab. 424, 5th Ed. tit. *Habeas Corpus; Rex* v. *Cowle*, 2 Burr. 834, 855; *Grotius de Jure Belli ac Pacis*, b. ii. c. 9; Rymer's Fœd., vol. viii. p. 15, Lond 1709, vol. iii, part iv. p. 135, Hague, 1740; *Campbell* v. *Hall*, Cowp. 204: and were about to proceed further, when another learned judge, Mr. Justice Crompton, with characteristic acuteness, broke in upon the argument, and called attention to the real point in the case, saying—"You must make out that this court has concurrent jurisdiction with the courts in Canada." Whereupon Cockburn, C. J., also observed—"You must show that this court has the power of issuing the writ into a possession of the crown, in which there is not only an independent legislature but an independent judicature." To which the learned counsel replied by way of *petitio principii*, as follows:—"The fact that Canada has both a separate legislature and judicature makes no difference. The superior courts in England have a concurrent jurisdiction with the courts in Canada, as to issuing writs of *habeas corpus*;" and immediately referred to cases about the Isle of Man, *R.* v *Crawford*, 13 Q. B. 613; the stat. 5 G. III. c. 26; Carus Wilson's case, 7 Q. B. 984 (about Jersey), Dodd's case, 2 DeG. & J., 510, S. C. 4 Jur. *n. s.*, 291 (also about Jersey), and in *ex parte Lees*, El. Bl. and El., 828, S. C. 5 Jur., *n. s.* 333 (about St. Helena the writ being refused). At this juncture, Mr. Justice Hill, who during the citation of the last mentioned cases had evidently been pursuing a train of silent reasoning, remarked, "When writs of *habeas corpus* were issued to Ireland, there was an appeal from the courts there to this court;"* and Cockburn, C. J., immediately stated—"Lord Campbell seems to have had considerable doubt whether, in a case like the present, the writ of *habeas corpus* could be issued. He said (El. Bl. & El. 834, S. C., 5 Jur. *n. s.* 334)—'It was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus* could be enforced in such dependencies'"† and, after a few observations in reply from the learned counsel, the Chief Justice reiterated—"The question is, whether the issuing of this *writ is not beyond the ambit of our jurisdiction, and whether the right of issuing the writ is not vested in another jurisdiction; that is, in the courts of Canada.*" To this counsel made reply by erroneously informing the court, that—"The colonial courts in Canada are established by charter of the Crown, sanctioned by the Legislature, and further stated that the party (Anderson) was not in custody under the commitment of any court which had power to try him; nor was the court asked to interfere with any judgment or sentence of any court, but that the party (Anderson) was in custody under the warrant of a local magistrate." Cockburn, C. J., having here observed—"*It is a serious question whether we should attempt to exercise a jurisdiction which we have no means of enforcing;*" the argument ended. The judges retired, and upon their return into court—

SIR A. COCKBURN, C. J., said‡—"We have carefully considered this matter, and the result of our anxious deliberation is, that we think that the writ ought to issue. *We are sensible of the inconvenience which may result from the exercise of such a jurisdiction. We are also sensible that it may be thought inconsistent with that higher degree of colonial independence, both in legislation and judicature, which has been carried into effect in modern times with happy results.* At the same time, in establishing local legislative and judicial authority, the legislature of Great Britain has not gone so far as expressly to abrogate any jurisdiction which the courts in Westminster Hall possess, of issuing writs of *habeas corpus* to any part of her Majesty's dominions; and we find that that jurisdiction in these courts has been asserted from the earliest times, and exercised down to the most recent. We have it upon the authority of Lord Coke (2 Inst. 58), Lord Mansfield, Blackstone, and Bacon's abridgment, that these writs of *habeas corpus* have been and are to be issued into all the dominions of the crown of England, when it is suggested that one of the Queen's subjects is illegally imprisoned. And not only have we these authorities in the shape of *dicta* of eminent judges, and assertions of text writers, but we

* The learned judge was quite correct. See *Fryer* v. *Bernard*, 2 P. Wms., 261 cited *post*, p. 49.

† See also Brac. Lib. 3 vol. 106, 107, par. 4 & 5, cited *post* p. 57.

‡ We give the judgment *in extenso*, not only because it is a useful one to record, but because this article should not, for obvious reasons, go forth to the world without it.

have the practical application of the doctrine in cases in very modern times. The more remarkable instances are where the writ was issued to the islands of Jersey, Man, and St. Helena. Finding, upon these authorities, that the power has been not only asserted, but carried into execution as matter of practice, even where an independent local legislature and judicature were established, we *think that nothing short of a legislative enactment, expressly depriving us of this jurisdiction, will warrant us in withholding the exercise of it when called upon to do so for the protection of the liberty of the subject.* It may be that the legislature has thought fit to leave a concurrent jurisdiction to be exercised by the superior courts of this country and by the colonial courts, as there is in this court and the other courts of Westminster Hall. We can only act on the authorities, and we felt that we should not be doing right, under the authority of the precedents cited, if we refused to issue this writ." *Rule granted.*

So far for the argument and judgment in this important case; and it is worth noting that, during the whole of the discussion, the learnd judges, as we have above shown, endeavoured by every means to ascertain their court's jurisdiction; while the learned counsel for the applicants not only used bold assertion for argument, but also neglected to cite either the Imperial statute 3 & 4 Vict. 35, or the Colonial statutes 2 W. IV. c. 8, and 22 Vict. c. 10, which are, by necessary implication, opposed to the jurisdiction of the court of Queen's Bench at Westminster.

But, before proceeding to lay the last mentioned statutes before the reader, it may be useful to shortly notice the *habeas corpus* acts, 31 Car. II. c. 2, and 56 G. III. c. 100; also to examine *seriatim* the nature and value of the above mentioned cases, premising that counsel for the applicants frankly admitted during their argument, that *no instance could be found of a writ of habeas corpus ad subjiciendum going into Canada,* and that the court of Queen's Bench at Westminster had no power to send such a writ either to Scotland or to the Electorate, all which Lord Mansfield had stated in *Rex* v. *Cowle.**

"THE HABEAS CORPUS ACT" is the statute 31 Car. II. c. 2, which was passed in the year 1678, and by it the writ runs into *any County Palatine, the Cinque Ports,* or other *privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey,* any law or usage to the contrary notwithstanding. Observe, no mention is made of Scotland, Ireland, the Plantations, the Colonies, or the Isle of Man.

The *habeas corpus* amendment act is the statute 56 G. III. c. 100, which was passed in the year 1816, and the territorial jurisdiction of that act is— *That part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or the Isles of Jersey, Guernsey, or Man.* Again no mention is made of Scotland, Ireland, the Plantations, or the Colonies; but the Isle of Man is mentioned for the first time, because it had, about fifty-one years previously, by statute 5 G. III. c. 26, been vested inalienably in the crown.

The reference to THE CALAIS WRIT, 8 Rym. Fœd. 15, although it gave Mr. Justice Blackburn an excellent opportunity of showing his intimate and ready knowledge of English history, yet, as an authority in Anderson's case, was altogether irrelevant and improper. Every body knows, or rather believes, that the unfortunate Duke of Gloucester, the subject of the writ, was kidnapped, secretly hurried to Calais, and confined there in a prison for treason, by the command of his king, and with the alleged assent of the Earls of Rutland, Kent, Huntingdon, Nottingham, and Salisbury, the Lord De Spencer, and Sir William Scrope, who afterwards presented to parliament their appeal against the duke; and, in order that such appeal should be heard, procured the issuing of a writ of *habeas corpus,* directed to the Earl Marshal of Calais, to bring the Duke to Westminster *to answer* the appeal. But that writ was, as Mr. Justice Crompton accurately remarked, not a *habeas corpus ad subjiciendum,* but a *habeas corpus ad respondendum,* i. e., a process of the crown to bring in the Duke to answer a charge. Such a writ *ad respondendum* is still among the *formulæ* of the superior courts of Westminster, and in every-day use when the presence of a prisoner in court is necessary as a party litigant. The following is a copy of the Calais writ, which is given in order that it may be seen that it and the modern writ in Chit. *Practice Forms,* p. 725, are almost identical; and that if the former, so the latter should have been cited:

DE HABENDO THOMAM DUCEM GLOUCESTRIÆ AD PARLIAMENTUM.

A. D. 1897.
An. 31 *R.* 2.
Cl. 21 *R.* 2.
P. 1 *m.* 22.

Rex Carissimo Consanguineo suo. THOMÆ COMITI MARESCALLO, CAPITANEO VILLÆ NOSTRÆ CALESII, *et ejus locum tenenti— Salutem.*

Cùm,

Carissimus Frater noster, EDWARDUS COMES RUTLANDIÆ.
Dilectus Consanguineus noster, THOMAS COMES KANTIÆ.
Carissimus Frater noster, JOHAN. COMES HUNTYNGDONIÆ.
Dilecti Consanguinei nostri, THOM. COMES NOTYNGHAMIÆ. JOHANNES COMES SOMERSETIÆ. JOHAN. COMES SARUM ET THOMAS DOMINUS DE SPENCER, *ac.*
Delectus et fidelis noster, WILLIELMUS LE SCROP, *Camerarius noster,*

Coram nobis, in præsenti parliamento nostro, inter alios appellaverint THOMAM DUCEM GLOUCESTRIÆ *in prisona nostra, sub custodia vestra, de mandato nostro, existentem, de diversis proditionibus, per ipsum et alios prædictos, contra nos, statum, coronam, et dignitatem nostram, factis et perpetratis.*

IPSIQUE APPELLANTES *appellum suum prædictum se optulerint, in parliamento nostro prædicto, secundum Legem et Consuetudinem, in regno nostro Angliæ hactenus usitatas, prosecuturi.*

Nobis humiliter supplicando quitanus ipsum ducem ad respondendum sibi, SUPER APPELLO PRÆDICTO, *coram nobis, in eodem parliamento nostro, corporaliter venire jubere velimus.*

Nos,

Supplicationi prædictæ annuentes,

Vobis MANDAMUS *firmiter injungentes, quòd præfatum Ducem* CORAM NOBIS *et* CONCILIO NOSTRO IN PARLIAMENTO NOSTRO PRÆDICTO, *cum omni festinatione quâ poteritis, salvò et securè venire facias,* AD RESPONDENDUM PRÆFATIS APPELLANTIBUS, SUPER APPELLO SUO PRÆDICTO, *secundùm legem et consuetudinem prædictas, et ad faciendum ulterius et recipiendum quod, per* NOS ET DICTUM CONCILIUM NOSTRUM, IN EODEM PARLIAMENTO NOSTRO, *de eo tunc contigerit ordinari.*

Et hoc nullatenus omittatis,

Et habeatis ibi hoc Breve.

Teste Rege apud Westmonasterium XXI. die Septembris,
Per ipsum Regem et Concilium in Parliamento.

The Calais writ being now before the reader, it is clear that there are three principal and decisive objections against its being quoted as an authority in favour of the rule in Anderson's case, viz.:—1st, It was a *hab. corp. ad resp.,* and not a *hab. corp. ad subj.* 2nd, It was a writ *per ipsum regem et concilium in parliamento,* and not a King's Bench writ, issued by the king's *Justiciarii Angliæ.* And 3rd, It was part and parcel of one of the most unconstitutional, atrocious, and murderous transactions to be found in English history, and therefore should never have been referred to in support of a modern legal right.

In *Rex* v. *Cowle,* 2 Burr. 834 (1759), the argument arose on a rule to show cause why a *writ of supersedeas* should not issue to a *certiorari* directed to the Mayor of Berwick, to remove an indictment into the Court of Queen's Bench at Westminster. It was not a case of *habeas corpus ad subjiciendum,* and, if it had been, it would not have been an authority applicable to Anderson's case, as it arose in 1759, nearly one

* *Rex* v. *Cowle.* Burr. 834.

hundred and thirty years after the passing of the before mentioned statute, 31 Car. II. c. 2, whereby the Court of Queen's Bench at Westminster was empowered to issue such a writ of *habeas* to Berwick, and fifteen years before the passing of the above mentioned imperial Statute, 14 G. III. c. 83, which recognised the Canadian Courts of Civil and Criminal Judicature. But notwithstanding this, the eminent Chief Justice, Lord Mansfield, who delivered the judgment, uttered the following important passages, the latter of which define and explain the power and jurisdiction of his Court in granting the writ of *habeas corpus* to the Plantations. He said, "That writs not ministerially directed (sometimes called Prerogative Writs because they are supposed to issue on the part of the king), such as writs of mandamus, prohibition, *habeas corpus* and certiorari, are restrained by no clause in the constitution given to Berwick. Upon a proper case they may issue to every dominion of the crown of England. We cannot send a *habeas corpus* to Scotland or to the Electorate. But to Ireland, the Isle of Man, the Plantations, to Guernsey and Jersey, we may —and formerly it lay to Calais. *But, notwithstanding the power which the Court have, yet where they cannot judge of the cause or give relief, they would not think proper to interpose. Therefore, upon imprisonments in Guernsey and Jersey, in Minorca, and in the Plantations, I have known complaints to the* KING IN COUNCIL, *and orders to bail or discharge.* BUT I DO NOT REMEMBER AN APPLICATION FOR A WRIT OF HABEAS CORPUS. *Yet cases have formerly happened of persons illegally sent from hence and detained there, where a writ of habeas corpus out of this Court would be the properest and most effectual remedy.*" So that, taking the whole of this case together, and not selecting isolated passages, it is claimed as an authority against, and not in support of, the power of the superior courts at Westminster, to issue a writ of *habeas corpus ad subjiciendum* to Canada.

In support of Lord Mansfield's opinion, we may here conveniently cite without comment the case of *Fryer* v. *Bernard*, 2 P. Wms. p. 261, 262, M. T. 1724 (*not quoted in Anderson's case*), a sequestration case, in which it was held that, although the Court of Chancery in *England* might lawfully grant a sequestration against a defendant in *Ireland*, because the courts of justice here had a superintendent power over those in Ireland, and therefore that writs of error lay in B. R. in England to reverse judgments in B. R. in Ireland; yet that the High Court in Chancery in England could *not* legally grant a sequestration to the governor of *North Carolina, or any other of the Plantations*, because Plantation appeals were to the king in council, and not to the High Court of Chancery in England. The Lord Chancellor, Lord Macclesfield, in giving judgment, said—"But as to the sequestration to be directed to the governor of North Carolina, or any other of the plantations, the court doubted much whether such sequestration should not be directed by *the king in council, where alone an appeal lies from the decrees in the Plantations.* For which reason it seemed, that in such cases the planter ought to make *his application to the king in council, and not to this court.*."

The two cases, i. e., *Carus Wilson's case*, 7 Q. B. 984 (1845), and *Dodd's case*, 2 DeG. & Jones, 510, S. C., 5 Jur. n. s. 333 (1857), in each of which it was held that a *habeas corpus ad subjiciendum* issued by an English court could run in *Jersey*, may be conveniently considered together, as both admit of the same answer—namely, that each of them was decided after the passing of the statutes 31 Car. II. c. 2, and 56 G. III. c. 100, which expressly enact that Jersey shall be subject to the English writ. These cases were, therefore, not in point for the applicant.

Crawford's case, 13 Q. B. 613, was decided in the year 1849, and, although it was referred to by the learned counsel for the applicant, its relevancy is not apparent. It was an application for a *habeas corpus ad subjiciendum*, to be directed to the governor of the Isle of Man. This island was purchased by the crown in 1765, and the purchase confirmed by statute 5 G. III. cc. 26 & 29, whereby the whole of the island and some of its dependencies were inalienably vested in the crown, and became subject to the jurisdiction of the superior courts at Westminster, facts which seem to have been the ground for the court's decision; for, on referring to the report of the case, we find the following marginal note, which is borne out by the judgment:—*Semble.* "That a writ of *habeas corpus ad subjiciendum* runs to the Isle of Man, at any rate since the statute 5 G. III. c. 26, by which the island is vested inalienably in the king and his successors;" and accordingly we find that, though the power of the superior courts at Westminster, to issue their writ of *habeas* into the island, was not given by the previously passed *habeas corpus* act, 31 Car. II. c. 2, yet we also find that it was expressly given by the subsequently passed statute, 56 G. III. c. 100.

It is difficult to ascertain the object for which the case of *ex parte Lees* El. Bl. and El. p. 828, S. C., 5 Jur. n. s. 334 (1858), was cited by the counsel for the applicants. It was not a Canadian case, and the learned chief justice, Lord Campbell, in refusing the rule prayed for, gave utterance to the following expressions as to the doubtful jurisdiction of his court:—"This was an application for a rule for a writ of error, or for a certiorari, or for a writ of *habeas corpus*, for the purpose of quashing a conviction of the supreme court of the island of St. Helena. Some old precedents of writs issued out of this court to the French dominions of our early English sovereigns were cited to show that such writs might lawfully issue. No precedent, however, of any such proceeding, with respect to a dependency like St. Helena, was brought before us; *and it was not at all explained in what manner our writs of error, certiorari, or habeas corpus, could be enforced in such dependencies.**

(*The conclusion in August number.*)

LORD CRANWORTH'S BILL TO AMEND THE LAWS RELATING TO CHARITABLE USES.

(*From the Solicitor's Journal.*)

The mortmain acts may be regarded in three distinct phases —according as we consider their contravention of the rule against perpetuities; the nature of the property to which they relate; or the administration and judicial procedure best adapted to the effective working of corporate or charitable institutions. The present observations are intended to apply only to the second of these heads of inquiry. The distinction of property into real and personal, which runs throughout our entire jurisprudence, has been, perhaps, in no branch of law more productive of inconvenience, than in that of which we are now treating. This complication has been in a great measure owing to the spirit in which the judges have endeavoured to carry out provisions of the Mortmain Acts, and the acuteness which they have consequently shewn in bringing cases within their purview, notwithstanding that the general leaning of the Courts is against a wide application of the doctrine of equitable conversion. But the main cause of the intricacies of the laws of mortmain is to be attributed to the difficulties that always attend the application of this doctrine. The Mortmain Acts apply to donations of real estate, or of property savouring of realty. Pure personalty is left, as at common law, wholly in the power of its owner, to be granted by will, or by a transaction *inter vivos*, without any ceremony being required to perfect the grant except what the law may require in case the donation were made to a private individual. Very many cases, however, have occurred in which land has been directed to be converted into money, or, *e converso*, in which money has been directed to be invested in land, and great

* This is a true test of jurisdiction, as is shown by Bracton, lib. iii. fol. 106, 107 par. 4 & 5, *post*, p. 57.

difficulty has thus arisen in applying to such cases the equitable doctrine of conversion, and determining whether the subject matter of the donation were sufficiently impressed with the character which the donor intended to impart to it. If money were directed by a testator to be laid out in the purchase of land for charitable uses, the sum so bequeathed became, in the eyes of equity, real estate, and the bequest was, therefore, void. The direction as to its conversion into realty, however, might not be sufficiently imperative to alter the legal incidents of the subject of the grant; and hence great litigation has frequently arisen between the representatives of the donor and the declared objects of his bounty. Moreover, a donation might have been intended to be made out of personalty; but, if it becomes necessary to resort to the real estate of the donor so far the gift fails. Before directing the attention of the reader to the remedy for these evils, a brief statement of the origin and development of the mortmain laws, and of some of the cases in which their application has been found most difficult, may facilitate a right comprehension of the necessity, as well as of the efficacy, of the remedy we propose. This is, indeed, almost too obvious to require much advocacy, were it not so long overlooked. It appears to us to consist in the abolition of the distinction of possessions into real and personal so far as the Mortmain Acts are concerned, and the enactment of a single comprehensive measure which will apply equally to all descriptions of property.

Corporations had at common law a capacity to take lands, but not without a license both from the lord of the seigniory and from the Sovereign, the lord paramount of all estates in the kingdom. Under the feudal law, the lord of a seigniory was entitled to certain services or fines upon the succession of the heir, or the marriage of a daughter, of his tenant; and if the latter attempted to settle or alien the land in any manner that would abridge these privileges of the lord, the latter could enter for a forfeiture, the tenant having thus committed a breach of fealty, in violation of the terms of the feudal compact. But a corporation had no daughters upon whose marriage the lord could obtain the usual reliefs, nor heirs, since in construction of law it never died, and "*Nemo est hæres viventis.*" The alienation of lands to such a body being thus a virtual renunciation of all seignorial claims, a license from the lord and from the Crown was necessary even at common law. A similar dispensing power existed in the civil law, which ordained that a special privilege was indispensable to enable a corporation to take lands. *Collegium, si nullo speciali privilegio subnixum sit, hæreditatem capere non posse, dubium non est*, Cod. 6, 8, 24. The English legislature added other restrictions, upon the ground that lands thus alienated were removed from the active use of commerce for a period beyond that allowed by the rule against perpetuities. The true reason, however, why alienations in mortmain were discountenanced by the feudal nobility of the middle ages is probably to be ascribed, not so much to the regard which the aristrocacy of that period entertained for the interests of commerce, as it is to their losses of aids, reliefs, &c., before-mentioned, and also to their jealousy of the growth of ecclesiastical power. Of the many explanations of the primary sense of the word Mortmain offered by Sir Edward Coke, 1 Inst. 2, the most probable is the one preferred by Blackstone, viz., that religious persons being dead in law, lands holden by them were *in mortuâ manu*. The term is at present used to denote all the possessions of corporations, whether these be religious or lay, and is used chiefly to express the dead and unserviceable character of such possessions, so far as the purposes of commerce are concerned. Our readers are, of course, aware that most of the peculiar complications of English law, and its administration in the distinct channels of law and equity, have arisen from the conflict for pre-eminence that has so long existed between the common and the civil law. The statutes which directly or indirectly affect alienations in mortmain indicate, like so many legal epochs, the successive stages of this juridical contest, and illustrate the gradual development of our present law of real property.

Magna Charta (9 Hen. III., c. 36) was the first mortmain statute. It forbids the giving of lands to religious houses, which were almost the only corporations then in being. The statute 7 Ed. I., c. 2, extended the prohibition to grants made to the secular clergy. Notwithstanding this statute, however, grants to such corporations are only voidable and not void, unless they be made for charitable uses, within the meaning of the statute of 9 Geo. II., c. 36, in which case they are absolutely void. A lease for twenty, or even ninety-nine years, appears not to be within the former statute, but the law is otherwise as to lease for a long term. The statute 13 Ed. I., provided that religious corporations should derive no benefit from recoveries, and the same bodies are excepted in the statute *Quia Emptores*, 18 Ed. I, c. 1., by which tenants obtained full power to alien their lands. The 15th Rich. II., c. 2, likewise exempts religious houses from the benefit of trusts. This statute was the first Mortmain Act passed in respect to lay corporations; it extended to these the provisions of the statute 7 Ed. I, c. 2. The statute 23 Hen. VIII., c. 10, which is the Act against superstitious uses, prohibits alienations of land made for devotional purposes to non-corporate bodies, such as churchwardens, &c. Such donations, it appears, were not within the previous statutes of mortmain, and were not void, although constituting a perpetuity. This was allowed probably on the ground of the prevalence of the custom. The statute 9 Geo. II., c. 36, completes our list of the Mortmain Acts. The object of that Act, however, is not to prevent alienations in mortmain, but to prescribe certain formalities to grants of land for charitable purposes. Alienations in mortmain were not made void by the statutes passed prior to this Act, so as to let in the grantor or his heirs, but amounted to a forfeiture of the lands to the superior lord. Mesne lords, however, as also the sovereign, the lord paramount, could dispense with their own privileges—*Quilibet potest renunciare juri pro se introducto.* A license from these was, therefore, efficacious, notwithstanding the mortmain statutes. After the feudal tenures were abolished by the staute 12 Car. II., c. 24, the value of a seigniory became much diminished. Moreover, few mesne seigniories existed even at that period, owing to the long operation of the statute, *Quia Emptories*, which has prevented subinfeudation. The statute 7 & 8 Wil. III., c. 37, accordingly, has vested in the Crown alone full powers to dispense with the statutes of mortmain. But, as at common law, no devise of lands was good, and as corporations are expressly excepted in the statute of wills, 32 Hen. VIII., c. 1, no devise lands to a corporation was valid until the statute 43 Eliz. c. 3, allowed such devises in cases of charities. This exception has been greatly narrowed by the statute, 9 Geo. II. c. 36. The first section of this statute enacts that no manors, lands, or hereditaments, chattels, or sums of money to be laid out in the purchase of lands, shall be given or granted to any person or body politic for the benefit of any charitable uses whatsoever, unless the conveyance be by deed indented, sealed, and delivered in the presence of two witnesses, twelve months before the death of the grantor, and enrolled within six months next after its execution. The same section also enacts that donations of stock, to be valid, should be completed by an actual transfer six months before the death of the donor, and that all grants of land and of money or stock to be laid out in the purchase of land, be made to take effect immediately in possession for the intended charitable use, and be without any power of revocation or reservation whatsoever for the benefit of the donor. The second section exempts grants for valuable consideration from the previous provisions as to the sealing and delivery of the deeds of grant and as to the transfer of stock at the specified periods, respectively, before the grantor's death. Such deeds, however, are equally as liable to all the

other formalities required by the act, as if they comprised mere voluntary grants. The third section of the Act provides that all deeds, not in accordance with the prescribed formalities, shall be null and void. The fourth section exempts from the purview of the Act the two Universities and the colleges of Eton, Winchester, and Wesminster.

A general impression having prevailed that all the conditions prescribed by this Act were waived by the second section as to cases of purchases made by charities, a general disregard of *all* the formalities prescribed by the first section frequently occurred in such cases of purchase. The Act 9 Geo. IV., c. 85, was passed to remedy some of these mistakes. It does not apply to deeds which contain a reservation in favour of the grantor, and it has only a retrospective operation. The chief object of Lord Cranworth's Bill, which is now before Parliament, is to dispense in future, in cases of purchase, with most of the formalities required by the Act of George II. The first section of the Bill proposes that no deed or assurance hereafter to be made for charitable uses, shall be deemed void within the meaning of the Act of George II., by reason of not being indented, nor by reason of reserving to the grantor a nominal rent, mines, easements, covenants as to repair or enjoyment, or a right of entry on breach of such stipulations; nor, as regards copyholds and customary freeholds, for want of a deed; nor, in cases of a purchase for full consideration, by reason of the consideration consisting of a rent reserved to the vendor or to any other person, provided that in all reservations the owner or vendor shall reserve the same benefits for his representatives as for himself. The second section provides that when the uses of a deed of conveyance are declared by a separate deed, the enrolment of the latter alone is in future to be sufficient. The third section validates all past deeds made for full value, under which possession is now held, if such deeds were made to take effect immediately in possession, without any power of revocation, and if such shall be enrolled (if not so already) within twelve months after the passing of this Act. The fourth section provides that if the uses of such deeds have been declared by separate deeds, the enrolment of the latter alone will be sufficient. The fifth section provides that the Act is not to invalidate any deed otherwise good, nor to apply to deeds already avoided or sought to be avoided in due course of law. The acknowledgment of deeds thirty years old, and of any other deeds, which it is impossible to have acknowledged within twelve months after the passing of the Act, is also declared unpecessary prior to enrolment. The last section of the Bill exempts from its provisions, Ireland, Scotland, the two Universities, and the Colleges of Eton, Winchester, and Westminster.

The case of *Jeffries* v. *Alexander* (7 Jur. N. S. 221), decided by the House of Lords last session, illustrates very clearly the various complications to which the present state of the law of mortmain has given rise. In this case a deed of covenant was executed by A. B. five years before his death, whereby he agreed that he would in his lifetime, or that his executors should within twelve months after his decease, but subject to the payment of his debts and legacies, invest a certain sum of money in Consols, in the names of trustees, for certain charitable uses. Part of the property left by the covenantor at his death consisted of personalty savouring of the realty. The House of Lords (Lords Cranworth and Wensleydale dissenting) held, reversing the decision of the Lords Justices, who had reversed that of Sir J. Romilly, M. R., that the deed of covenant, so far as the chattels real were concerned, was within the meaning of the third section of the Mortmain Act, and, therefore, void, although the deed did not *ex facie* violate the provisions of that statute. Where the proceeds of an estate devised to be sold were bequeathed in trust for charitable purposes, Lord Havdwicke held the bequest void, although such a bequest had no tendency to bring the lands into mortmain; *Attorney-General* v. *Lord Weymouth* (Ampb. 25). On the other hand, if a testator whose assets consisted exclusively of a bond due from a deceased obligor, were to make any charitable bequest, the real estate of the obligor would be resorted to if necessary for the purpose of discharging the bequest, *Foone* v. *Blount* (Cowp. 464). The principle of this case, however, which was cited by Lord Cranworth in support of his dissent in *Jeffries* v. *Alexander*, appears to be easily distinguished from that affirmed by the latter case, inasmuch as the resort to realty for satisfaction of the bequest in *Jeffries* v. *Alexander*, was rendered necessary by the donor's own acts; but in *Foone* v. *Blount*, this necessity was owing to the nature of the property of a party who had nothing to do with the bequest, and who could not, therefore, be affected by the Mortmain Act. In *Harrison* v. *Harrison* (1 Russ. & M. 71), a vendor's lien for unpaid purchase-money was held to be an interest within the meaning of the Mortmain Act; inasmuch as the vendor, like a mortgagee, had the legal estate, until a conveyance was perfected.

Assets are never marshalled in favour of charities: *Mogg* v. *Hodges*, (2 Ves. 53). Such bequests, moreover, fail in the proportion in which, if valid, they should have been paid out of realty, or out of personalty savouring of realty, such as mortgages, leaseholds, &c., *Attorney-General* v. *Tyndal* (2 Eden. 597). But a testator may direct his charitable bequests to be paid exclusively out of his pure personalty, and the Court will give effect to his intention; *Robinson* v. *Geldard* (3 Mac. & G. 735.) In *Tempest* v. *Tempest*, 5 W. R. 402, a testatrix by her will gave her real estate to trustees upon certain trusts, and amongst divers specific and pecuniary bequests bequeathed to the same trustees such a sum of money as when invested in consols would produce a certain clear annual income upon trust for certain specified charitable uses. She also directed that the said charitable bequests should be paid *in precedence of other pecuniary legacies* bequeathed by the same will out of such part of her personal property not specifically bequeathed as was by law applicable for charitable purposes, and she gave the residue of her personal property to the trustees upon the trusts in the will mentioned. By an order of Wood, V.C., on further consideration it was declared that the debts and funeral expenses of the testatrix, and the costs of the suit for administering her estate, were primarly payable out of her personal estate savouring of the realty. The ground of this decision would appear to be that the general rule against marshalling in favour of charities was neutralized in this case by the demonstrative character of the charitable bequests; demonstrative legacies not being liable to abate ratably with general or pecuniary legacies on a deficiency of assets. (*Vide* "Smith's Com. Real and Per. Pro.," 826.) On appeal from this order, the Lord Chancellor held that the testatrix did not indicate an intention of exempting the pure personalty from its usual liabilty to contribute ratably with the personalty savouring of the realty to the debts and funeral expenses of the testatrix and that, therefore, the charitable bequests could be enforced only against the portion of the pure personalty which remained after such a deduction. The principle of this decision appears to be that the rule against marshalling in favour of charities is not to be waived, except upon the expression of a clear intention in a will to that effect, and that a bequest of a demonstrative legacy out of a fund of pure personalty is not a sufficient indication of such an intention. These cases, and especially the judgments in *Jeffries* v. *Alexander*, clearly depict the complications which the distinction of property into realty and personalty has produced in this branch of law.

The laws and procedure relating to the administration of charities are in a very unsatisfactory state, notwithstanding that the reports of commissioners on the subject fill twenty eight volumes folio, and cover 28,000 pages. Upon this branch of the laws of charites we do not offer any comments at present. We merely suggest that, while the administration of

charitable funds is, no doubt, wholly distinct in its juridical relations from the laws which should regulate charitable donations and bequests, yet we would gladly see the whole mechanism, as well as the theory, of charities provided for by a single comprehensive enactment. Partial legislation is seldom desirable. By the Endowed School Act of last session, trustees of schools were bound to open them to Dissenters, without imposing any conformity to the Church of England. As an alleged corollary to this Act, the Trustees of Charities Bill, lately before Parliament, proposed that the appointment of the trustees of schools should be made without reference to religious qualifications. This Bill, if passed, might have been also found to be unequal even to the object of its author, as also wanting in harmony with the other parts of the system. But if the administration of charities was provided for on the same principles, and by the same statute that regulated charitable donations and bequests, the chances of an incongruity between the theory and the working of these institutions would be greatly obviated. We regret that Lord Cranworth does not propose to deal with the whole law of mortmain, and submit a single comprehensive measure, which would be calculated to obviate the existing causes of difficulty. We do not see why purchases made by charitable institutions should be subjected to peculiar restrictions as to the formalities of conveyancing. If the accumulation of wealth by charitable corporations should be discountenanced upon grounds of public policy, let the law declare this. But is is somewhat absurd to allow these corporations to take as much personalty, and buy as much realty, as they can, but subject to restrictions which are necessarily troublesome and also frivolous.

The main cause of the intricacies of the laws of mortmain is, doubtless, to be referred to their applying merely to grants of realty. The first Mortmain Acts applied only to donations of land, as the personal property in the kingdom in those times was comparatively trivial, and incapable of conferring political power upon its possessors. The subsequent Mortmain Acts followed in the same track, and thus, in the Act of George the Second, we find no mention of personal property, except such as is directed to be converted into realty, although at that period the personalty of British subjects was of very considerable value. If the principle, then, of the Mortmain Acts be politic, they should, surely, apply to that description of property which at present constitutes so large a portion of the national wealth. The importance of extending their provisions to personalty is still greater than can be indicated by any estimate of the relative value of the personalty and the realty of British subjects, since the real estate which is not tied up in family settlements, and which alone can be granted to charitable or any other uses, is the only realty which the Mortmain Acts can affect. This amount of realty is, we may assume, at any given time, not a very large proportion of the whole landed wealth of the kingdom. On the other hand, the proportion of the whole personalty of British subjects, which is not out of the reach of transfer or donation, is always very great, and it is with this amount the proportion of disposable realty is to be compared. The laws of mortmain, then, have provided only for that part of the national wealth which, in respect to our present inquiry, is far the less valuable; while the distinction between realty and personalty, which these laws recognise, have been, as we have shown, productive of immense litigation. Land, indeed, affords, by reason of its indestructibility, a basis of peculiar value for the adjustment of political rights, and for securing an independence for an unborn generation; and to this limited extent we consider that the distinction which our law takes between real and personal property, has had very beneficial results. But when we find this distinction unnecessarily maintained in other branches of law, we should recur to first principles, and not perpetuate an undue extension of antiquated and subtle rules in a state of society and of national wealth, to which those distinctions were not originally intended to apply. Our mortmain laws, then, it is obvious, should equally relate to personalty and realty. Moreover, the equitable doctrine of conversion has so confused the boundaries of real and personal estate, that unless the former species of property greatly preponderated in value over the latter, the expensive distinction should be abrogated. It has not been our intention to have discussed in this paper the political phases of the laws of mortmain. The present principle of these laws is perhaps sufficiently sound, as after a license is obtained by the intended donee, the subject has full power to grant away all his property during his life, or at least before the period likely to precede the approach of his last illness. The law ordains, wisely, we think, that a testator should not selfishly enjoy his property during life, and then, on his death bed, with a view to his own spiritual good, cheat his relations or expectant heirs, or other realtives. This rule of public policy is not likely to conflict with the religious opinions of any class. But, whatever may be the principles of public policy which the legislature shall adopt for its guidance as to the laws of mortmain, it is, we think, an indispensable condition to the salutary operation of those laws, that they should make no distinction between grants of real and of personal property.

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be addressed—"The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 147.)

Thus by operation of law certain Court Divisions may be established, as for a junior county, and will continue as they were before the separation, until altered by order of sessions. But as the number, limits, and extent of such divisions, and the designation of the Courts will in general but ill accord with the new order of things, the obvious duty of the magistrates assembled at the *first* general Quarter Sessions of the Peace for the new (junior) county, is to exercise the power given to them by the act for the appointment of new divisions for the county. The words, "*until* the justices," &c., plainly assume that such is to be done at an early day; in the meantime provision is made by the clause for continuing the Courts as established, and the business thereof.

As regards a senior county, on the dissolution of a union, section 14 enacts, that—

"At the first sittings of the General Quarter Sessions of the Peace for any senior county, after the issue of any proclamation for separating a junior from a senior county, the justices there present shall appoint the number (not less than three, nor more than twelve), the limits, and extent of the several divisions within the county, and the time when such change of divisions shall take effect; but if the justices do not make such change at the first sittings, they may do so at any other sittings of such Court, and a less number of justices shall not rescind or alter any resolution

or order made by a greater number under the provisions of this section."

The language of this section is, it will be noticed, express and positive. The justices of the senior county *shall* (the direction is imperative), at the first sittings of the Court of Quarter Sessions, appoint new Court divisions, as under section 8; and, moreover, *shall* appoint the time when such change of divisions is to take effect. The justices neglecting to make the change at the proper time, are not indeed *concluded* from acting, but the permission to do so at another sitting would not justify the omission to perform the duty at the first sittings of the Court.

Every order of sessions altering Court divisions ought to be made to take effect at a future day, and so appear on the face of the order. Sudden changes in the Court divisions would produce confusion in the business of the Courts, and cause public inconvenience: and a reasonable interval should be allowed between the publication of the order, and the time it is to take effect, to enable proper arrangements to be made for continuing to completion pending business, and to give the officers of the Courts affected, and to the public resorting to the Courts, timely notice of the change.

That such orders as these were not designed by the Legislature to come into force at once, may be collected from the language used in the 11th and 14th sections: and indeed the practical difficulty attendant on an abrupt change is so obvious, that it need not be enlarged upon.

While ample power has been given to justices in sessions, for increasing the number of divisions, for consolidating two or more, or for taking a part from one division and adding it to another to suit public convenience,—their every act in respect to these Courts, is subject, as we have seen, to this general restriction, that "a less number of justices shall not alter or rescind any resolution or order made by a greater number" (secs. 8 and 14). This, in the nature of things, would probably be held as law—the express provision gives emphasis to the prohibition. Alterations should be sparingly made in established Courts, and then only on public grounds. Constant changes in the local Courts are most embarassing to suitors, and disturb the general economy of the Courts. "Orders and resolutions" are both named, the Legislature probably having in view not only orders for appointing and altering Court limits, but also correlative resolutions of a precautionary character—such, for instance, as would prevent the body of magistrates in a judicial district being taken unawares, and changes made which would ultimately be disapproved in a full Court of Quarter Sessions. In view of the provision referred to, the name of every magistrate present, when any order or resolution under the act is passed in Quarter Sessions, should appear in the minutes of the Court.

The following section provides for a separate record of all orders of sessions relating to the appointment and alteration of Court divisions:—

"The Clerk of the Peace, in a book to be by him kept, shall record the divisions declared and appointed, and the time and places of holding the Courts, and the alterations from time to time made therein, and he shall forthwith transmit to the Governor a copy of the record." (Sec. 15.)

This record may be made by entering the orders of sessions with a proper caption, shewing the Court at which they were made, and the names of the magistrates present. *The places of holding the Courts* cannot be entered by the Clerk of the Peace, till he is informed thereof by the judge, whose duty it is, under the 6th section, to appoint them. *As to the times of holding the Courts*, it is not so clear what is the proper course; it may be that instantly the entry is to be made "once in every two months," in such and such Courts, and "once in every six months" (*or as the case may be*), in such divisions as the justices (acting under sec. 7), may certify to the expediency of holding a Court less frequently than once in every *two* months; or that the Clerk of the Peace first receives information from the judge, and then makes the entries. The justices' certificate has no force without the order of the Governor, which order is communicated to the judge; and the judge may, *in his discretion*, hold any Court *oftener* than once in two months; so that it is he only who can give *full* information to the Clerk of the Peace. And therefore the last suggested mode of complying with the requirements of the clause seems the more correct—indeed the only one that will enable full entries to be made in harmony with all the enactments.

The entries in this book are of such a public nature, that an examined copy or extract therefrom certified as such, and signed by the Clerk of the Peace, would be admissible in any Court of Justice, or before any person having, by law or consent of parties, authority to hear, receive, or examine evidence (Consol. Stat. U. C., cap. 33, sec. 6).

Intimately connected with the duty of appointment and alteration of Court divisions, is that set forth in section 7, as follows:—

"If the magistrates of any county in Quarter Sessions assembled, certify to the Governor that in any division of the county, from the amount of business, remoteness or inaccessibility, it is expedient that the Court should be held so often as once in every two months, the Govenor in Council may order the Court to be held at such periods as to him seems meet, and may revoke the order at pleasure, but a Court shall be held in the division at least once in every six months."

Where a judicial district is extensive and portions of it but thinly populated, the public interests may require the

formation of a Court division in a remote or isolated settlement, perhaps approachable only at some seasons of the year, while to hold a Court in such a division six times in the year would be uncalled for and unnecessary, the local magistracy, who have the best means of knowing, are made the judges of this, and may certify as to the expediency of reducing the number of Court sittings. The considerations upon which this question of expediency is to be resolved, are—1. The amount of business for the particular Court: 2. The position of the division as to distance from the more settled parts, *i. e.*, its "remoteness:" and 3. Its unapproachableness; not absolutely, of course, but its comparative inaccessibility. If, then, the particular locality would furnish only a few cases in the year, or is far away from the business part of the county: or, from want of roads or other causes, is accessible by the ordinary modes of conveyance, only in midsummer or in sleighing time—these, or any one of these facts, would form grounds for a certificate under the section; and two or all three of them prevailing, would shew the inexpediency of holding more than two Courts in the year. To occupy the judge's time in holding such Courts, would be to provide for the *possible* accommodation of the few, at a *certain* loss to the many.

It will be seen that magistrates acting in Quarter Sessions, are invested with very extensive power for the appointing new divisions, thus calling Courts into existence, as well as for altering, from time to time, the number, limits, and extent of existing divisions: and this power, like all powers in law, must be duly executed at the times, and in the manner, and to the extent, prescribed by the statute; and magistrates have no authority out of the act, in respect to the Division Courts. So that if the power be not duly followed up in any act or order of session, it would be without authority, and so void.

(To be continued.)

CORRESPONDENCE.

A FEW MORE "VEXED QUESTIONS."

Another letter from Mr. Durand, which is given below, will be read with attention by every one interested in Division Court Law. Our readers will thank the writer for the interest he takes in courts, of which the profession generally take little notice. Few members of the profession gratuitously undertake the labor of an effort to promote what is sound in administration in these tribunals: and yet in the aggregate they embrace a very large share of the law business of the country, and affect the rights of thousands.

The questions which Mr. Durand notices will set men to think, and must but be contributory towards settling the questions of law which these points embrace.

To exhaust the subjects suggested would involve more time and larger space than has been allotted to this department in the *Law Journal;* and nothing more can be expected from a law periodical, under the circumstances, than a brief notice rather than a legal essay—holding open its columns, as we do, to all comers who are capable of contributing to the discussion of the topics suggested, and willing to take the trouble to do so.

On the first question—our present leaning is towards the broader construction of the jurisdiction clause. The words "all personal actions," in sec. 35, are commonly used in contradistinction to *real* or *mixed* actions; and under the first division of this clause, only three questions need be answered to determine jurisdiction: 1. Is the action a personal action? 2. Is the amount claimed £10 or less? 3. Is the action within any of the exceptions in sec. 54? If the answers to the first and second be in the affirmative, and to the third in the negative, the Division Court has jurisdiction. Then the residue of the section, if taken according to its literal and technical meaning, will include several causes of action which, if we rightly understand Mr. Durand, some of the judges have held not to be within the jurisdiction. The 199th section, providing for suits in cases of absconding debtors, uses the words, "debt or damages arising on any contract, express or implied, or any judgment," and if the narrow construction of sec. 55 prevailed, would give a larger jurisdiction in the case of absconding debtors, than in other cases, which never could have been intended. Any new question now arising in the Division Court Act, should be resolved on the act as it is: seeing that the Legislature has provided that if the provisions of the Consolidated Law are not in effect the same as the repealed acts, the Consolidated Law shall prevail.

We however invite discussion on this important question of jurisdiction.

2nd. This question is surrounded with difficulty. Our present impression is, that a summons sued out would save the operation of the statute for a year, and longer if continued by an *alias*. *Alias* and *plurias* summonses are recognized and sanctioned by the rules of practice.

We are disposed to agree with Mr. Durand's view as to the third question, and have noted the point for further examination. The case of *Harrison* v. *Brega*, reported in our last number, has a bearing on this point. We are not altogether satisfied with the decision in *Duggan* v. *Kitson*, as reported.

With renewed thanks to Mr. Durand for his communication, we commend it to the attentive perusal of our readers.

To the Editors of the Law Journal.

TORONTO, May 20th, 1861.

GENTLEMEN,—I now send you a few more "Vexed Questions" arising in the practice of the Division Court Law. They are by no means all that have been noticed by me; but the following, with those alluded to in a former number of your Journal by me, are the most important.

1st. A question often arises in division courts whether a suit can be entertained for more than £10 damages, in actions for breaches of covenant, and actions of assumpsit for breaches of parol agreements. It seems to be well understood that

actions for mere torts to personal chattels or personal wrongs cannot be brought in these courts, if the damages exceed £10, unless the excess be abandoned. On the other hand, it is very generally believed by laymen that actions for damages for breaches of covenant in leases to cultivate land in a husband-like manner, to repair, or to do some other act; and for failure to perform agreements to build houses or other specific jobs, may be brought to the extent of £25 for the uncertain damages. Also, that in cases of parol engagements to sell wheat or produce, to buy the same, or to deliver other property, as well as false warranties on horse trades, where the damages amount to £25, that they can be brought in Division Courts. I know several judges of these courts who hold that such amount of damages in such cases may be sued for therein. At a late Newmarket court, a professional gentleman attending there urged Judge Boyd to rule in this way, but the judge refused to do so. Judge Harrison used so to rule, but he has now altered his opinion, holding that the courts have in no case jurisdiction for mere damages above £10. The question has also been very ably decided by Judge McKenzie at Kingston, and by Judge Hughes at St. Thomas. Yet when one, especially a mere layman, reads sub-section 2 of section 54 of the Consolidated Statutes of Upper Canada, at page 145, in these words: "All claims and demands of debt, account, or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed one hundred dollars," it must be admitted that the point is yet open to severe criticism and argument. We see a distinction drawn in these words between "claims of debt" and "claims of breach of covenant," in such a way as to lead one to suppose that a "breach of covenant" for mere damages may be meant. I believe, however, that a great majority of county court judges hold that the division courts are limited to the jurisdiction of £10 in all cases, where mere damages are sued for. I am not aware that the superior courts have decided this point. It seems to me the better opinion, that as in all personal actions (not limiting them to tort only) the jurisdiction in damages is £10: that there is no authority in the act to exceed that sum in other forms of action for uncertain damages.

2nd. Another very important question often arises, at least it has with me, in these courts, in relation to the Statute of Limitations, where a summons has been taken out in a suit to stay the operation of the Statute or in any way, but not continued from court to court. Suppose a case: "A." has a note against "B." for £10, and it has run five years and six months after maturity before suit brought. Six months before it is barred by the statute a summons is taken out, but not served, it may be, for various reasons—the man may abscond against whom it issues—he may conceal himself—cannot be found—or the bailiff may neglect his duty. An alias is not taken out at each consecutive court, but after the lapse of a year or within the year, but after the expiration of the six years from the maturity of the note, an alias summons is issued in continuation of the first, and served on the defendant. Now the question is, can he plead the Statute of Limitations in such a case? Is the first summons spent by lapse of time? Are continuances from court to court necessary? Does not the *bona fide* issue of a summons within the six years, although it is left in abeyance unserved for a year more or less, but yet finally served after the six years from the maturity of the note, prevent the operation of the statute? Section 74 of the Division Court Act, page 147 Upper Canada Consolidated Statutes, describes the manner in which suits are to be entered. Neither it, nor the tariff, nor any other clause of the act, says anything about the issuing of an alias summons. But of course when the suit is once entered it stops the force of the statute, and an alias or several summonses may issue, until the defendant is legally served; and if judgment be given against him, the clerk taxes all the summonses, including the first against the defendant. The foundation of the action is the first. It seems to me, until the first summons is disposed of legally by the judge, or the suit regularly withdrawn by the plaintiff, it remains in force to be reverted to, certainly until the *lapse of a year*, (and *quære*, until the lapse of six years?) where it appears that efforts to serve have been made without effect upon the defendant. Continuances are now abandoned in all the courts; and why should a summons be continued in the division courts from court to court? Section 69 of the Division Court Act may be supposed to refer to very doubtful cases like this. A suit once entered in the division court, remains there until disposed of by the judge or withdrawn by the plaintiff.

3rd. The Statute of Limitations also applies to another class of cases that very frequently arise in division courts. They are embraced within the provisions of section 193 of the Act, Consolidated Statutes page 171; where it is said, "That any action, &c., against any person for anything done in pursuance of this act, shall be commenced within six months after the fact was committed," "and notice in writing, &c., given of the causes of action, &c." The question arises thus: "A," a bailiff, is sued, together with his sureties, for a false return to an execution, or for the non-payment of money made under it. It is supposed by many that the bailiff may be sued (and has been the practice to sue) for any description of misfeasance within six years after the fact committed. It is sometimes very difficult to distinguish the exact time which legally separates cases where he must be sued within six months from those where he may be sued within six years after the fact committed. For the mere non-payment of money collected, it is quite clear he may be sued after the six months; but for any description of tort in his office, or wilful misconduct, he should be sued within six months. But it is easy to suppose a case not exactly coming within the shortest limit, whilst some might suppose it within the longest one. For instance: "A," the bailiff, after the payment of the debt, but whilst the goods are seized and in his hands, converts them to his use by wrongful sale—or receives the money without sale—does not pay it over—and another execution issues, on which the debtor's goods are sold for the same debt. Such cases have actually occurred within my knowledge. If sued after six months, could he plead the statute in the last two cases? Would the case of an action for a false return of *nulla bona* to an execution be within the six months' limit? The judges differ in their view of this clause. The question is, what class of cases falls within the six months' limit? Hundreds of instances exist where the plaintiff cannot know within six months whether the bailiff has made a false return or not. On the other hand it is a great hardship for the bailiff's sureties to be sued after six months. If sued at once they might resort to the bailiff for the claim, which, at the distance of six years, they might not be able to do.

4th. The question of the power to sell leasehold interests was decided lately in the Queen's Bench, in a case of *Duggan* v. *Kitson*, in which I was for the defendant. The court decided that a bailiff could not sell a term held by a tenant.

5th. The question whether a clerk's sureties are liable for fees wrongfully withheld by him from a bailiff, was also settled by the Queen's Bench lately, in a case in which I was attorney for the bailiff, in which it was held the sureties were liable. These questions had been before these decisions unsettled.

6th. The practice in interpleader cases in the division courts is not at all well settled. Clerks and bailiffs do not appear to properly understand it in all cases. I cannot, however, enlarge this letter already too long.

Truly yours,

CHARLES DURAND,
Barrister.

U. C. REPORTS.

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*

IN RE. GEORGE LOUNT, REGISTRAR.

Registration—Fees of, when documents to be recorded in more than one township —How chargeable.

Held, that the registrar is only entitled to charge for one registry of any document to be recorded in one *or more* townships, provided the number of words recorded "counting folios" does not exceed 800, and all in excess of 800 words are to be charged per folio as allowed by the Statute Con. Stat. U. C., ch. 89, sec. 33.

(C. P., H. T., 24 Vic.)

Spencer obtained a rule calling upon Mr. Lount to shew cause why a mandamus should not issue commanding him to put on record in the registry office of the county of Simcoe, a certain mortgage, dated on or about the 27th of December, 1860, and made by William Proudfoot and wife, to Mary McMichael and Jessie McMichael, on the ground that the same has been sent to him for registration, and his fees for recording the same have been paid him.

On moving the rule he filed an affidavit that he had computed the number of words in the memorial, that to the best of his knowledge and belief it contained no more than 475 words, without counting the words contained in the description. That the number of words contained in the description together with the necessary certificates to be endorsed on the mortgage would not exceed 700 words; that the application was made on behalf of the morgagees in order to compel the registrar to record the mortgage; that the total number of words contained in all the necessary entries to be made in all the books, including certificates, would not exceed, in his belief, 2250 words in excess of the first 800 words.

And a second affidavit, that about the 31st of December last, the deponent enclosed to the registrar a mortgage and the memorial thereof for registration, with 6s. 3d. for fees, to which he received a reply from the deputy-registrar that the fees were $6.25, as the lands mentioned in the mortgage were in five townships, which with the mailing fee would amount to $6.50, and claiming that sum, that he replied to the registrar that it was not the practice in the registry office, Toronto, to charge the full fee for each township, and requested him to lose no time in putting the mortgage on record, and what the statute allowed him beyond the 800 words would be remitted, that the registrar replied, affirming his first letter, and stating that on receipt, &c., the deed would be recorded, that deponent thereupon calculating the number of words as well as he could, sent $3.25 more, making $4.50 in the whole. The registrar replied, still demanding $6.50, *i. e.*, $6.25 for recording, and $0.25 for the mailing fee.

A. Wilson, Q. C., shewed cause, referring to Consolidated Statute U. C., ch. 89, secs. 30, 33, 74, sub-sec. 2; *Smith* v. *Ridout*, 5 U. C. Q. B. 617.

Spencer supported the rule.

DRAPER, C. J.—By Consolidated Statute U. C., ch. 89, sec. 33, it is enacted that when any deed, will, or other instrument embraces different lots or parcels of land situate in different localities in the same county it shall only be necessary to furnish one memorial of such deed. &c., and such memorial shall be copied into the registry book for the city, town, township, or place in which the different parcels or lots of land are situate in the same manner and to the same extent only as if a separate memorial had been furnished in relation to the lands situate within such city, town, township, or place respectively, and the registrar shall make the necessary entries and certificates accordingly.

By section 74, sub-section 2 of the same statute, the registrar is allowed for recording every deed, conveyance, &c., &c., including *all necessary entries* and certificates, one dollar and twenty-five cents, but in case *such entries* and certificates exceed 800 words, then at the rate of 13½ cents in the dollar for every additional hundred words, but in counting folios in cases within the 33rd section only one certificate of registry shall be charged for, and the marginal certificates, notes, or references, shall not be charged for. The 30th section of the act makes it the registrar's duty to "*enter*" every memorial in the registry book.

The case of *Smith* v. *Ridout*, (5 U. C. Q. B. 617) was decided under the 9th Vic., ch. 34. The 22nd section of that act made it the duty of every person holding or executing the office of registrar to keep and cause to be used for that purpose a separate registry book for each township, reputed township, city and town, the limit whereof shall be defined by law within the county or riding for which he shall be registrar. The 68th section of the Consolidated Statute contains a similar provision in almost the same words. The 16th section of the former act allowed the registrar for the recording of every deed, conveyance, &c., the sum of 2s. 6d., and no more, in case the same doth not exceed 100 words, but if it exceed 100 words, then at the rate of 1s. for every hundred words after the first 100. Upon this statute the court held that the registrar was entitled to "charge by the same rate for each registration, that is to say, 2s. 6d. for the first hundred words, and 1s. for each 100 words above the first 100, which computation is to be made upon the words contained in the recording of every such deed, that is upon the contents of the entry in the registrar's book, and not upon the words contained in the deed or conveyance itself." The judgment of the court is stated to be for the defendant, and so it certainly was, on the ground that the registrar's fees were not to be computed by the number of words contained in the deed to be recorded, or even the memorial produced for registry thereof, but by "*the contents of the entry* in the registrar's book," and it appears that the court allowed 2s. 6d. for the first hundred words in each entry in each separate book, at least, I so understand the judgment as printed, though a memorandum made by me at the time, for I was a member of the court when the judgment was given, tends towards the conclusion, or would admit of the interpretation, that the whole of the entries made by the registrar were to be put together as constituting one recording of the deed, and that the registrar had the right to charge 2s. 6d. for the first 100 words, and 1s. for every subsequent hundred.

But, however this may be, the words of the act now under consideration, differ materially from those of the 16th section of the 9th Vic., ch. 34, though the fees are as in the former act, "*for recording every deed*," &c. A gross sum of $1 25c. is given for that service, "including all necessary *entries* and certificates," and a charge for each 100 words additional to the first 800, but, "in counting folios" (*i. e.* each 100 words) under the 33rd section, only one certificate of registry is to be allowed for. The 33rd section provides that in case of lands in several townships, only one memorial shall be necessary, which shall be copied into (synonymous with entered in) each proper township book to the same extent only as if there were no lands mentioned therein, lying in any other township, "and the registrar shall make the necessary *entries* accordingly," of which entries the *folios* are to be counted, as I read the provisions regulating the registrar's fees.

It appears to me the plain meaning of these provisions put together is that the "necessary entries" in each township book, constitute one "recording of the deed," for which the registrar is entitled to receive $1.25c., and no more, unless all those necessary entries and certificates, adding also one certificate of registry, exceed on "counting folios" 800 words, when the statute gives an additional allowance for every additional 100 words.

We may suppose a case where a memorial (drawing concisely) of a conveyance of four lots in different townships of the same county, described only by the numbers and concession would not require an entry in each township book exceeding four hundred words dividing one certificate of registry between the four.

According to the argument urged for the registrar, he would be entitled to five dollars, *i. e.*, $1 25c. for each entry in each book; But charging for all necessary entries for the recording of the deed at the rate of $1 25c. he would be entitled to $1 25c. for the first 800 words and at the rate of 13½ for 800 words or eight folios more, making in all $2 37c. or less than one half of the claim set up on his behalf. In my humble judgment the latter mode of charge is what this statute contemplates and prescribes. In this case the demand is for entries each at $1 25c.—$6 25c. and 25 cents for going to the post-office to mail the deed after registry. We have nothing to do with this latter charge—it is not authorised by the statute. The other party offers $1 25c. for the first 800 words, and at the rate of 13½ cents in the dollar for every ad-

ditional hundred words, in all $4 50c. In my view this is correct as to the principle, they can settle the computation.

But though this is my construction of the act, and as we have heard the case argued, I have thought it as well to express it, I cannot agree to grant a rule for a *mandamus* on the materials before us.

The rule does not state that the lands are in the county of Simcoe, nor do either of the affidavits filed, nor is it shewn, except by belief, on a computation made, without having the memorial present how many words it contains; nor do the affidavits shew in how many townships the lands lie, though in a letter annexed to the affidavit, it is said, in five townships and nothing to the contrary being said, we may assume they are all in the county of Simcoe.

When the facts we opened on moving the rule, it never occurred to the court that the affidavits were so entirely defective, nor was it suggested during the argument, nor was any reliance placed on the objection, that a *mandamus* was not the proper remedy, but that the same course should have been followed as in *Smith* v. *Ridout*. If the delay caused the security to be worthless, the registrar or the party undertaking to procure the registry might be called upon to make good the loss.

Under these circumstances, I think we ought to discharge the rule, for we should discountenance such imperfect and hastily prepared applications; but as no objection has been made on these grounds by the registrar, it should be discharged without costs.

Per cur.—Rule discharged.

CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-Law.*)

Emery v. Iredale.—Emery v. Hodge.

Action for infringement of Patent—Prayer for Injunction—Damages within jurisdiction of Inferior Court—Right to costs—Patent Act.

Held—1. The fact that a plaintiff prays an injunction in an action in a Superior Court in which an injunction may be granted is not, even after verdict for plaintiff, sufficient to entitle plaintiff to recover Superior Court costs, without the certificate of the Judge who tried the case, when the amount of damages recovered is clearly within the jurisdiction of an inferior court.

2. The action itself must be of such a nature, and the equitable relief sought of sufficient importance, to justify the Judge who tried the cause in certifying it to be a proper action to be withdrawn from the inferior and tried in the Superior Court.

3. There is nothing in the Patent Act, Consol. Stat. Can. cap. 34, to justify the presiding Judge in refusing to certify for costs, merely because defendant might have defeated plaintiff entirely in his action by proper pleading, but had not done so.

4. Under the peculiar circumstances of these cases, *Held*, that the first was a case proper for a certificate, but the second case not so.

(Chambers, May, 1861.)

These were two actions brought by the plaintiff for the alleged infringement of letters patent for an invention granted to the plaintiff.

The declaration in the first case, alleged that the plaintiff was the true and first inventor of a machine for the manufacture of eave-troughs of tin and galvanized iron, and by letters patent, dated 28th November, 1857, which recited a petition of plaintiff stating that he claimed to be the original inventor of a press for the manufacture of eave-troughs of tin or galvanized iron, not before his invention known or used in this province, and not in public use or on sale in the province with his consent as inventor, our Lady the Queen, of her special grace, &c., did give and grant unto the plaintiff, during the term of fourteen years, the full and exclusive right and liberty of making, constructing, using and vending the said invention within the province, &c. To have and to hold, &c. Averment in first count, that since the letters patent, defendant, without the license of plaintiff, did work, use, exercise and put in practice the said invention, and did make and manufacture divers machines according to and by means of the said invention, and in second count, that defendant did, without plaintiff's license, make and manufacture machines intended to, and which did, imitate, counterfeit, and resemble the said invention, and divers parts thereof, &c. Claim of damages and a writ of injunction.

The declaration in the second was substantialy the same.

The pleas in the first case were, 1. Not guilty. 2. That the supposed invention was not at the time, &c., new as to the public use and exercise thereof, &c.

The pleas in the second case were the same as in the first, with an additional plea, 3. That the plaintiff was not the true and first inventor, &c.

The trial took place at the Autumn Assizes, 1860, in the City of Toronto, before Richards, J.

The plaintiff put in his patent corresponding with the statement of it in the declaration, and having a specification setting forth its parts in detail and the mode of operation.

According to the evidence, some of the parts of the machine in detail were not new, but the combination of them as a whole was new. As was stated by one of the witnesses, he would be obliged to use three machines separately to produce the result which was obtained at once by the plaintiff's process.

It was not denied that the combination was new. but rather contended that the plaintiff claimed as new the parts in detail which were in fact not new, and so that his patent was void.

The jury in the first case found for the plaintiff, with damages amounting to $60; and in the second case they also found for plaintiff, with a verdict of $20.

In each case certificates were moved if necessary, and the question of costs by consent reserved.

The verdicts were moved against, but both rules discharged, on the ground that it was not open to defendants on the pleas pleaded to raise the objection against the validity of the patent.

Both cases are fully reported in 11 U. C. C. P. 106.

The question of costs was afterwards argued in Chambers, before Richards, J., who tried the actions.

R. A. Harrison, for plaintiff, contended that plaintiff was entitled to full costs upon two views.

1. That under the Statute of Gloucester, a plaintiff is entitled to full costs if he recover any damages whatever, unless deprived of costs by some subsequent statute; and that there is no statute subsequent to the Statute of Gloucester which deprives plaintiff of costs in cases such as these. He referred to the several statutes, 43 Eliz. cap. 6, sec. 2; 21 Jac. cap. 19, sec. 6; 22 & 23 Car. II. cap. 9; Consol. Stat. U.C. cap. 22, sec. 324, 328; and contended that none of them applied. He also submitted that the plaintiff was entitled to full costs without a certificate, because in both suits he prays an injunction, and inferior courts have no jurisdiction to entertain such actions. He argued that as an injunction is sought, and the inferior courts have no power to grant it, therefore the actions are not of the proper competence of the inferior courts, or either of them, and no certificate under sec. 328 of Consol. Stat. U. C. cap. 22, is necessary.

2. That at all events the actions were brought to try a right beyond the mere right to damages, and submitted that the Judge in his discretion should certify for full costs, with costs, inasmuch as the Court of Chancery always grants the injunction after the right is established. He referred to *Morison et al.* v. *Sampson*, 9 Dowl. P. C. 387; Hindmarch on Patents, 297-306; *Bateman* v. *Gray*, 8 Ex. 906; Chitty's Equity Index Practice Injunction.

D. McMichael, for defendants, contended that the court has decided that plaintiff's patent is really void for claiming more than he is entitled to, though the particular technical plea might not have been pleaded to warrant a verdict being rendered for the defendants, yet the facts showing that the patent was void were brought out at the trial, and therefore under the Patent Act (Consol. Stat. Canada, cap. 34, secs. 23, 26, 27) plaintiff ought to be deprived of his costs. That, at all events, the amount he has recovered in each action being within the competence of the inferior court and the action itself could have been brought there were it not for the prayer of an injunction. That praying for an injunction could make no difference. That the action is brought to recover damages; and if the damages would be covered by an amount within the jurisdiction of the inferior court, the action should have been brought there, and if any necessity existed for an injunction it could have been had in equity. That if plaintiff is not entitled to costs without a certificate, the certificate should not be granted, for on giving judgment the court or some of the judges intimated that costs ought not to be allowed, and the facts

brought out on the trial show that plaintiff has really no right to recover at all.

Plaintiff's counsel intimated that he had no wish to claim triple costs, under Consol. Stat. Can. c. 84, s. 24, and his willingness to undertake to tax only full Superior Court costs in the event of getting a certificate.

RICHARDS, J.—I am not prepared to admit that because a plaintiff *prays* an injunction in an action where an injunction *may* be granted, that from this cause he is entitled to recover full costs in the Superior Courts, when he recovers damages clearly within the jurisdiction of the Division Court, and in other respects his action was of the proper competence of the inferior court.

Up to the present time the plaintiff has not obtained any injunction, and he may never even apply for one, much less obtain one, and yet I am called upon to say that he is entitled to full costs for such injunction. He in the same manner prays for an account of all the profits that have been made by defendants out of the use of the invention, and the inferior court could not aid him in that respect, yet the Court of Queen's Bench in England decided, in *Holland* v. *Fox*, 3 El. & B. 977, that no account of profits accruing before the bringing of the action would be ordered in cases where damages were recovered in the action for the infringement of the patent.

These actions are really brought to recover damages for the infringement of the patent, and incidentally to try a right. After the plaintiff has established his right, he may then apply for a perpetual injunction. If he applies to a court of equity, that court usually grants the injunction with costs, at the same time. I cannot doubt that that court may exercise its discretion in relation to costs in a proceeding of this kind, as it does in many other proceedings.

I am not prepared to declare that in all cases where the Legislature has given an equitable jurisdiction to the Superior Courts of common law, that merely calling upon the court, amongst other matters, to grant the plaintiff the aid of its special equitable jurisdiction, without such aid ever having been really granted, gives to a plaintiff the right to tax full costs of suit. The aid that he seeks may be of very trifling consequence. Suppose in one of these actions an account had been sought of the profits made from the use of plaintiff's invention, from the time the action was brought up to the rendering of the verdict. Suppose such profits had amounted to 5s., would it be contended, for enforcing such a right as that, that the Legislature intended a plaintiff should go into the Superior Court and recover fifteen or twenty pounds of costs? I think not. If the plaintiff's action is in other respects within the jurisdiction of the inferior court, merely praying an injunction or the taking of an account will not of itself in my judgment entitle him to full costs. The action itself must be of such a nature and the equitable aid sought of sufficient importance to justify the Judge in certifying it is a proper action to be withdrawn from the inferior and tried in the superior courts.

If the costs of procuring the relief if sought in a court of equity would be in the discretion of the court or a judge, I do not think, by giving the same power to grant relief to a court of common law, the Legislature intended that full costs should be allowed when the benefit incurred was of so trifling a character that the granting of full costs would really work gross injustice, according to the views now generally entertained.

I am not in these cases prepared to direct the Master to tax full costs in the absence of the certificate of the Judge who tried the cause.

I am not prepared to decide, as contended for by the defendant, that under the Patent Act the plaintiff is not entitled to any costs. The 18th section, and the 5th sub-section of that same section, refer to cases of disclaimer, and where the action is brought to recover damages for the infringement of so much of the patent as is the invention of the patentees; but in the cases before us the action is not brought for partial infringement. The 26th and 27th sections, and sub-section 2 of section 27, do not apply, for the judgment of the court is in favour of the plaintiff.

The question still remains, ought I, as the Presiding Judge, to certify that one or both of these actions were proper to be withdrawn from the inferior and tried in the superior court? If the verdicts had been under 40s., there is no doubt that it would be necessary to certify to give the plaintiff full costs. It is urged by the defendant that I should not certify, because from the facts which appear at the trial the plaintiff claimed more than he was entitled to; and if the pleas, which the court thought necessary to raise the point, had been filed, the plaintiff must have failed in his action and the patent would be void. That these facts manifestly appearing, I ought not to certify to give the plaintiff treble costs in an action that ought never to have been brought, and for the infringement of a patent which is clearly void. The case thus put seems strong for the defendants.

On the other hand, there is no reason to suppose that the plaintiff was guilty of any intentional fraud in claiming what he did in his specification, and that, independent of any former use of parts of it, the whole machine as an invention was an improvement; and the combination of the older parts with the additions which were undoubtedly new, made a machine which was valuable in itself and for which he could have obtained a patent.

The acts of the defendant were considered by the jury to be an infringement of the original combination and new parts of the plaintiff's invention, and for which he had a right to bring an action. I cannot therefore say that the facts presented at the trial did not show that the plaintiff had invented a machine by the combination of some parts previously known and used, for which he had a right to obtain a patent; nor can I say that defendants have not infringed upon the rights which would have been guaranteed to plaintiff by a proper patent. I cannot deny that plaintiff has a meritorious claim. Technically he might have been defeated, if the proper steps had been taken by defendants for that purpose. Fortunately for the plaintiff, the defendants failed to put the proper pleas on the record, to bring up the weak part of the case, and the court have held that his action will lie. I do not consider I would be justified in refusing him costs, merely because the defendants might have defeated him entirely in his actions, but have not done so.

As to the action against Hodge, it appeared in evidence that before the writ was issued the defendants wrote to plaintiff and offered to buy two of the machines of his manufacture, and enclosed him the money to pay for them. By this act it appears to me they sufficiently acknowledged plaintiff's right under his patent, and in purchasing the articles patented they showed a disposition to pay him for the use they intended to make of his invention. For some cause, the plaintiff chose to decline selling to the Hodges, and prosecuted them. The only object I can conceive he could have in bringing that action was to recover damages. The offer to purchase seemed to be so far a concession of plaintiff's right that it was not necessary to bring the action against them to try the right. It could then be only for the damages. The jury have found but £5 damages; an amount clearly within the jurisdiction of the Division Court. To recover this amount it was not necessary to bring the defendant into this court, and to prevent the use of the machine by them through an injunction could hardly be an object, for plaintiff was selling the machines constantly; and if he sold to defendants, he of course would not desire to restrain them; and if with a view to punish them he refused to sell to them, they could easily have purchased through a third party, and in that way would have been able to use them.

The facts as presented at the trial seem to indicate that plaintiff, having discovered that the Hodges had been infringing on his patent to the extent of using one or two machines not made by him, thought he had them in his power; and although before the action brought they had so far yielded to his claim as the inventor as to send the money to him for the purchase of two machines, yet he refused to sell to them, and determined to exercise his power by harassing them with costly litigation in the higher courts.

I do not think, if I can exercise a discretion in the matter, I should use it to encourage the bringing of actions from such motives. The supremacy of his patent having been recognised, he should have been content to stop there, and sell to those men who wished to purchase; or if any extraordinary expense had been incurred by him in getting up evidence to sustain an action against them, he should have so stated to them, and offered to forego any action if they would pay these expenses. Had this been done, his position would have been better before the court. It is true the Hodges, having been forced into court, did then deny his right, in

other words, they made the best fight they could, but it is evident they did not desire to come into court; they were brought there by what seems to be the somewhat harsh conduct of the plaintiff. Under these circumstances, I am not disposed to certify for full costs for the plaintiff in the action against the Hodges.

From the evidence given in the suit against Iredale, the defendant's course was different. After obtaining a knowledge of plaintiff's invention, he applied to a person to construct something similar for himself, and used it in a way to conceal the fact from the plaintiff and his agents, and throughout refused to recognize plaintiff's right. It did seem necessary then that plaintiff should bring an action to vindicate his right; and the action being one likely to raise difficult questions both of law and fact, perhaps it was not unreasonable in him to bring it in the Superior Court.

This is the first action in point of time, the writ having been issued in April, 1860, whilst the suit against the Hodges was not commenced until August in the same year. The plaintiff might more easily urge the necessity of bringing this action in the Superior Court that the one against the Hodges, for this action having been commenced long before that against the Hodges, the plaintiff's rights and the law on the subject could all have been settled by this suit, and then, if it had been necessary to sue the Hodges, there would be no difficulty in taking proceedings in the inferior court.

I cannot say that I am entirely free from doubt on the subject; but as the plaintiff is willing to undertake only to tax full costs of suit, and not treble costs, as the statute would seem to allow, I feel disposed to grant in the suit against Iredale the certificate that it was a proper action to be withdrawn from the inferior courts and to be tried in the Court of Common Pleas.

I find the following laid down in Grey on Costs, at page 216: It is to be observed that an action on the case for the infringement of a patent is within Lord Denman's Act (Consol. Stat. U. C. cap. 22, sec. 321), and also within the County Court Acts. In almost any successful action of this kind, however, a Judge would not hesitate to certify that it was to try a right besides the mere right to recover damages, and that there was good reason for bringing it in a superior court."

GRAY ET AL. v. P. J. O'NEIL.

Writ of summons—British subject residing abroad—Writ for service within the jurisdiction—Service—Practice—Amendment—Consol. Stat. U. C., cap 22, secs. 2 and 49.

A writ of summons was issued in the common form, for a defendant residing or supposed to reside within the jurisdiction, and personally served it in a foreign country on the defendant, a British subject without the jurisdiction of the Court. On an application to set aside the writ for irregularity, it appearing that defendant had been personally served, and that the time allowed for appearance was a reasonable time, an amendment was allowed without costs by the substitution of the form of a summons for a defendant without the jurisdiction, in lieu of the form used.

(Chambers, June 8, 1860.)

Defendant obtained a summons on plaintiff to shew cause why the writ of summons served on the defendant in this case, should not be set aside for irregularity with costs, on the ground that such writ is not in accordance with the form given by the statute of a writ to be served on a British subject residing out of the jurisdiction of the Court.

It appeared that the defendant had been a resident inhabitant of Toronto, but it was sworn in an affidavit filed in support of the application, that he was, at the time of the application and had been for several months past, residing at Port Huron in the United States of America, and that he was served there with a copy of the summons in this case.

In the copy of the summons served, the defendant was described as of the City of Toronto, in the county of York, and the copy was in the ordinary form, requiring him to appear within ten days, and with the ordinary notices indorsed on writs intended to be served within the jurisdiction.

It was sworn on the part of the plaintiff, that the defendant had been for many years and till lately, resident in Toronto: that to avoid being arrested in another suit he left Toronto about three months ago, and travelled about from place to place: that the deponent heard a few days before this application, that he was again in Toronto, but could not ascertain whether it was so or not; as his friends are on their guard when enquiries are made.

It was admitted that the defendant, at the time of the application, was a British subject.

The writ was issued 15th May, 1861, and the defendant contended that it ought to have been in the form directed by the C. L. P. Act, Consol. Stat. U. C., cap. 22, sec 48, and schedule A. 3, giving a suitable number of days in the body of the writ for the defendant to appear in, and with a memorandum indorsed that the writ was for service out of Upper Canada.

R. A. Harrison shewed cause. He contended that the writ was regular, and must be supported either if the defendant resides or was "supposed to reside within the jurisdiction" of the Court (Consol. Stat. U. C., cap. 22, sec. 2); and that the supposed residence of defendant was correctly described in the writ in this case. He referred to Prov. Stat. 12 Vic., cap. 63. sec. 22, and to the English Uniformity of Process Act, 2 Wm. IV., cap. 39, sec. 1, where similar language to that in the Common Law Procedure Act was used. He cited *Windham* v. *Fenwick*, 2 Dowl. *N. S.* 783; *Balman* v. *Sharpe*, 16 M. & W. 93; *Jelks* v. *Fry*, 8 Dowl. P C. 87; *Ripper* v. *Dawson*, 5 Bing. N.C. 206; as to the interpretation of the last mentioned statutes, and *Hesketh* v. *Flemming*, 30 L. & Eq. 259, to shew that the same rule of interpretation is to be applied to the construction of the Common Law Procedure Act. He admitted that if defendant were really resident without the jurisdiction of the Court at the time of the service of the writ, that the service of it was irregular; but submitted that the writ itself, and not the service of it, was moved against. He pointed out that even if one form of writ had, by mistake or inadvertence, been substituted for the other, that such mistake or inadvertence was "no objection to the writ" (Consol. Stat. U. C., cap. 22, sec. 49); and that, if necessary, an amendment would be allowed without costs (*Ib.* sec. 49).

ROBINSON, C. J.—The cases cited upon the effect of the English statute 2 Wm. IV., cap. 39, which is the same as our statute 12 Vic., cap. 63, sec. 22, do not serve as authorities upon this application, for here the defendant was served out of the jurisdiction, in a foreign country, under the provisions of the present C. L. P. Act, and for all we judicially know, the ten days mentioned in the writ as the time for appearing, may not, under such circumstances, have been sufficient.

The intention of the Legislature was evidently that in all cases where the plaintiff avails himself of this provision, allowing the process to be served out of the jurisdiction, there should be a time for appearance given in the process, which should be specially fixed with reference to the distance of the place of foreign residence. Here there was no special time fixed, but the defendant was required to appear as if he had been served within the jurisdiction, and the question is, can the plaintiff have the advantage of a service made out of the province, when the writ has not been framed as the statute directs, to suit the circumstances, and the consequence to the defendant in any case of the kind may be most material?

Where, as in this case, the defendant, though supposed to be resident in Upper Canada (if we are at liberty to assume that, when it is not sworn that the plaintiffs or their attorney were under that impression), was not in fact as resident, and the plaintiffs found that they were mistaken in that respect, it is rather difficult to admit that they were at liberty, on account of the mistake, to serve the process in a foreign country, when it was not such process as the Legislature have required it shall be if it is to be made that use of.

But however that may be, the sections 48 and 49 admit of the form of the summons, and of the copy being amended, and, if the Court shall think fit, without costs, which may be done in this case, as the defendant has been personally served, and has had ample time to appear or may have such time reserved to him as may be thought proper.

The following was the order made:—

Upon reading the summons issued in this cause upon hearing the parties, and upon defendant undertaking within 48 hours from the time of the amendment hereinafter mentioned, to enter an appearance to the writ of summons issued in this cause when amended as hereafter mentioned, as if the said writ had been

issued and served after such amendment; I do order that the said writ and the copy thereof, personally served on the defendant and filed by him on this application, be amended by altering the said writ and copy, which are in the form of No. 1 of schedule A. to the Common Law Procedure Act, to correspond with the form No. 3 in the same schedule to the same act, without costs, and that if defendant make default in appearing within the time aforesaid, then that plaintiffs shall be at liberty to proceed in this cause to judgment and execution.

Order accordingly.

CARRUTHERS v. RYKERT ET AL.

23 Vic. c. 42, s. 4—Trial of Superior Court cause in County Court—Necessity for Notice of Trial—Service of Issue book.

An action had been instituted in the Court of Queen's Bench. After issue joined an order was made under and pursuant to s. 4 of 23 Vic. cap. 42, for the trial of the issue at the next sittings of the County Court of the United Counties where the action was commenced. On the same day, in good time, plaintiff gave notice of trial for the County Court Sittings, but did not serve the issue book till the day following:

Held 1. That the order referring the cause for trial to the County Court Sittings did not dispense with the necessity of notice of trial for that sittings. 2. That the notice of trial being in good time was not under the circumstances irregular merely because no issue book had been in fact served till the day following, when too late to give notice of trial.

(Chambers, 12th June, 1861.)

This action was instituted in the Queen's Bench, and by an order of Mr. Justice Hagarty the issue joined between the parties was directed to be tried in the County Court of York and Peel.

On the 3rd of June, notice of trial to take place in the County Court to be holden on the 11th of June, was served.

On the 10th of June, defendant's attorney obtained a judge's summons to set aside the notice of trial, with costs, on the ground of irregularity—on account of no issue book having been served until after the time for giving notice of trial had expired.

When notice of trial was given no issue book had been served. It was served on the next day, 4th of June.

One of the defendants suffered judgment by default. The other two being sued, one as maker and the other as indorser of a promissory note, pleaded payment only, on which plaintiff joined issue.

Carruthers showed cause.

ROBINSON, C. J.—By our 33rd Rule, Trinity Term, 1856, it is provided that the Common Law Procedure Act having dispensed with the sealing and passing of the Nisi Prius Record, the practice in England as to making up and delivering paper books and issue books is to be followed in future.

The judge's order made on the 3rd June, 1861—that this cause shall be tried in the County Court for York and Peel at the next sittings of that court—can hardly be taken as dispensing with notice of trial, on the ground that the day of sitting of the County Court is fixed by Act of Parliament, and that that order was served on the defendant, because the plaintiff may not in fact be prepared to go down to trial at that sitting of the Court, and it is for him to give notice whether he will do so or not. The notice of trial was served long enough before the sitting of the Court. The only objection is that the plaintiff could not properly give notice of trial till he had delivered his issue book.

I think that the effect of our 36th Rule, Trinity Term, 1856, would have been to make the notice of trial regular in this case, even if the cause had not been sent to the County Court, by writ of trial, and if notice of trial in the Queen's Bench had been served before the issue had been delivered.

The case of *Mullins et al.* v. *Ford*, 4 D. & L., 765, appears to me to establish this.

I refer also to *Pool* v. *Pain*, 2 Lowndes, *Maxwell & Pollock*, 609, as bearing upon the question, although from the difference of circumstances it is less in point.

But, upon consideration, I do not see any room for doubt, under the particular circumstances of the present case, for this was sent as an issue to be tried in the County Court, under an order made by a Judge of this Court, on the 3rd day of June, and no doubt before the notice of trial was given, and the order is stated to have been made after hearing the parties.

The defendant does not pretend that he opposed the order being made on the ground that there was no issue then joined; or that he had been served with no copy of the issue; nor does it appear that he took exception in any manner to the want of service of the issue book. He must then have had sufficient notice before the notice of trial was served that the plaintiff had abided by the pleadings as they stood upon his traverse—of the defendant's plea of payment; and I do not think he can now be allowed to move against the notice of trial on the ground that he had not been served with the issue book.

Summons discharged with costs.

PRACTICE COURT.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

MARTIN v. STINSON ET AL.

Rule Pr. 129—Service on Agent of Attorney.

Held, under the Rule of Practice, No. 129, that service of a Judge's order on the agent of the Attorney, with an affidavit that the same has been disobeyed, is sufficient to entitle the party who obtained the order to make the same a Rule of Court, and that on these materials he is entitled to a Rule of Court absolute in the first instance with costs.

(E. T. 1861.)

Harrison moved to make the order of Mr. Justice Burns, dated 2nd January last, a Rule of Court, with costs of making the same a Rule of Court.

He filed an affidavit shewing service of the same on the agent of the defendant's attorney in Toronto, and that the order so far as it relates to the payment of costs was disobeyed.

The question was, whether the serving of the rule on the agent is sufficient without being served on the attorney or on the defendants.

He cited Rule No. 129, Har. C. L. P. A., p. 649, and *Thompson* v. *Billing*, 11 M. & W. 361.

Jackson opposed the motion, and submitted that the service was not sufficient.

RICHARDS, J.—The Rule of Court, No. 129, states that when a judge's order is made a rule of court, it shall be a part of the rule that the costs of making the order a rule of court shall be paid by the party against whom the order is made: provided an affidavit be made and filed that the order has been served on the party, his attorney or agent, and disobeyed.

Thompson v. *Billing*, cited by Mr. Harrison, is an express decision that service on the town agent is sufficient under the rule. The case seems better reported in 2 Dowl. N. S. 824. That case was decided under the Rule of the Court of Exchequer, made 22nd May, 1840, which required an affidavit that the order had been served on the party or his attorney and disobeyed. Though there was no mention of "agent" in the rule, the Court held service on the town agent of the attorney was all that was required.

By the Rules of Court in England, of Hilary Term, 1853, the words "or agent" were added after attorney, and the rule in England is now the same as our Rule No. 129 above quoted.

In *Morris* v. *Bedward*, 9 Dowl. P. C. 130, Patteson, J., held that service on the agent of the attorney was sufficient, though he understood the officers of the other courts thought the service ought to be on the attorney and not on the agent.

It was expressly decided in *Black* v. *Lowe*, 4 D. & L. 285, that where it appears from the affidavit filed that the order was served and disobeyed, the rule will be absolute in the first instance.

I think, according to these authorities, that plaintiff is entitled to have his rule absolute at once for making the Judge's order a rule of court, with the costs of making the same a rule of court.

Per Cur.—Rule absolute, with costs.

ENGLISH CASE.

From the "Law Times," June 8.

BARTLEY v. HODGES.

Insolvency—English bill of exchange—Discharge of defendant by a Colonial Court of Insolvency—Subsequent action to recover the amount.

A., who accepted a bill of exchange in England for a debt contracted in England, went to Victoria, in Australia, where he took the benefit of the Insolvent Debtors' Act for that colony. Upon being afterwards sued in England for the amount of the said bill, and pleading such discharge:

Held, that his discharge in the colony was no bar to the action.

This was a demurrer to the replication. The action was upon a bill of exchange (inland), of which the defendant was the acceptor. The facts raised by the pleadings disclosed that subsequently to the acceptance the defendant went out to Victoria, in Australia; that there he was placed under sequestration, and submitted to the laws of the colony passed for the relief of insolvent debtors; that his estate was placed under sequestration by the Supreme Court of Victoria, according to the laws of that colony, and that proceedings were thereupon had, and he afterwards obtained his certificate of conformity; that during these proceedings he was resident in Victoria, and subject to the jurisdiction of the said Supreme Court, and was by the law of the colony discharged from the said debt, the said court having jurisdiction to discharge him therefrom.

J. Brown, in support of the demurrer, contended that the debt was barred by the defendants's insolvency, for that by the sequestration of his property his entire means were taken from him: (13 & 14 Vic. c. 59; 18 & 19 Vic. c. 55; *Edwards* v. *Ronald*. Knapp's Cases before the Privy Council, 259; *Ferguson* v. *Spencer*, 2 Scott N. R. 229; *Sidaway* v. *Hay*, 3 B. & C. 12.) [Blackburn, J.—*Lewis* v. *Owen*, 4 B. & Ald. 654; *Phillips* v. *Allen*, 8 B. & C. 477.]

Prentice for the plaintiff was not called upon.

Wightman, J.—In this case there must be judgment for the plaintiff. In all the cases cited for the defendant, where the discharge under the bankruptcy or insolvency laws of one country has been held to bind creditors in another country, or to be a bar to debts contracted in another country, the laws giving the discharge were those of the Imperial Legislature of England, by which both parties were equally bound. No case however, has been cited showing that an English creditor can be affected by the laws of a Colonial Legislature.

Blackburn, J.—This debt was not contracted in Victoria, nor was the plaintiff a domiciled subject of the colony. The rule is laid down in Story's Conflict of Laws, s. 342, and by Bayley, J. in *Philips* v. *Allen*. The colonial law cannot affect creditors resident in this country, any more than the laws of a foreign state.

Judgment for the plaintiff.

UNITED STATES LAW REPORTS.

In Re John Merryman.

United States—Habeas Corpus—Right thereto—Power of Executive to suspend.

Held—1. That the President of the United States of America cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it.
2. That a military officer has no right to arrest and detain a person not subject to the rules and articles of war, for an offence against the laws of the United States, except in aid to the judicial authority and subject to its control.

(1st June, 1861.)

On the 26th May, A. D. 1861, the following sworn petition was presented to the Chief Justice of the United States on behalf of John Merryman, he being at the time in confinement in Fort McHenry.

To the Hon. Roger B. Taney,

Chief Justice of the Supreme Court of the United States

The petition of John Merryman, of Baltimore county, and State of Maryland, respectfully shows, that being at home, in his own domicil, he was, about the hour of 2 o'clock, A. M., on the 25th of May, A. D 1861, aroused from his bed by an armed force pretending to act under military orders from some person to your petitioner unknown. That he was by said armed force, deprived of his liberty by being taken into custody, and removed from his said home to fort McHenry, near to the city of Baltimore, and in the district aforesaid, and where your petitioner now is in close custody.

That he has been so imprisoned without any process or colour of law whatsoever, and that none such is pretended by those who are thus detaining him; and that no warrant from any court, magistrate, or other person having legal authority to issue the same exists to justify such arrest; but, to the contrary, the same, as above stated, hath been done without color of law, and in violation of the Constitution and laws of the United States, of which he is a citizen. That since his arrest he has been informed that some order purporting to come from one General Keim of Pennsylvania, to this petitioner unknown, directing the arrest of the Captain of some company in Baltimore county, of which company the petitioner never was and is not captain, was the pretended ground of his arrest, and is the sole ground, as he believes, on which he is now detained.

That the person now so detaining him at said Fort is Brigadier General George Cadwalader, the military commander of said post, professing to act in the premises under or by color of the authority of the United States. Your petitioner therefore prays that the writ of habeas corpus may issue, to be directed to the said George Cadwalader, commanding him to produce your petitioner before you, Judge as aforesaid, with the cause, if any, for his arrest and detention, to the end that your petitioner be discharged and restored to liberty, and as in duty, &c.

John Merryman.

Fort McHenry, 25th May, 1861.

United States of America, District of Maryland, to wit:

Before the subscriber, a Commissioner appointed by the Circuit Court of the United States, in and for the fourth circuit and district of Maryland, to take affidavits, &c., personally appeared the 25th day of May, A. D. 1861, Geo. H. Williams, of the city of Baltimore and district aforesaid, and made oath on the Holy Evangely of Almighty God that the matters and facts stated in the foregoing petition are true to the best of his knowledge, information and belief, and that the said petition was signed in his presence by the petitioner, and would have been sworn to by him, said petitioner, but that he was at the time and still is in close custody, and all access to him denied, except to his counsel and his brother-in-law—this deponent being one of said counsel.

Sworn to before me, this 25th day of May, A. D. 1861.

John Hanan. *U. S. Commissioner.*

United States of America, District of Maryland, to wit:

Before the subscriber, a Commissioner appointed by the Circuit Court of the United States, in and for the fourth circuit and district of Maryland, to take affidavits, &c., personally appeared this 26 day of May, 1861, George H. Williams, of the City of Baltimore and district aforesaid, and made oath on the Holy Evangely of Almighty God that on the 26 day of May he went to Fort McHenry, in the preceding affidavit mentioned, and obtained an interwiew with Gen. Geo. Cadwaladar, then and there in command, and deponent, one of the counsel of said John Merryman, in the foregoing petition named, and at his request, and declaring himself to be such counsel, requested and demanded that he might be permitted to see the written papers, and to be permitted to make copies thereof, under and by which he, the said General, detained the said Merryman in custody; and that to said demand the said Gen. Cadwalader replied that he would neither permit the deponent, though officially requesting and demanding, as such counsel, to read the said papers, nor to have or make copies thereof.

Sworn to this 26 day of May, A. D. 1861, before me.

John Hanan,
United States Commissioner for Maryland.

Upon this petition the Chief Justice passed the following order:

In the matter of the petition of John Merryman, for a writ of habeas corpus:

Ordered, this 26th day of May, A. D. 1861, that the writ of habeas corpus issue in this case, as prayed, and that the same be directed to General George Cadwalader, and be issued in the usual form, by Thomas Spicer, clerk of the Circuit Court of the United States in and for the district of Maryland, and that the said writ of habeas corpus be returnable at eleven o'clock, on Monday, the 27th of May, 1861, at the Circuit Court room, in the Masonic Hall, in the City of Baltimore, before me, Chief Justice of the Supreme Court of the United States.

R. B. Taney.

In obedience to this order, Mr. Spicer issued the following writ:

District of Maryland, to wit: United States of America.

To General George Cadwalader, *Greeting:*

You are hereby commanded to be and appear before the Honorable Roger B. Taney, Chief Justice of the Supreme Court

of the United States, at the United States Court Room, in the Masonic Hall, in the City of Baltimore, on Monday, the 27th day of May, 1861, at 11 o'clock in the morning, and that you have with you the body of John Merryman, of Baltimore county, and now in your custody, and that you certify and make known the day and cause of the caption and detention of the said John Merryman, and that you then and there do submit it to, and receive whatsoever the said Chief Justice shall determine upon concerning you on this behalf, according to law, and have you then and there this writ.

Witness the Honorable R. B. Taney, Chief Justice of our Supreme Court, &c., &c., &c.

THOMAS SPICER, *Clerk*,

Issued 26th May, 1861.

The Marshall made his returns that he had served the writ on General Cadwalader on the same day on which it issued, and filed that return on the 27th May, 1861, on which day at 11 o'clock precisely the Chief Justice took his seat on the Bench. In a few minutes Colonel Lee, a military officer, appeared with General Cadwalader's return to the writ, which is as follows:

Head-quarters, Department of Annapolis,

To the Hon. Roger B. Taney, *Chief Justice of the Supreme Court of the United States, Baltimore, Maryland.*

Sir—The undersigned, to whom the annexed writ of this date, signed by Thomas Spicer, clerk of the Supreme Court of the United States, is directed, most respectfully states, that the arrest of Mr. John Merryman, in the said writ named, was not made with his knowledge or by his order or direction, but was made by Col. Samuel Yohe, acting under the orders of Major General Wm. H. Keim, both of said officers, being in the military service of the United States, but not within the limits of his command.

The prisoner was brought to this post on the 20th inst. by Adjutant James Whittimore and Lieut. Wm. H. Abel, by order of Col. Yohe, and is charged with various acts of treason, and with being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government. He is also informed that it can be clearly established that the prisoner has made often and unreserved declarations of his association with this organized force as being in avowed hostility to the government, and in readiness to co-operate with those engaged in the present rebellion against the government of the United States. He has further to inform you that he is duly authorized by the President of the United States in such cases to suspend the writ of habeas corpus for the public safety.

This is a high and delicate trust, and it has been enjoined upon him that it should be executed with judgment and discretion, but he is nevertheless also instructed that in times of civil strife, errors, if any, should be on the side of the safety of the country. He most respectfully submits for your consideration that those who should co-operate in the present trying and painful position in which our country is placed, should not, by any unnecessary want of confidence in each other, increase our embarassments.

He therefore respectfully requests that you will postpone further action upon this case until he can receive instructions from the President of the United States, when you shall hear further from him.

I have the honor to be, with high respect, your obedient servant,

GEORGE CADWALADER,

Brevet Major-General U. S. A. Commanding.

The Chief Justice then inquired of the officer whether he had brought with him the body of John Merryman, and on being answered that he had no instructions but to deliver the return, the Chief Justice then said:

Gen. Cadwalader was commanded to produce the body of Mr Merryman before me this morning, that the case might be heard, and the petitioner be either remanded to custody or set at liberty if held on insufficient grounds; but he has acted in disobedience to the writ, and I therefore direct that an attachment be at once issued against him, returnable before me here at twelve o'clock to morrow. The order was then passed as follows:

Ordered, That an attachment forthwith issue against General George Cadwalader for a contempt in refusing to produce the body of John Merryman according to the command of the writ of habeas corpus returnable and returned before me to-day, and said attachment be returned before me at 12 o'clock to morrow, at the room of the Circuit Court.

R. R. TANEY.

Monday, May 27th, 1861.

The Clerk then issued the writ of attachmen as directed.

At 12 o'clock on the 28th May, 1861, the Chief Justice again took his seat on the bench, and called for the Marshal's return to the writ of attachment. It was as follows:

I hereby certify to the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, that by virtue of the within writ of attachment to me directed on the 27th day of May, 1861, I proceeded on this 28th day, of May, 1861, to Fort McHenry for the purpose of serving the said writ. I sent in my name at the outer gate—the messenger returned with the reply "that there was was no answer to my card," and therefore could not serve the writ as I was commanded. I was not permitted to enter the gate. So answers

WASHINGTON BONIFANT,

U. S. Marshall for the district of Maryland.

After it was read the Chief Justice said, that the Marshall had the power to summon the *posse comitatus* to aid him in seizing and bringing before the Court, the party named in the attachment, who would, when so brought in, be liable to punishment by fine and imprisonment. But where, as in this case the power refusing obedience was so notoriously superior to any the Marshall could command, he held that officer excused from doing anything more than he had done. The Chief Justice then proceeded as follows:

"I ordered this attachment yesterday, because, upon the face of the return, the detention of the prisoner was unlawful, upon the grounds:

"Frst—That the President, under the Constitution of the United States *cannot suspend the privilege of the writ af habeas corpus* nor authorize a military officer to do it.

"Second—A military officer has no right to arrest and detain a person not subject to the rules and articles of war for an offence against the laws of the United States, except in aid of the judicial authority, and subject to its control; and if the party is arrested by the military, it is the duty of the officer to deliver him over immediately to the civil authority to be dealt with according to law."

It is therefore very clear that John Merryman, the petitioner, is entitled to be set at liberty and discharged immediately from imprisonment.

"I forbore yesterday to state orally the provisions of the Constitution of the United States which make those principles the fundamental law of the Union, because an oral statemement might be misunderstood in some portions of it, and I shall therefore put my opinion in writing, and file it in the office of the Clerk of the Circuit Court in the course of this week."

He concluded by saying that he should cause his opinion, when filed, and all the proceedings to be laid before the President, in order that he might perform his constitutional duty, to enforce the laws by securing obedience to the process of the United States.

The following is a copy of the opinion subsequently filed by the Chief Justice:

TANEY, C. J.—The application in this case for a writ of *habeas corpus* is made to me under the 14th section of the Judiciary Act of 1789, which renders effectual for the citizen the constitutional privilege of the writ of *habeas corpus*. That act gives to the courts of the United States as well as to each justice of the Supreme Court, and to every district judge, power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment. The petition was presented to me at Washington, under the impression that I would order the prisoner to be brought before me there; but as he was confined in Fort McHenry, at the city of

Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ, under such circumstances, would not withdraw General Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: The petitioner resides in Maryland, in Baltimore county. While peaceably in his own house with his family, it was, at two o'clock on the morning of the 25th of May, 1861, entered by an armed force, professing to act under military orders. He was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, General George Cadwalader, by whom he is detained in confinement, in his return to the writ, does not deny any of the facts alleged in the petition. He states that the prisoner was arrested by order of General Keim, of Pennsylvania, and conducted as aforesaid to Fort McHenry by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant or order under which the prisoner was arrested, was demanded by his counsel, and refused. And it is not alleged in the return that any specific act, constituting any offence against the laws of the United States, has been charged against him upon oath, but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts which in the judgment of the military officer constituted these crimes. And having the prisoner thus in custody upon these vague and unsupported accusations, he refuses to obey the writ of *habeas corpus*, upon the ground that he is duly authorized by the President to suspend it.

The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears. Under this order his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of *habeas corpus* at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the President not only claims the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return; and I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of Congress.

When the conspiracy of which Aaron Burr was the head, became so formidable, and was so extensively ramified as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed on his part no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it; and in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if in his opinion the public safety demanded it.

Having therefore regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the Constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them; but being thus officially notified that the privilege of the writ has been suspended under the orders and by the authority of the President, and believing as I do that the President has exercised a power which he does not possess under the constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act without a careful and deliberate examination of the whole subject.

The clause of the constitution which authorizes the suspension of the privilege of the writ of *habeas corpus*, is in the 9th section of the 1st article.

This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing "that all legislative powers therein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives;" and after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifically the legislative powers which it thereby grants; and, at the conclusion of this specification, a clause is inserted giving Congress "the power to make all laws which may be necessary and proper for carrying into execution the foregoing powers vested by this constitution in the government of the United States, or in any department or office thereof."

The power of legislation granted by this latter clause is by its words carefully confined to the specific objects before enumerated; but as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles essential to the liberty of the citizen, and to the rights and equality of the States, by denying to Congress, in express terms, any power of legislation over them. It was apprehended, it seems, that such legislation might be attempted, under the pretext that it was necessary and proper to carry into execution the powers granted; and it was determined that there should be no room to doubt where rights of such vital importance were concerned, and accordingly this clause is immediately followed by an enumeration of certain subjects to which the powers of legislation shall not extend; and the great importance which the framers of the constitution attached to the privilege of the writ of *habeas corpus* to protect the liberty of the citizen, is proved by the fact that its suspension, except in cases of invasion or rebellion, is first in the list of prohibited powers, and even in these cases the power is denied, and its exercise prohibited, unless the public safety shall require it.

It is true that in the cases mentioned, Congress is of necessity the judge of whether the public safety does or does not require it, and their judgment is conclusive; but the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise before they gave the government of the United States such power over the liberty of a citizen.

It is the second article of the constitution that provides for the organization of the executive department, and enumerates the powers conferred on it, and prescribes its duties; and if the high power over the liberty of the citizen now claimed was intended to be conferred on the President, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the executive power shall be vested in a President of the United States of America, to hold his office during the term of four years, and then proceeds to prescribe the mode of election, and to specify in precise and plain words the powers delegated to him, and the duties imposed upon him. And the short time for which he is elected, and the narrow limits to which his power is confined, show the jealousy and apprehensions of future danger which the framers of the constitution felt in relation to that department of the government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English government, which were considered as dangerous to the liberty of the subject, and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the government.

He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office. He is from necessity and the nature of his duties the commander-in-chief of the army and navy, and of the militia, when called into actual service. But no appropriation for the support of the army can be made by Congress for a longer term than two years; so that it is in the power of the succeeding House of Representatives to withhold the appropriation for its support, and thus disband it, if in their judgment the President used or designed to use it for improper purposes. And although the militia, when in actual service, are under his command, yet the appointment of the officers is reserved to the States, as a security against the use of the military power for purposes dangerous to the liberties of the people or the rights of the States.

So, too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He cannot appoint the ordinary officers of government, nor make a treaty with a foreign nation or Indian tribe, without the advice and consent of the Senate, and cannot appoint even inferior officers, unless he is authorized by an act of Congress to do so. He is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power; for the 5th article of the amendments to the constitution expressly provides that no person "shall be deprived of life, liberty or property, without due process of law"—that is, judicial process.

And even if the privilege of the writ of *habeas corpus* were suspended by act of Congress, and a party not subject to the rules and articles of war was afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison or brought to trial before a military tribunal; for the article in the amendments to the constitution immediately following the one above referred to—that is, the 6th article—provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

And the only power, therefore, which the President possesses, where the "life, liberty and property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power, he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the President, in any emergency or in any state of things, can authorize the suspension of the privileges of the writ of *habeas corpus*, or arrest a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws if he takes upon himself legislative power by suspending the writ of *habeas corpus*, and the judicial power also by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessity of government, for self-defence in times of tumult and danger. The government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted; for the 10th article of the Amendments to the Constitution in express terms provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Indeed the security against imprisonment by executive authority provided for in the 5th article of the Amendments to the Constitution, which I have before quoted, is nothing more than a copy of a like provision in the English constitution, which had been firmly established before the declaration of independence.

Blackstone, in his Commentaries (1st vol., 133) states it in the following words:

"To make imprisonment lawful, it must be either by process of law from the courts of judicature, or by warrant from some legal officer having authority to commit to prison." And the people of the United Colonies, who had themselves lived under its protection while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that in framing a government intended to guard still more efficiently the rights and liberties of the citizen against executive encroachment and oppression, they would have conferred on the President a power which the history of England had proved to be dangerous and oppressive in the hands of the crown, and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English Executive to usurp and retain it.

The right of the subject to the benefit of the writ of *habeas corpus*, it must be recollected, was one of the great points in controversy during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of the statesmen engaged in framing a new and as they supposed a freer government than the one which they had thrown off by the revolution. For from the earliest history of the common law, if a person were imprisoned, no matter by what authority, he had a right to the writ of *habeas corpus* to bring his case before the King's Bench; and if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence was charged which was bailable in its character, the court was bound to set him at liberty on bail. And the most exciting contests between the crown and the people of England, from the time of Magna Charta, were in relation to the privilege of this writ; and they continued until the passage of the statute of 31st Chas. II, commonly known as the great *Habeas Corpus* Act.

This statute put an end to the struggle, and finally and firmly secured the liberty of the subject against the usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing; for, although the right could not justly be denied, there was often no effectual remedy against its violation. Until the statute 13th Wm. III., the judges held their offices at the pleasure of the king, and the influence which he exercised over timid, time-serving and partizan judges, often induced them, upon some pretext or other, to refuse to discharge the party, although entitled by law to his discharge, or delayed their decisions from time to time, so as to prolong the imprisonment of persons who were obnoxious to the king for their political opinions, or had incurred his resentment in any other way.

The great and inestimable value of the *Habeas Corpus* Act of the 31st Chas. II., is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

A passage in Blackstone's Commentaries, showing the ancient state of the law on this subject, and the abuses which were practised through the power and influence of the crown, and a short extract from Hallam's Constitutional History, stating the circumstances which gave rise to the passage of this statute, explain briefly but fully all that is material to this subject.

Blackstone, in his Commentaries on the Laws of England (3rd vol., 133, 134), says:

"To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty, by rendering its protection impossible.

"But the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court upon a *habeas corpus* may examine into its validity, and, according to the circumstances of the case may discharge, admit to bail or remand the prisoner.

"And yet, early in the reign of Charles I., the Court of King's Bench, relying on some arbitrary precedents (and those perhaps misunderstood), determined that they would not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the *Petition of Right* (3 Chas. I.), which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when in the following year Mr. Selden and others were committed by the lords of the council, in pursuance of his Majesty's special command, under a general charge of 'notable contempts, and stirring up sedition against the king and the government,' the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable; and when at length they agreed that it was, they however annexed a condition of finding sureties for their good behaviour, which still protracted their imprisonment, the Chief Justice, Sir Nicholas Hyde, at the same time declaring that 'if they were again remanded for that cause, perhaps the court would not afterward grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years."

It is worthy of remark that the offences charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Selden. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject, that the delay of the time-serving judges to set him at liberty upon the *habeas corpus* issued in his behalf, excited the universal indignation of the bar. The extract from Hallam's Constitutional History is equally impressive and equally in point. It is in vol. 4, p. 9, and is also cited at length in the note to pp. 136, 137 of the 3rd vol. of Wendell's edition of Blackstone:

"It is a very common mistake, and not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Charles II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no freeman could be detained in prison, except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the Court of King's Bench a writ of *habeas corpus ad subjiciendum*, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner, with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in Magna Charta (if indeed it is not more ancient), that the statute of Chas. II. was enacted, but to cut off the abuses by which the government's lust of power, and the servile subtlety of crown lawyers, had impaired so fundamental a privilege."

While the value set upon this writ in England has been so great that the removal of the abuses which embarrassed its enjoyment have been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no power in England, short of that of Parliament, can suspend or authorise the suspension of the writ of *habeas corpus*. I quote again from Blackstone (1 Com. 136): "But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient. It is the Parliament only or legislative power that, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reason for so doing." And if the President of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown—a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

But I am not left to form my judgment upon this great question from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the commentaries on the constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the Supreme Court of the United States; and also the clear and authoritative decision of that court itself, given more than half a century since, and conclusively establishing the principles I have above stated.

Mr. Justice Story, speaking in his Commentaries of the *habeas corpus* clause in the Constitution, says:

"It is obvious that cases of a peculiar emergency may arise which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it—a very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body." 3 Story's Con. on the Constitution, section 1336.

And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *ex parte* Bollman and Swartwout, uses this decisive language in 4 Cranch, 95: "It may be worthy of remark that this act (speaking of the one under which I am proceeding) was passed by the first Congress of the United States sitting under a Constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when in cases of rebellion or invasion, the pulic safety might require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation they gave to all the Courts the power of awarding writs of *habeas corpus*."

And again, in page 101:

"If at any time the public safety should require the suspension of the powers vested by this act in the Courts of the United States, it is for the Legislature to say so. That question depends on political considerations, on which the Legislature is to decide. Until the Legislative will be expressed, this court can only see its duty, and must obey the laws."

I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me, show that the military authority in this case has gone far beyond the mere suspension of the privi- of the writ of *habeas corpus*. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers. For at the time these proceedings were had against John Merryman, the District Judge of Maryland, the Commissioner appointed under the act of Congress, the District Attorney and the Marshall, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstrustion to the process of any court or judicial officer of the United States in Maryland, except by the military authority. And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the Dristict Attorney: and it would then have become the duty of that officer to bring the matter before the District Judge or Commissioner, and if there was sufficient legal evidence to justify his arrest, the Judge or Commissioner would have issued his warrant to the Marshall to arrest him; and upon the hearing of the case would have held him to bail, or committed him for trial, according to the character of the offence as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military.

And yet, under these circumstances a military officer, stationed in Pennsylvania, without giving any information to the District Attorney, and without any application to the judicial authorities assumes to himself the judicial power in the District of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if, indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing even before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The Constitution provides, as I have before said, that "no person shall be deprived of life, liberty or property, without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It provides that the party accused shall be entitled to a speedy trial in a court of justice.

And these great and fudamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus upon any pretext or under any circumstances be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsitility may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

GENERAL CORRESPONDENCE.

Law Scholarships—Books.

TO THE EDITORS OF THE LAW JOURNAL.

June 8, 1861.

GENTLEMEN,—In the June number of your Journal you take notice of certain Scholarships, to be given by the Law Society to Students.

In the subjects of examination for the first and second years, amongst other works, are mentioned "Stephens' Blackstone's Commentaries." Will you be so kind as to mention, in your next number, what Students are to understand by the expression "Stephens' Blackstone's Commentaries." Whether as the wording would imply, an edition of Blackstone's Commentaries by Stephens, or Stephens' (own) Commentaries founded on Blackstone.

LAW STUDENT.

[So far as we can learn, the latter is the work intended.—EDS. L. J.]

Toronto, York and Peel—Separation.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Is it true that the City of Toronto is separated from the United Counties of York and Peel for judicial purposes? Are we to have two batches of officials in these United Counties? If so, I think there is just cause of complaint. Who petitioned for any such change? I have no been able to see the act which it is said effects the change, but shall be glad to know something about it from you.

ENQUIRER.

Toronto, June 27, 1861.

[The act to which our correspondent refers is 24 Vic. cap. 53. It is entitled, "An Act to provide for the separation of the City of Toronto from the United Counties of York and Peel for certain judicial purposes," and declares that "the City of Toronto shall be deemed a county for all matters and purposes in the act mentioned connected with the administration of justice," (s. 8). Now we have neither space nor inclination to specify for our correspondent all "the matters and purposes" mentioned in the act. Suffice it to say that the act contains no less than seventeen sections, and for these our correspondent must in patience wait till the published statutes are distributed.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Ex. C. *May*, 14, 15.

WITHERS v. PARKER, *and another (Executrix and Executor &c.)*

Sheriff—Execution—Bill of Sale—Fi. Fa—Ca. Sa—Attorney—London Agent—Order for withdrawal of fi fa, not acted on—Consent to Judge's order.

P. recovers Judgment against F., and the Sheriff, on April 15, seizes under a *fi. fa*, in that action goods of F. in Hampshire. On the same day F, executes a bill of sale to W., and a writ of *fi. fa.* in an action at suit of W. is lodged with the same Sheriff. On

May 1, F. is taken on a *ca. sa.* in Middlesex at the suit of P. P's Attorney in Hampshire thereupon writes to request the Sheriff of Hampshire to withdraw from possession under the *fi. fa.* The officer in possession does not, in fact withdraw; but he tells W. he will hold for him under his writ. A summons is subsequently taken out in the suit of P. *v.* F. to set aside the *ca. sa.* on the ground that no return had been made by the Sheriff to the *fi. fa.*, under which sheriff then held; and an order is made by consent that F. shall be discharged out of custody, and that P. shall be at liberty to proceed on the *fi. fa.* under which the sheriff was in possession. W. was Attorney for F. in the action of P. *v.* F. and plaintiff in the action W. *v.* F.; and the order above mentioned was consented to by B. and R., London Agents of W. W. had not in fact, given his consent, but did not, on his knowing of the order, inform P. that he had given no consent, nor taken any steps to object to it.

Held, affirming the Judgment of the court of Exchequer, that independently of the question of the writ of *fi. fa.* at the suit of P. being withdrawn or not, W. had consented to the judge's order, and was bound thereby.

B C. EX PARTE WALLER (*an articled Clerk*). *June*, 11.

Attorney—Articled Clerk.

Admission of an articled clerk to practice as an Attorney allowed, although the usual entries had not been made in the books at Judge's chambers.

Ex. C. DESLANDES. v. MCGREGOR *and Another*. *June*, 15.

Principal and Agent—Charter Party—Liability of Agent.

In a charter party it was agreed "between D. & Son, owners of of the ship A,, of the one part, and G. Brothers, as agents to F., of Anamaboo, merchants and charterers, of the other part &c" The voyage, &c., was then set out; the words merchants and charterers in the plural number were printed and continued in the plural throughout the whole charter party. It was signed "For D. & Son., of Jersey, owners; B. an agent, for F of Annamaboo; G. Brothers, as agents."

Held, affirming the Judgment of the Court of Queen's Bench, that G. Brothers were not liable on the charter party as principals.

C. P. LOCKWOOD v. SEVICK. *May*, 22.

Commission Agents—whether Commission to be paid only upon goods sold and delivered, or upon goods ordered and order accepted.

Where the plaintiff, who was a commission agent, agreed with the defendant to do business with him, upon the understanding expressed in a letter that he should receive a commission on all goods bought by houses whose accounts were opened through him with the defendant.

Held, that the plaintiff was entitled to receive his commission on all goods ordered, where the order had been accepted, whether the order had been accepted or not.

Ex. MACKAY v. FORD. *June*, 2.

Slander—Privileged Communication.

An action of slander cannot be brought for anything said in the regular course of a judicial proceeding; therefore, where an Attorney, in a speech for the defence in a police court, said that the prosecutor had plundered his master, and the prosecutor gained the verdict in an action for slander against the Attorney.

Held, that the matter alleged to be slanderous being relevant was privileged, and that a non-suit should be entered.

C. P. RICHARDSON v. DUNN.

Action for damages—whether too remote.

The defendant, by a representation which turned out not to be correct, induced the plaintiff to buy the good-will of a public house from C., and finding that the recipts did not come up to what had been represented by the defendant brought an action against C., without communicating with the defendant, C., at the trial, said that the defendant had no authority from him to make the statement he did; and the plaintiff failed in his action. He then brought an action against the defendant, and included in his demand the amount of costs sustained in the former action.

Held, that he could not recover the costs paid in the first action, the damage not being the natural and proximate result of the defendants act.

Ex. C. ABBOTT v. FEARY. *June*, 20.

Appeal to court of error—New trial—Common Law Procedure Act.

A Superior Court of Common Law has a discretion independently of the wish of the parties, to order a new trial upon any ground which appears to them sufficient, against which there is no appeal to a court of error.

Where, upon a rule obtained in the court below to show cause why a verdict entered for defendant should not be entered for plaintiff, or a new trial had, the court ordered a new trial.

Held, (WILLIAMS J., *dissentiente*) that there was no appeal to a court of error.

Ex. C GREENOUGH. v. MCCLELLAND. *June*, 15.

Promisory Note—Principal and Surety—Equitable defence—Giving time to Principal.

In an action on a promissory note defendant pleaded by way of equitable plea, that defendant and A. were joint and several makers of the note, but that defendant was surety for A, to the knowledge of plaintiff, who gave time to A.

Held, affirming the decision of the Court of Queen's Bench that the above constituted a good equitable defence, and that knowledge alone of the relation of principal and surety, at the time of giving the note, was sufficient, coupled with the giving time to the principal to discharge the surety without any express agreement betwen plaintiff and defendant to that effect.

Ex. C. MCDONALD *and another* v. LONGBOTTOM. *June*, 15.

Sale of Goods—Parol Evidence to explain written contract—Latent ambiguity.

The defendant, a wool-buyer, purchased of the plaintiff's, sheep farmers, a quantity of wool described in the written contract simply as "your wool." A previous conversation had taken place between the parties, in which the plaintiff had stated that, besides their own clip of wool, they had purchased the clips of four or five neighbouring farmers, whose names were specified, and that altogether the quantity amounted to "2,300 stones, a hundred stones more or less."

Held, in an action against the defendants for not accepting the wool, that evidence of this conversation was admissable to explain what was meant by the term "your wool."

Held also (WILLIAMS, J., *dubitante*) that this conversation was not thereby made part of the contract, so that the quantity specified became an ingredient in the contract, and that the contract was performed by the plaintiff's sending all the wool which they then had amounting to 2,505 stones.

Judgment of the Queen's Bench affirmed.

CHANCERY.

V.C.K. THOMAS v. JONES. *May* 24.

Practice—Administration—Payment of a legatees' fund to trustees on their undertaking to distribute.

Where, in an administration suit some legatees are dead, the fund is insufficient, and an order has been made for distribution, the court will order payment of all legacies not originally exceeding £50 to the trustees, they undertaking to pay such sums to the parties entitled.

M. R. SECOMBE v. EDWARDS. *June 22, July 2.*

Will—Construction—"And," not read "or"—Gift over.

A testator by his will gave certain property to trustees in trust for the four children of his sister, and directed that "should one or more of them decease before marriage, and leave no issue, then their part or parts shall fall to the remaining brother or brothers, or their issue, share and share alike." Two of the children died unmarried, and without issue. Another died leaving several children. The remaining child died married, but without leaving any issue. *Held*, that the word "and" could not be changed into "or," and therefore that the gift over to the children of the deceased child did not take effect.

L.J. IN RE BURKE. *June 5.*

Lunacy—Idiot not so found by inquisition—Fund in Court—Payment of dividends to relatives of the idiot for his maintenance.

An idiot, aged 29, residing with his brother and sister, was entitled to £4,446 11s. consols, paid into court under the Trustees' Relief Act, and also to other property, the whole income of which was under £300 a-year. Upon a petition presented in lunacy, and under the said act, an order was made for payment of the dividends of the fund in Court to the brother and sister of the idiot so long as he should reside with them, or their undertaking to maintain him.

V.C.S. *March* 10, 12, 13, 14, 15, *May* 26.

JENNER v. JENNER.

Mistake—Family arrangement—Rectification of settlement.

Real estate was settled on A. for life; remainder to B., his eldest son in tail. B. at A's. request joined with him in opening the entail to let in a charge. The estates were re-settled, and several years afterwards B. discovered that his estate tail had been cut down to an estate for life. B. stated that he had joined in opening entail on the understanding that subject to the charge and to certain modifications in A's. power of jointuring and charging portions, the estates should be settled precisely as they had previously been. A. stated that he had been under the same impression.

On evidence that the persons who prepared the re-settlement had explained the limitations to A. & B., a bill filed by B. to rectify the settlement was dismissed with costs.

L.C. & L.L.J. WHITE v. BAKER. *May, 2, 26.*

Will—Construction—Survivor.

Testator by will, after giving income of £5,000 stock to W. for her life, gave it after her decease to E. and A. in equal shares, and in case of the death of either of them in the lifetime of W., then upon trust, to pay the whole of the fund and interest unto the survivor of E. and A.

Held, that A. was entitled upon the death of E., living W., to a vested and indefeasible interest in the fund.

L.J. *Feb.* 27, 28, 29, *March* 1, 2, 5, *April* 26.

CONYBEARE v. THE NEW BRUNSWICK AND CANADA RAILWAY AND LAND COMPANY, LIMITED.

Joint Stock Company—Purchaser of shares—Representations by Secretary—Suit to rescind contract.

The purchaser of shares in a joint stock company limited, filed a bill to set aside his contract on the ground of alleged misrepresentations by the secretary in his interviews with him prior to the purchase.

Held, (reversing the judgment of Vice Chancellor Stuart) that the evidence showed that the purchaser was not sufficiently apprized by the Secretary, who was their agent for negotiating with the purchaser, of the position of the company, and that he had not the means of acquiring proper information about it, or of discerning the misrepresentation: that the company was bound by the acts of its secretary; that the purchase must be set aside, and the money repaid with interest.

M.R. HARBIN v. DARBY. *May 22.*

Solicitor—Execution—Professional services—Charges disallowed—Taxation.

Where a Solicitor who is appointed as executor, is authorized by the will to charge for his professional services, he is only entitled to charge for what are strictly "professional" services, and not for work done and services rendered, which ought to be done or rendered by an executor in a lay capacity.

If he accepts the office of executor, he must undertake its duties.

REVIEWS.

The ECLECTIC MAGAZINE for July is before us, containing, with a historical portrait, the usual selections from the current foreign literature. The present number is fully up to the standard, having articles upon history, geography, and literary topics, of a character calculated to sustain the high reputation of this well known monthly.

BLACKWOOD'S MAGAZINE for June opens with a paper upon the "Book Hunter," treating of the divisions of that class whose literary instincts confine them to the collection and not the reading of books. "The Monks of the West" is a review of the popular work of M. de Montelambert, under the same title. The next article is a review of "Two Years in Switzerland and Italy," by Miss Bremer. The reviewer devotes a few well-written pages to a criticism of the peculiar theological opinions of the authoress, as shown in the anxious searches for her free church to be reared and animated by the genial spirit of benevolence by which she has been moved; and then continues with more general notes upon the very readable book under notice. Several other interesting papers fill the present number, which concludes with the "Memoirs of a Tory Gentlewoman," a paper of the class always entertaining, for they call to mind the earlier times of the mother country, and, in their notices of the brilliant men and beautiful women, give us a closer view of that history so glorious in its epochs.

THE MONTHLY LAW REPORTER (Boston) for May is in our hands. The leading articles are, an extended notice of the death of Chief Justice Shaw, of Massachussetts; and a charge upon the Law of Piracy, with an especial reference to the privateering tendencies of the so styled Confederate States. The number is concluded with the reports of the Supreme Courts of several States of the Union and a few English decisions.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

JAMES F. BROWN, of Toronto, Esquire, to be a Notary Public in Upper Canada. (Gazetted June 15, 1861.)

CORONERS.

DAVID CAW, Esquire, M.D., to be an Associate Coroner for the County of Waterloo. (Gazetted June 15, 1861.)

GEORGE PATON, Esquire, M.D., and HART A. MASSEY, Esquire, to be Associate Coroners for the United Counties of Northumberland and Durham. (Gazetted June 15, 1861.)

ROBERT HAWDEN, Esquire, M.D., to be an Associate Coroner for the United Counties of Lanark and Renfrew. (Gazetted June 15, 1861.)

TO CORRESPONDENTS.

"H. F., DUNDEE, SCOTLAND." Your letter of 12th June received, but not the pamphlet to which it refers. We shall be glad to receive a copy and as glad to hear from you occasionally. You deserve to be well and honestly supported in your endeavours. No. 8 of Vol. 6 mailed as requested to your address.

"CHARLES DURAND"—Under "Division Courts."

"LAW STUDENT"—"ENQUIRER"—Under "General Correspondence."

DIARY FOR AUGUST.

4. SUNDAY ..... 10th *Sunday after Trinity.*
10. Saturday ..... Articles, &c., to be left with Secretary Law Society.
11. SUNDAY ..... 11th *Sunday after Trinity.*
14. Wednesday ..... Last day for service of writ County Court.
18. SUNDAY ..... 12th *Sunday after Trinity.*
20. Tuesday..... Last day for notice for Chancery Examination, Toronto.
21. Wednesday ..... Long vacation ends.
24. Saturday ..... Last day to declare County Court.
25. SUNDAY ..... 13th *Sunday after Trinity.*
26. Monday ..... Trinity Term begins.
30. Friday..... Paper Day, Q. B.
31. Saturday ..... Paper Day, C. P.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

AUGUST, 1861.

THE ACT FOR THE BETTER ASSIGNMENT OF DOWER.

The law of Dower in Upper Canada has always been a subject of much perplexity to the lawyer, and of more or less oppression to the land-owner.

While dower was, in theory, for the support of the widow, in practice it yielded her little or nothing, and, worse still, caused much loss to the owner of the fee.

This being the case, the aim of the doweress was rather to levy a money compensation than to have the *enjoyment* of one-third of a bush-lot, which, owing to the existence of the primeval forest, she could not cultivate, or even one-third of a lot partly cleared, of which, for want of means, she could make no use.

In truth no greater punishment could, in many cases, be inflicted upon the claimant than to admit her claim, and to permit her to take possession of that which apparently she so earnestly prized. But even here there was a difficulty: parties, owing probably to the fact that the claim for one-third of the land was only a pretence, could not agree upon the portion to be assigned, and an action for dower, with its attendant expenses, was the consequence.

Then, suppose the right to dower conceded, was it just to allow the widow to have not only one-third of the lot as left by her deceased husband, but at the same time, in consequence of her own neglect to claim immediate dower, to give her, by way of damages for detention, the benefit of subsequent improvements? Was it fair to carve out of the centre of a farm one-third of it, so as to render the working of the remainder ruinously expensive? Was it right for the law capriciously to impoverish any of her Majesty's subjects without, at least, a corresponding benefit to her who put the law in motion? These, and similar questions without number, were daily asked, but owing to the vexatious state of the law, could not be satisfactorily answered.

The Legislature has at length made an attempt to place the law of dower upon a more satisfactory footing in passing the act 24 Vic. cap. 40, intitled "An Act for the better assignment of Dower in Upper Canada." It is confined to Upper Canada, and does not affect cases where the right to dower has become consummate by the death of the husband before 18th May, 1861: (s. 16).

It is by this act enacted that "In estimating damages for detention of dower nothing shall be allowed for the use of permanent improvements made after the alienation by, or death of, the husband of the claimant" (s. 17); and that "no action for dower shall be brought but within twenty years from the death of the husband of the person claiming dower, nor until one calendar month's notice, in writing, demanding the same, has been given by the claimant to the tenant of the freehold:" (s. 18.) It is also, very properly enacted, that no such action shall be hereafter brought "in case the claimant joined in a deed to convey the land or release dower therein to a purchaser, though the acknowledgment required by law at the time may not have been had, or though any informality may have occurred in respect thereof:" (s. 19.)

The leading features of the act, however, are two: first, to provide facilities for the issue of a writ of assignment of dower; and, secondly, to provide a means whereby the assignment of dower may be, as far as possible, reasonable and just.

Facilities for issue of writ.—Where there exists an outstanding claim for dower in any real estate in Upper Canada, and the owner of the real estate acquiesces therein and is willing to assign dower, but the parties are not agreed as to the admeasurement, it is made lawful for either of the parties to apply to a judge of either of the superior courts of common law, or to the judge of the county court of the county in which the lands lie, out of which dower is demanded, for a writ of assignment of dower: (s. 2.) It must be made to appear to the satisfaction of the judge, by evidence on affidavit, (intitled, it is presumed, in one of the courts) that the parties agree as to the existence of the right of dower. This is the foundation of the summary jurisdiction. When it is established to the satisfaction of the judge he is authorized, without

suit or other proceeding, to order the writ of assignment of dower to issue to the sheriff of the county in which the land lies, out of which the dower is demanded. So, whenever, a widow's right to dower is established in an action for that purpose, she is entitled to sue out from the court in which the action is brought a writ of assignment of dower, under the provisions of the act. The writ must, of course, in this case be sued out upon the judgment, and in any case be directed to the proper sheriff: (s. 1.)

Form of writ.—The Legislature has not given the form of the writ intended, but, on the contrary, declared that the superior courts of common law shall frame a form of writ of assignment of dower, and *fieri facias* for costs, adapted to the provisions of this act and any other act in force in Upper Canada relating to dower:" (s. 15.)

Duty of sheriff upon receipt of the writ.—It is made the duty of the sheriff to whom the writ is directed, to appoint three reputable and disinterested freeholders commissioners, for the purpose of making admeasurement of the dower. The appointment must be by an order which shall specify, 1. The lands of which dower is to be admeasured; and, 2. The time at which the commissioners shall report: (s. 3)

Oath of Commissioners.—Before entering upon their duties the commissioners must take an oath of office. No form of oath is given, but it must be to the effect that "they will faithfully, honestly and impartially discharge the duty and execute the trust reposed in them by the appointment." The oath may be administered by the sheriff who made the appointment, or before some officer authorized to take affidavits: (s. 4.) There is no obligation on the part of any person to accept of the appointment. It may be refused, and even if accepted it would appear may be neglected without any very serious consequences. It is, however, to be presumed that any person who takes the oath "faithfully, honestly and impartially" to discharge the duty will not be guilty of neglect.

Provision in case of death or resignation of Commissioners.—If the persons appointed commissioners, or any or either of them die, resign, neglect or refuse to serve, others may be appointed in their places by the sheriff. Persons so appointed must take the oath before mentioned.

General duty of Commissioners.—The commissioners are required "as speedily as possible" to lay off the one-third of the lands embraced in the order for that appointment, as the dower of the widow. The part so admeasured and laid off must be by the commissioners designated with posts, stones, or other permanent monuments: (s. 5, sub-s. 1).

Rule to be observed as to improvements.—In making the admeasurement, the commissioners are required to take into view any permanent improvement made upon the lands embraced in the order, by any guardian or minor heir, or other owner, since the death of the landlord, or since the time that the lands came to be owned by any person or persons by the alienation of the husband or by title derived through him. If practicable, the commissioners must award the improvement within that part of the dower not allotted to the widow. If not practicable so to award it, they shall make a deduction from the lands allotted to the widow proportionate to the benefit she will derive from such part of the improvements as may be included in the portion assigned to her: (s. 5, sub-s. 2).

Power to award annuity in lieu of Dower.—It is not under all circumstances imperative upon the commissioners to make an actual assignment of dower. If from the improvements upon the land or other peculiar circumstances, the commissioners find that an assignment of dower cannot be so made as to be fair and just to all parties by metes and bounds, they may assess the amount of a yearly sum of money in lieu thereof. In assessing the annuity they must take evidence of all facts and circumstances relating to the lands, and the improvements thereon, making allowances for the improvements in the same way as would have been done had the assignment been made by metes and bounds. The evidence should be taken in writing on oath and be subscribed by the witnesses. It must be returned to the Sheriff: (s. 5, sub-s. 3).

Annuity—its effect, and how recoverable.—The annuity will be a lien upon the entire of the lands, unless the commissioners think it just to confine it to a part, and then only to such part. It will be payable as the commissioners may direct, and recoverable by distress in the same manner as rent. The usual personal remedy against the owners of the land may also be preferred and be had: (s. 5, sub-s. 4).

Employment of a surveyor.—When an admeasurement is necessary, the commissioners may employ a surveyor with necessary assistants to aid them in the admeasurement: (s. 5, sub-s. 6).

Report of Commissioners.—The report or return must be by the commissioners directed to the sheriff, with a full and ample report of their proceedings, with the quantity, courses, and distances of the land admeasured and allotted to the widow, with a description of the posts, stones, and other permanent monuments thereof: (s. 5, sub-s. 5).

Controlling power of Sheriff—Confirmation of Report.—The sheriff is empowered upon the application of the commissioners or of either party, to enlarge the time for making the report. He may also by order compel the report or discharge the commissioners neglecting to make the same, and appoint others in their places. (s. 6). When the report is made, he may at the time for receiving it, or at

such other time to which the hearing shall have been adjourned on good cause shown set aside the report and appoint new commissioners as often as may be necessary. If not set aside, the sheriff is required by order to be endorsed on the writ to confirm the report and admeasurement: (s. 7).

Report when absolute.—The report when made and confirmed is to be filed with the proceedings in the cause thirty days thereafter: (s. 6). The report so made and confirmed at the expiration of thirty days from the date of confirmation, unless appealed from is binding and conclusive upon all parties to the action in which the writ of assignment of dower was issued: (s. 8).

Right of appeal.—Any party interested may appeal from the order of confirmation of the report of the commissioners in the court in which the proceedings have been carried on. The appeal must be made within thirty days after the order of confirmation: (s. 9).

Mode of appeal, bond, &c.—The appeal must be filed with the sheriff who granted the order. It will not, however, be effectual or valid for any purpose, until a bond to the adverse party is executed by the appellant, and filed with the sheriff with security to be approved by him. The approval must be evidenced by an indorsement on the bond. The bond itself must be in the penal sum of $100, and conditioned for the diligent prosecution of the appeal, and of all costs that may be adjudged by the court against the appellant: (s. 10.)

Duty of sheriff when bond approved.—It is made the duty of the sheriff with whom the appeal bond is filed; 1. To transcribe the order, evidence, report, and other proceedings had before him, together with the appeal; 2. To certify the same under his official seal; and, 3. To transmit the same to the proper officer of the court appealed to: (s. 11).

Review of proceedings by the court.—The court to which the appeal is made, is required to proceed at the next ensuing term after the transmission, and not later than the second term after the making of the order appealed from, to review the proceedings upon the application, and to do therein "what shall be just:" (s. 11).

Hearing of appeal.—The hearing shall be brought on by the ordinary practice as in cases of an appeal from the County Court, and the court may by rule direct further returns from any sheriff whenever the same shall be necessary: (s. 14).

Proceedings upon reversal.—In case of the reversal of the order of confirmation, the court is to cause the same to be certified to the sheriff making the order, to the end that new commissioners may be appointed or a new admeasurement be had, as the court may direct: (s. 12). The court itself may, if it see fit, appoint the commissioners: (*Ib*).

Duty of sheriff if no appeal.—If there be no appeal within the time limited for the purpose, it is the duty of the sheriff to deliver possession of the land admeasured to the claimant for her dower, and she may hold the same, subject to the payment of all taxes and charges accruing thereon subsequent to her taking possession: (s. 8).

Costs.—In all cases where a widow's right to dower is established in an action for that purpose, the costs of proceedings for the assignment of dower follow the suit, and are recoverable by writs of *fieri facias* from the goods and chattels or lands of the defendant in the suit: (s. 13). In all other cases, the costs are in the discretion of the court or judge that issues the writ of assignment of dower: (*Ib*). But in both classes of cases all costs in appeal are in the discretion of the court of appeal: (*Ib*). Power is conferred upon the Superior Courts of Common Law to settle the fees to be allowed to the sheriff, commissioners, and all others for services: (s. 15).

Registry of report.—A certified copy of the report may be registered in the registry office for the county where the lands are situate: (s. 6).

ORDERS OF THE COURT OF CHANCERY.

29TH JUNE, 1861.

PRO CONFESSO—SETTING DOWN.

Where a bill has been ordered to be taken *pro confesso*, the cause may thereupon be set down to be heard; but the day for which the same is so set down is to be not less than ten days from the setting down thereof, unless the Court think fit to appoint a special day for the hearing thereof.

MOTION FOR DECREE.

Where a party has given notice of motion for decree, he is to set the cause down to be heard on such motion not less than ten days before the day for which such notice is given, unless he shall have obtained an order allowing a less time for such purpose.

Motions for decrees are to be allowed only in three classes of cases, namely:—

First—Where there is no evidence.

Second—Where the evidence consists only of documents, and such affidavits as are necessary to prove their execution or identity, without the necessity of any cross-examination.

Third—Where infants are concerned, and evidence is necessary only so far as they are concerned for the purpose of proving facts which are not disputed: but this order is not to apply to cases in which, but for this order, the court would grant leave to serve short notice of motion for decree in order to prevent irreparable injury.

DELIVERY OF POSSESSION AFTER FINAL FORECLOSURE.

In any suit for foreclosure or for redemption, the mortgagor or other person entitled to the equity of redemption, being in possession of the premises foreclosed, may be ordered to deliver up

possession of the same upon or after final order for foreclosure, or for the dismissal of the bill, as the case may be.

PARTIES INTERESTED IN THE EQUITY OF REDEMPTION MADE PARTIES IN THE MASTER'S OFFICE.

In any case in which it shall appear conducive to the ends of justice that parties interested in the equity of redemption should be allowed to be made parties in the Master's Office, by reason of the parties so interested being numerous or otherwise, it shall be competent to the Court, at the hearing, or afterwards, to direct that parties so interested, may be made parties in the Master's Office, upon such terms as to the Court shall seem fit; such order to be only made where one or more parties interested in the equity of redemption are already before the court.

DEFENDANT ABSCONDING OR BEING CONCEALED.

In case it appears to the court by sufficient evidence, that any defendant against whom a bill has been filed, has been within the jurisdiction of the Court at some time, not more than two years before the filing of the bill, and that such defendant, after due diligence, cannot be found to be served with an office copy of the bill, and that there is good reason to believe that he has absconded from the jurisdiction, or that he is concealed within the same, the court may make such order as is prescribed by section 7th of the 9th of the General Orders of June, 1853.

APPOINTMENTS AND NOTICES IN THE MASTER'S OFFICE.

Where the Master shall direct that parties not in attendance before him shall be notified to attend before him at some future day, or for different purposes at different future days, it shall not be necessary to issue separate warrants, but the parties shall be notified by one appointment, to be signed by the Master, of the proceedings to be taken, and of the times by him appointed for taking the same.

In cases where parties are notified by appointment from the Master, of proceedings to be taken before him, no warrants shall be issued as to such parties in relation to the same proceedings.

Parties making default upon such appointments, are to be subject to the same consequences as if warrants had been served upon them.

TAXATION OF COSTS.

Where costs are awarded to be paid, it shall be competent to the Master in Ordinary to tax the same, without any express reference to him for that purpose.

PAYMENT OF MORTGAGE MONEY.

Where the Master is directed to appoint mortgage money to be paid at some time and place, he is to appoint the same to be paid into some Bank at its head office, or at some branch or agency office of such Bank, to the joint credit of the party to whom the same is made payable, and of the Registrar of this court; the party to whom the same is made payable, to name the bank into which he desires the same to be paid, and the Master to name the place for such payment.

Where money is paid into some Bank, in pursuance of such appointment aforesaid, it shall be competent to the party paying in the same, to pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of such party and the Registrar. If the same be paid to the sole credit of the party, such party shall be entitled to receive the same without the order of this court.

Where default is made in the payment of money appointed under this order to be paid into any Bank, the certificate of the cashier, where the same is made payable, or of other, the like Bank officer, shall be sufficient evidence of such default. Where the affidavit of the party entitled to receive the same is by the present practice required, the like affidavit shall still be necessary.

CONDUCT OF SALE.

Where, upon a bill for foreclosure, a sale is asked for by a defendant, it shall be competent to the court to require as a condition that the party asking the same, shall conduct the sale at his own expense, dispensing in such case with a deposit, if the court shall think fit.

NOTICES, APPOINTMENTS, &c., HOW TO BE SERVED.

The General Order of this Court, number 43, is altered and varied in the following particulars:

Where the pleadings in any cause have been filed in the office of the Registrar of the Court, at Toronto, or in the office of any Deputy-Registrar, all notices, appointments, warrants, and other documents and written communications in relation to matters transacted in Court or Chambers, or in the office of the Master or Registrar, which do not require personal service upon the party to be affected thereby are to be served upon the Solicitor, when residing in the City of Toronto; and when the Solicitor to be served resides elsewhere than in the City of Toronto, then such notices, appointments warrants, and other documents, and written communications aforesaid, may be served either upon such Solicitor, or upon his Toronto Agent, named in the "Solicitors' and Agents' Book; unless the Court, or a Judge thereof, or a Master, before whom any such proceeding may be had shall give any direction as to the Solicitor upon whom any such notice, appointment, warrant, or other document or written communication shall be served. And if any Solicitor neglect to cause such entry to be made in "the Solicitors' and Agents' Book," as is required by the above general order, the leaving a copy of any such notice, appointment, warrant, or other document, or written communication for the Solicitor neglecting as aforesaid, in the office of the Registrar, is to be deemed sufficient service, unless the Court direct otherwise.

AFFIDAVITS ON APPLICATIONS TO COURT.

Section 3, of General Order, number 40, is hereby abolished, except as to affidavits in support of *ex parte* applications; but this order is not to be taken to warrant the taxation of costs of obtaining office copies of affidavits, for use upon the hearing of any matter, by the party on whose behalf they are filed.

Affidavits except upon *ex parte* applications, must be filed before they can be used; and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion.

PROCEEDING WHERE STATE OF ACCOUNT CHANGED AFTER DECREE OR REPORT.

In cases where after a decree or decretal order for the sale or foreclosure of mortgage property the state of the account ascertaind by decree or decretal order, or by the report of the Master, shall be changed by payment of money, by receipt of rents and profits, by occupation rent, or otherwise, before final order for foreclosure or sale obtained, it shall be competent to the plaintiff or other party to whom the mortgage money is payable, to give notice

to the party by whom the same is payable, that he gives him credit a sum certain to be named in such notice, and that he claims that there remains due to him in respect of such mortgage money for a sum certain, to be also named in such notice; and in case upon the final order for foreclosure for sale being applied for, the judge shall think the sums named in such notice proper to be allowed and paid under the circumstances, the order for final foreclosure is to go without further notice, unless the judge shall direct notice to be given, or it shall be competent to the party to whom the mortgage money is payable, to apply to a judge in Chambers for a reference to a master, or for an appointment to fix such sums respectively, and in the latter case either upon notice, or *ex parte*, as the judge may think fit, and the order to be made thereupon is to be served, or service thereof dispensed with, as the judge may direct.

It shall be competent to the party to whom such notice may be given to apply to a judge in Chambers for an appointment to ascertain and fix the amounts proper to be allowed and paid instead of the amounts mentioned in such notice; or for a reference to a master for a like purpose; and in case the judge shall think a reference to a master proper, the same may be made *ex parte*, unless the judge shall otherwise direct.

APPEALS FROM MASTER'S REPORTS.

Section 17 of General Order 42, is altered and varied in the following particular:—

Reports become absolute, without order, confirming the same at the expiration of fourteen days after the filing thereof, unless appealed from. An appeal shall lie to the court upon the motion, at any time from the signing of the report, to the expiration of fourteen days from the filing of the same in respect of the finding of the the master upon any matter presented in his office for his decision, without objections or exceptions being previously taken.

It shall be competent for any party affected by the report to file the same, or a duplicate thereof, and the filing of such duplicate shall have the same effect for the purposes of this order as the filing of the report, by the party taking the same.

J. C. P. Esten, V. C.
J. G. Spragge, V. C.

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1860.

ARTICLED CLERKS' EXAMINATION.

BLACKSTONE, VOL. I.

1. Into what two classes does Blackstone divide the relations of persons.
2. What are the three *absolute* rights of individuals?
3. How are parliaments dissolved? Is their any provincial statute on this point?

SMITH'S MERCANTILE LAW.

1. "I promise to pay to A. or order £50 on demand, in goods:" is this a good promissory note? Give your reasons.
2. What is requisite to a valid sale of goods over the value of ten pounds? Does it make any difference whether the goods are in existence at the time of the sale?
3. What is the effect of mentioning no time for payment in a bill or note?
4. What are general and particular liens, and how are they respectively looked upon by the law?

WILLIAMS ON REAL PROPERTY.

1. What are the various kinds of estates, in real property, and how are they transferable?
2. What is a "use?" and, in connexion with this, explain the operation of a conveyance under the Statute of Uses.
3. Explain the nature of a mortgage, and the respective rights of the mortgagor and mortgagee.
4. Define a "reversion," and mention some of its incidents.

STORY'S EQUITY JURISPRUDENCE.

1. Explain the origin of equity jurisprudence, and distinguish between courts of law, and courts of equity, strictly so called.
2. Give the general heads of equitable relief, with examples to illustrate your meaning.
3. Explain "marshalling," and "substitution" or "subrogation."
4. What is the nature of the remedy by "injunction."

STATUTES AND PLEADING OF THE COURTS.

1. What is an avowry and cognisance?
2. What is the effect of a creditor obtaining judgment against his debtor as an absconding debtor, where it afterwards appears to the court that such debtor was not an absconding debtor?
3. What is the course to be pursued when a plaintiff dies during the progress of a suit?
4. In what cases can the court or a judge direct that a plaintiff shall be at liberty to proceed against an absent defendant without his having entered an appearance?
5. What is the penalty incurred by a tenant who is served with a writ of ejectment, and omits to notify the same to his landlord?
6. What are the requisites of a bill and answer respectively?
7. What changes have the general orders introduced as to "parties?"
8. What is the practice in this country and in England respecting as to obtaining "discovery?"
9. How far are persons interested in a suit admissible as witnesses?

EXAMINATION FOR CALLS.

TAYLOR ON EVIDENCE.

1. Of what facts are the entries of a deceased person against his interest, and in the ordinary course of business. respectively evidence, is there any and what difference between them in this respect?
2. Explain the rule that there are no degrees of secondary evidence. Would this rule make a copy of a copy sufficient, in cases where secondary evidence is admissible? Give your reasons.
3. Mention some cases in which evidence is excluded on the grounds of public policy.
4. Mention some cases in which a notice to produce is not necessary for the purpose of letting in secondary evidence.

BYLES ON BILLS.

1. Is a debt due from a third person to A. a good consideration for a note payable *in futuro*, given by B. to A.? Give your reasons.

2. If a bill is accepted in one country, payable in another, is the contract to be construed by the law of the country in which it is accepted, or of that in which it is payable? Give your reasons.

3. Is a plea of tender, by the acceptor after the bill has become due, but before action brought, good? Give your reasons?

SMITH'S MERCANTILE LAW.

1. What is the effect of the endorsement of a bill of lading on the vendor's *legal* right to stop goods in transitu?

2. Are there any, and if so, what cases, in which the concealment of facts within the knowledge of the insured will not vitiate a policy?

3. What is a charter party? and what is the ordinary form of contract of affreightment by a general ship.

ADDISON ON CONTRACTS.

1. What is the effect of the consideration for a contract, and of the contract itself respectively, being partly legal and partly illegal?

2. Upon what does the question, whether goods supplied to an infant are necessaries, depend?

WILLIAM'S ON REAL PROPERTY.

1. Distinguish between a "reversion" and a "remainder."

2. What are estates of "courtesy" and in "dower," and the incidents thereof respectively?

3. What is an "easement," and how may it be conferred or lost?

4. What are the limitations imposed by statute, with respect to the recovery of real estate?

STORY'S EQUITY JURISPRUDENCE.

1. When does a bill in equity lie for "an account?"

2. What is "accident," as one of the heads of eqitable jurisdiction?

3 When will equity relieve against forfeitures?

4. How far will the defective execution of a power be remedied in equity.

STATUTES AND PLEADING OF THE COURTS.

1. In what, if any, cases of ejectment, can mesne profits be recovered at the trial of the action of ejectment?

2. In what cases is the venue in replevin local, and in what transitory?

3. In what manner can a plaintiff suing upon a lost negotiable instrument, prevent such loss being set up as a defence?

4. What is the effect of a party to a suit refusing to admit a document saving just exceptions after having been duly called on by notice to do so? and, what is the effect of omitting to give such notice?

5. Under what circumstances in equity is a "demurrer" proper?

6. What is the effect of a "replication" in equity, and when should it be filed?

7. Classify the different kinds of bills in chancery, and state how far they are effected by the general orders.

8. What is an order for the production of documents, and the effect of it?

SELECTIONS.

THE CASE OF ANDERSON, THE FUGITIVE SLAVE.

Continued from page 173.

As to *Campbell* v. *Hall*, Cowp. 204 (1774), it was an action for money had and received against a customs collector of Grenada—not a *habeas corpus* case, and therefore inapplicable to Anderson's case. The references to Vattel's "Law of Nations," *Grotius de Jure Belli ac Pacis*, and the memorandum in 2 P. Wms. 75, refer to the rights of a conquering prince over a conquered state, immediately upon subjugation, and consequently are irrelevant to the kindly relations which exist between the mother-country and Canada; especially now that the latter has a legislature and judicature of its own. In Watson's case, 9 A. & E. 731 (1839), though the prisoners, the subject of the *habeas corpus*, were brought from Canada, yet they were in Liverpool (England) when the writ was granted, to which place, as part and parcel of England, the Court of Queen's Bench at Westminster had clearly power to issue its writ of *habeas corpus*. Beside, since this case was adjudged, the colony of Canada has had an independent judicature, and special privileges conferred upon it by the Imp. Stat. 3 & 4 Vic. c. 35; to which reference will be made hereafter.

We now proceed to demonstrate that the negative of the question stated in the first paragraph of this article is the correct one, and that the issue of the writ of *habeas corpus* by the Court of Queen's Bench at Westminster, was an act quite beyond either its common law or statutory jurisdiction.

As the common law jurisdiction of the Court is inapplicable to a colony which we have not possessed for three generations, no further comment is necessary on this head.

Our observations as to the statutory jurisdiction will be arranged under two principal heads. 1st, As to the topical jurisdiction of the Court of Queen's Bench at Westminster; and 2dly, As to the privileges and territorial ambit of the Canadian courts of civil judicature.

1st.—*As to the topical jurisdiction of the Court of Queen's Bench at Westminster.* That the Court of Queen's Bench at Westminster has a well-defined territorial jurisdiction, which it cannot legally transgress, is clearly shown as well by the appointments and patents of its judges, as by the course of its practice for a long series of years.

The head of the Court of Queen's Bench at Westminster,* is a functionary whose formal title formerly was that of *Justiciarius Angliæ*, and his court being a remnant of the ancient *aula regis*, can still be removed by the queen to any place in *England*, wherever she may, for the time being, happen to be; and for this reason it is that the process of such court may be still made returnable, as formerly it always was, "*Ubicunque fuerimus in Anglia.*"

It may be argued, and with some plausibility, that the official name of the chief-justice, though confined to England, does not limit the jurisdiction of his court to this island, because it may well be that though his court must be held in England, yet its writs may lawfully run into the colonies or other dominions of her majesty. But, when the matter

* "The Chief-Justice of the King's Bench is not now that *Justiciarius Angliæ* which was anciently in use; for he had, in effect, all jurisdiction both in civil and criminal matters in the King's Bench, Chancery, Common Pleas, and Exchequer, and often sat in those Courts as their chief judge. But the chief-justice of the King's-Bench has, as one of the judges of such court, that part of the jurisdiction of the *Justiciarius Angliæ* which concerns criminal causes, and the inspection and reformation of the judgments of other courts. It is true he is frequently called Chief-Justice of England, because he presides in that court where the *Justiciarius Angliæ* did most frequently and naturally sit, as the King's deputy in the administration of justice. But it is a misconclusion that therefore he is that *Magnus Justiciarius Angliæ*, the great state officer before the time of Henry III. He is created by writ, and always was; but the *Justiciarius Angliæ* by patent."—2 Hale's "Pleas of the Crown," p. 6.

comes to be fairly considered upon authorities and usage, it will be found that the chief-justices of the Court of Queen's Bench in England have so constantly refused (except where specially authorised by statute) to accept jurisdiction over a local action arising, or crime committed, out of England, that the jurisdiction of the court is practically and actually co-extensive with its judges' patents.

The nature and extent of the topical jurisdiction of the Court of Queen's Bench at Westminster may therefore be defined to embrace England, Wales, and Berwick-upon-Tweed, but not Scotland nor Ireland. The Isle of Man, and the Islands of Jersey, Guernsey, Alderney, and Sark are also excluded. Here the ordinary process of the Courts at Westminster has no force, and no action of a local character arising therein can be brought in the courts of this country. The colonies are also excluded, as is shown by the case of *R.* v. *Hooker*, 7 Mod. 193 (7 Geo. II., K. B. cor. Lord Hardwicke C. J., and Page, Probyn and Lee, JJ.), in which a motion for an information for an assault and battery, committed on a person in Newfoundland, was refused on the ground that the offence was local, and that the procedure by information was not distinguishable, so far as related to the court's jurisdiction from an indictment. Further, in *Doulson* v. *Matthews*, 4 T. R., 503, Lord Kenyon and Buller, J. expressly held that trespass would not lie in the superior courts at Westminster for entering a house in Canada. The latter judge saying—"We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local." These authorities are, it is submitted, conclusively against the jurisdiction of the English courts.

We now proceed to notice several acts of parliament which have been from time to time passed, in order to enlarge not only the jurisdiction and process of the superior courts at Westminster, but also the powers of their judges and other officers, which, but for such enabling statutes, could not have been legally exercised; and it appears that it has only been after centuries of struggles, that the Court of Queen's Bench at Westminster has at last established its jurisdiction over the whole of England proper. The first we propose to notice is the Stat. 11 Geo. IV. & 1 Wm. IV., c. 70; which was passed in order to give currency to Westminster writs within the county Palatine of Chester and in Wales, which it does in language that clearly shows that Queen's Bench writs were previously limited to England. Thus, section 13 enacts:—

That from and after the commencement of such Act, his Majesty's writ shall be directed and obeyed, and the jurisdiction of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer, respectively, *and of the several judges and barons thereof*, shall extend and be exercised over and within the County of Chester, and the County of the City of Chester, and the several counties in Wales, in like manner, to the same extent, and to and for all intents and purposes whatsoever, as the jurisdiction of such courts respectively is now exercised *in and over the* COUNTIES OF ENGLAND, *not being counties Palatine*, any statute heretofore passed to the contrary notwithstanding: and that all original writs to be issued into the said several Counties of Chester, City of Chester, and Wales, shall be issued by the cursitors for *London and Middlesex*, and the process and proceedings thereon shall be issued by and transacted with such of the officers of the several Courts of King's Bench and Common Pleas, as shall be named for that purpose by the chief-justices of such courts respectively, each naming for his own court.

So, when our relations with our East Indian possessions became considerable, it required the Stat. 13 Geo. III. c. 63, to empower the Court of Queen's Bench at Westminster to issue a *mandamus*, commanding the chief-justice and judges of the Indian Courts to examine witnesses in India, and to render legal the use of such examinations in the superior courts at Westminster, on the trial of misdemeanours or offences committed in India.

Further, the Stat. 1 Wm. IV. c. 22, after reciting that great difficulties and delays were often experienced, and sometimes a failure of justice took place in actions depending in courts of law, by reason of the want of a *competent power and authority* in the said courts to order and enforce the examination of witnesses when the same might be required before the trial of a cause; and after reciting the above-mentioned Stat., 13 Geo. III. c. 63, enacted by sect. 1st, That all and every the powers, authorities, provisions, and matters contained in such recited Act, relating to the examination of witnesses in India, should be, and the same were thereby, extended to all COLONIES, *Islands, Plantations, and places under the dominions of his Majesty in foreign parts.*

The 5th section provided—That every person whose attendance is required, is entitled to the like conduct-money, and payment for expenses and loss of time, as upon attendance upon a trial; and the 6th section enacted—That any sheriff, gaoler, or other officer having the custody of any prisoner, may take such prisoner for examination, under the authority of this Act, by virtue of a writ of *habeas corpus*, to be issued for that purpose; which writ may and can be issued by any court or judge under such circumstances, and in such manner as such court or judge might then by law issue the writ, commonly called the writ of *habeas corpus ad testificandum.*

Notwithstanding the passing of the last-mentioned Act, yet so jealously have the courts at Westminster respected their original jurisdiction, that when, in *Wainwright* v. *Bland*, * a *mandamus* was moved to examine a witness in *Scotland*, the court of King's Bench refused the rule, and held that the witness must be examined by a commission, the court having no authority to issue a *mandamus* to Scotland, not being "foreign parts" within the above statute.

So it required the passing of the Stat. 45 Geo. III. c. 93, in order to provide for the appearance of persons to answer in cases where warrants were not usually issued, and to give evidence in criminal prosecutions in every part of the United Kingdom. The second section of which Act enacted:—

That the service of every writ of subpœna or other process, upon any person in any one of the parts of the United Kingdom, requiring the appearance of such person to answer or give evidence in any criminal prosecution in any other of the parts of the same, shall be as good and effectual in law as if the same had been served in that part of the United Kingdom where the person so served is required to appear; and in case such person so served shall not appear according to the exigence of such writ or process, it shall be lawful for the court out of which the same issued, upon proof made of the service thereof to the satisfaction of the said court, to transmit a certificate of such default under the seal of the same court, or under the hand of one of the judges or justices of the same, *to the Court of King's Bench in England*, in case such service was had in England; or, in case such service was had in Scotland, to the Court of Justiciary in Scotland; or, in case such service was had in Ireland, to the Court of King's Bench in Ireland; and the said last-mentioned courts respectively shall and may thereupon proceed against and punish the person so having made default, in like manner as they might have done if such person had neglected or refused to appear in obedience to a writ of subpœna, or other process issued out of such last-mentioned courts respectively.

And the 4th section provided and enacted—That none of such last-mentioned courts shall in any case proceed against or punish any person for having made default, by not appearing to give evidence in obedience to any writ of subpœna, or other process, for that purpose, unless it shall be made to appear to such court that a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpœna or other process was served upon such person.

So the Statute 17 & 18 Vic. c. 34, after reciting that great

* 1 Gale, 163. S. C. 3 Dowl, 653.

inconvenience arose in the administration of justice, from the want of a power in the superior courts of law to compel the attendance of witnesses resident in one part of the United Kingdom at a trial in another part, and that the examination of such witnesses by commission was not in all cases a sufficient remedy for such inconvenience, enacted by sect. 1:—

That if any action or suit now, or at any time hereafter, depending in any of Her Majesty's superior courts of Common Law at Westminster or Dublin, or the Court of Session or Exchequer in Scotland, it shall appear to the court in which such action is pending, or, if such court is not sitting, to any judge of any of the said courts respectively, that it is proper to compel the personal attendance at any trial of any witness who may not be within the jurisdiction of the court in which such action is pending, it shall be lawful for such court or judge, if in his or their discretion it shall so seem fit, to order that a writ, called a Writ of *Subpœna ad testificandum*, or of *Subpœna duces tecum*, or Warrant of Citation, shall issue in special form, commanding such witness to attend such trial wherever he shall be within the United Kingdom: and the service of any such writ or process *in any part of the United Kingdom*, shall be as valid and effectual to all intents and purposes, as if the same had been *served within the jurisdiction of the court from which it issues*. By sect. 4, persons are not to be punished for disobedience if sufficient money has not been tendered for expenses.

These statutes it must be admitted, when fairly considered, show that the topical jurisdiction of the Court of Queen's Bench at Westminster is co-extensive with England proper, and not beyond, and that the authority and powers of its judges are limited by such jurisdiction, except where expressly enlarged by statute. But whether a court has or not jurisdiction in any given case, can readily be known by the following simple test, viz.: By ascertaining whether, if the jurisdiction were assumed and denied by the subject, such court could legally enforce its judgment by execution; for it is a legal axiom on this subject, that the power of enjoining its decision is a consequence of jurisdiction, and thus that jurisdiction and execution are convertible terms. This axiom is acknowledged by Lord Campbell in *Ex parte Lees*, El. Bl. & El. p. 834, where he said—"It was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus* could be enforced in such dependencies," which passage was, as we have seen, quoted with approbation by Chief Justice Cockburn in Anderson's case. This test is also laid down and descanted upon in a learned and accurate treatise, known to the profession as "Mosley on Inferior Courts," in p. 64, of which is the following paragraph:—

So a power of enjoining its decision is a necessary adjunct to a jurisdiction, and therefore it is said by Bracton *—"Oportet etiam quod ille qui judicat, ad hoc quòd rata sint judicia, habeat jurisdictionem ordinariam vel delegatam, et non sufficit quòd jurisdictionem habeat, nisi habeat coertionem, quòd si judicium suum executioni demandare non posset, sic essent judicia delusoria." Also—"Sunt enim causæ spirituales, in quibus judex secularis non habet cognitionem nec executionem, CUM NON HABEAT COERTIONEM."† and so strongly is a jurisdiction dependent upon a power and authority of giving it effect, that if a jurisdiction be created by act of parliament, or letters patent, and no mention made of such powers as are necessary for giving it effect, as a power of issuing process and execution, they will be implied by mere operation of law.

2nd—*As to the privileges and territorial ambit of the Canadian Courts of Civil Judicature.*—The first statute to which attention is directed to the Imperial Statute of 3 & 4 Vic. c. 35, which was passed on the 30th July, 1840, and is entitled,—"An Act to reunite the provinces of Upper and Lower Canada, *and for the government of Canada.*" It recites that it is necessary that provision be made for the good government of the provinces of Upper Canada and Lower Canada in such manner as may secure the *rights and liberties*, and promote the interests, of all classes of her Majesty's subjects within the same; and that it is expedient that the said provinces be reunited, and form one province for *the purposes of executive government and legislation.*

This statute, after declaring the union of the provinces, provides a legislative council and assembly, appoints a governor with very large powers, and by section 44, which establishes Courts of Appeal, Queen's Bench, and Chancery, in and for Upper Canada.‡

After reciting "That, by the laws then in force in Upper Canada the governor, lieutenant-governor, or person administering the government thereof, or the chief justice thereof, together with any two or more of the members of the Executive Council thereof, constituted and were a *Court of Appeal* for hearing and determining all appeals from such judgments or sentences as might lawfully be brought before them. And also, that by a legislative act of Upper Canada, stat. 2 Wm. IV. c. 8, entitled 'An Act respecting the time and place of sitting of the Court of King's Bench,' it was amongst other things enacted, that his Majesty's Court of King's Bench in that province should be holden in a place certain, that is, in the city, town, or place which should be, for the time being, the seat of the civil government of such province, or within one mile therefrom. And also reciting, that by a Legislative Act of Upper Canada, passed in 7 Wm. IV. c. 2, entitled 'An Act to establish a Court of Chancery in this province,' it was enacted that there should be constituted and established a Court of Chancery, to be called and known by the name and style of 'The Court of Chancery for the province of Upper Canada,' of which Court the governor, lieutenant-governor, or person administering the government of such province, should be Chancellor; and which court, it was also enacted, should be holden at the seat of government in the said province, or in such other place as should be appointed by proclamation of the governor, lieutenant-governor, or person administering the government thereof."

And it was enacted, that until otherwise provided for§ by an act of the Canadian legislature, all judicial and ministerial authority which before and at the time of the passing of the said Act 3 & 4 Vic. c. 35, was vested in, or might be exercised by the governor, lieutenant governor, or person administering the government of the said province of Upper Canada, or the members, or any number of the members of the executive council of the same province, should be vested in, and might be exercised by the governor, lieutenant-governor, or person administering the government of Canada, and in the members of the like number of the members of the executive council of such province respectively.

And that, until otherwise provided for,‖ by act or acts of the Canadian legislature, the said Court of King's Bench, now called the Court of Queen's Bench of Upper Canada, should, from and after the union, be holden in the city of Toronto, or within one mile from the municipal boundary of such city. Provided always, that until otherwise provided by act or acts as aforesaid, the governor of Canada might, by and with the advice and counsel of the Executive Council of such Province, by his proclamation fix and appoint such other place as he might think fit, within that part of the last-mentioned province which then constituted the province of Upper Canada, for the holding of the said Court of Queen's Bench.‖

* Lib. iii. f. 106, 107, par. 4. † Lib. iii. f. 106, 107, par. 5.

‡ As Anderson escaped to Upper Canada, we need not trouble ourselves with the courts of Lower Canada. Other courts are also established by this statute, but for our purpose it is unnecessary to detail them.

§ This section is superseded by the provincial act, 12 Vic. c. 63, and other acts making other provision for the same matters.

‖ See *ante*, p. 34, and *post*, p. 60.

‖ The 47th section of the same Act enacts—"That all the courts of civil and criminal jurisdiction, within the provinces of Upper and Lower Canada, at the time of the union of the said provinces, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, or ministerial, within the said provinces respectively, except in so far as the same may be abolished, altered, or varied by, or may be inconsistent with the provisions of this act, or shall be abolished, altered, or varied, by any act or acts of the legislature of the

The second Statute to which attention is directed was passed in the year 1859 (22 Vic. c. 10), and is entituled, "An Act respecting the superior courts of civil and criminal jurisdiction;" and by it her Majesty, by and with the advice and consent of the legislative council and assembly of Canada, enacted as follows—

By Section 1., "Her Majesty's Court of Queen's Bench for Upper Canada, and the Court of Common Pleas for Upper Canada, are to continue under the names aforesaid; and all commissions, rules, orders, and regulations granted or made in, by, or respecting such courts, or the judges or officers thereof, existing and in force when such Act took effect, remain in force until altered or rescinded, or otherwise determined."

By Section II., "Such Courts of Queen's Bench, &c., are during the reign of a King, to be called '*His Majesty's Court of King's Bench for Upper Canada*' and during the reign of a Queen, '*Her Majesty's Court of Queen's Bench for Upper Canada.*'"

By Section III., "Such courts are Courts of Record of original and co-ordinate jurisdiction, and respectively possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction; and have and shall use and exercise all the rights, incidents, and privileges of a court of record, and all other rights incidents, and privileges, as fully, to all intents and purposes as the same were, at the time such Act took effect, used, exercised, and enjoyed by any of Her Majesty's superior courts of common law at Westminster in England, and may and shall hold plea in all, and all manner of actions, causes, and suits, as well criminal as civil, real, personal, and mixed, and proceed in such actions, causes and suits, by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same; and may and shall hear and determine all issues of law, and also hear, and (except in cases otherwise provided for) by and with an inquest of twelve good and lawful men determine, all issues of fact that may be joined in any such action, cause, or suit, and judgment thereon give, and execution thereof award, in as full and ample a manner as, at the time this Act takes effect, can or may be done in Her Majesty's Courts of Queen's Bench and Common Pleas, or in matters which regard the Queen's revenue, (including the condemnation of contraband or smuggled goods), by the Court of Exchequer in England."

By Section IV., "The aforesaid courts are to be held at the *City of Toronto.*"

By Section V., "Such Court of Queen's Bench shall be presided over by the chief justice of Upper Canada and two puisne justices; and such Court of Common Pleas by a Chief Justice and two puisne justices; and such courts respectively may be holden by any one or more of the judges thereof, in the absence of the others; and the chief justice and justices of the said courts respectively has, and may use and exercise all the rights, incidents, and privileges of a judge of a Court of Record, and all other rights, incidents, and privileges, as fully, to all intents and purposes, as the same were, at the time such Act took effect, used, exercised, or enjoyed by any of the judges of any of Her Majesty's Superior Courts of Common Law at Westminster."

As, therefore, Her Majesty's Court of Queen's Bench in Canada has jurisdiction over the same subject-matters as its sister court in England, so the former Court is, as regards Canada, intrusted with the highest jurisdiction; not only over all capital offences, but also all other misdemeanours whatsoever of a public nature, tending either to a breach of the peace, the oppression of the subject, the raising of factions controversy, or debate, or to any matter of misgovernment. So that, whatever crime is manifestly against the public good comes within its cognizance, and this though no person is directly injured. *Neither can any private subject, who has not forfeited his right to the protection of the law, suffer any kind of unlawful violence or gross injustice against his person, liberty, possessions, from any person whomsoever, without a proper remedy from this court;* not only for satisfaction of the private damage, but also for the exemplary punishment of the offender.†

Neither is it necessary, in a prosecution for any such offence in the Canadian Court, to show a precedent of the like crime formerly punished there, agreeing with the present in all its circumstances; for such court, like the Court of Queen's Bench at Westminster, being the *custos morum* of all subjects in Canada, whenever it meets with an offence contrary to the first principles of common justice, and of dangerous consequence to the public if not restrained, may and will adopt such a punishment as the heinousness of the offence requires.

The above Acts of Parliament, although they do not in terms exclude the jurisdiction of the Court of Queen's Bench in England, yet, as such court never had any common law jurisdiction over Canada, and as there is no statute conferring upon such court the power of sending its prerogative writs into that colony, the necessity for expressly excluding the jurisdiction of the English courts did not arise. Indeed, had such statutes contained language restraining the jurisdiction of the English courts, the fact might have afforded a plausible ground for asserting that the jurisdiction once existed, although in truth it never has.

More could be stated on this important and interesting subject, was there space for so doing; but sufficient has been alleged to convince any impartial mind, that neither the common law, nor the present topical jurisdiction of the English Court of Queen's Bench at Westminster, ever extended, or now extends to Canada (except as to those matters specially given to it by statute); and that, as there is no statutory power whereby the English court is enabled to grant a *hab. corp. ad. subj.* into that colony, so the writ in Anderson's case should not have been granted.

It has also been demonstrated that, as the lives and liberties of her Majesty's subjects in Canada are protected by her Majesty's courts there, having powers equally extensive, ample, and powerful as those enjoyed by the Court of B. R. in England, so the latter Court has acted improvidently in usurping a jurisdiction which is the privilege of the Canadian courts, and of the Canadian courts alone. Such usurpation may, indeed, in the present instance, be attempted to be palliated by the extreme and urgent circumstances of Anderson's case; but this is undeniable, that a prerogative writ tested in England, and issued by the Court of B. R. here, has been sent for execution on to American soil; that Canadian privileges have been violated; and that a dangerous and alarming precedent has been established, which sooner or later may be made the stepping-stone for further encroachments, and may ultimately lead to a collision between the judicatures of this country and our North American possessions, to end, probably, with a second declaration of American independence.

province of Canada, shall continue to subsist within those parts of the province of Canada which now constitute the said two provinces respectively, in the same form and with the same effect as if this act had not been made, and as if the said two provinces had not been reunited as aforesaid."

† 2 Hawkins' "Pleas of the Crown," p. 7.

U. C. REPORTS.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*

JOHN GRANT QUI TAM V. MOSES MCFADYEN, ESQ.

Magistrate—Return of conviction—Notice of action against—Con. Stat. U. C., ch. 126.

In an action against a magistrate for the penalty given by the statute (Con Stat. U. C., ch. 124) for having neglected to make an immediate return of the conviction of one J. S.

Held, that one month's notice before action under Con. Stat. U. C. ch. 126, secs. 9 and 10, not necessary.

The declaration stated that an information having been laid against one John Leng, and the defendant and W. S., and J. R F., three of Her Majesty's justices of the peace, having adjudicated on the causes of complaint in the said information, afterwards on the 5th July, 1850, at Elma, in the said county of Perth was (*sic.*) convicted before the defendant and W. S. and J. F. R., being such three justices of the peace for the said county, for that the said John Leng did, on, &c., (stating an assault and battery of plaintiff,) and adjudged the said John Leng for his said offence to forfeit $8, and to pay plaintiff $10, for his costs in that behalf, and if those sums were not paid, that the said John Leng should be imprisoned for twenty days, unless the said sums and the costs of taking the said John Leng to gaol should be sooner paid, whereupon it became defendant's duty to make an immediate return of the said conviction according to the statute, yet defendant did not nor did the other justices or either of them make an immediate return of the said conviction, whereby an action hath accrued to the plaintiff, who sues as well, &c., to recover $80.

Pleas 1.—Not guilty. 2. Not indebted.

The case was tried at Stratford in October, 1860, before *Hagarty* J. It was proved that the defendant, with two other justices of the peace as stated in the declaration, made the conviction therein set forth in July, 1860. The information had been laid on the 14th June, before another magistrate, who summoned the accused, and appointed a meeting at a particular place. On going there at the appointed time, he found defendant and the other two justices. They heard the case altogether, but the summoning justice did not concur in the conviction made. The complainant, the now plaintiff, gave immediate notice of appeal, and at the following quarter sessions the conviction was quashed. On the 10th September, 1860, after the action was commenced, this conviction, dated 5th July, 1860, was delivered by defendant to the clerk of the peace. A return of the conviction was sent to the clerk of the peace on 14th September. The quarter sessions met on the 11th September and adjourned to the 18th, when the appeal was heard, both parties having appealed, and the conviction was quashed.

The defendant's counsel objected that it did not appear the justices were requested to proceed summarily, or that the parties were brought before them. That it was not alleged that the assault was unlawful, either in the information or conviction; that the disposition of the fine was unlawful; that it should have been directed to be levied by distress; that the conviction does not recite the information or the summons issued, or the appearance, or set forth any evidence; that when a conviction is appealed against, the statute does not apply; that no notice of action to defendant was proved, and that the return to the Court of Quarter Sessions was sufficient. Leave to move for a nonsuit on the last the last three objections was reserved.

The learned judge left the case to the jury on the question whether the defendant had made an *immediate* return. They found for plaintiff. It was further objected that the learned judge told the jury that the fact of notice of appeal having been immediately given should not be considered by them.

In Michaelmas term, *S. Richards, Q.C.*, obtained, a rule *nisi* for a new trial for misdirection, or to enter a nonsuit on the leave reserved

Crooks shewed cause, citing *Kelly qui tam* v. *Cowan*, 18 Q. B. U. C., 104; *Murphy qui tam* v. *Harvey*, 9 C. P. U. C., 528; *O'Reilly qui tam* v. *Allan*, 11 Q. B. U. C., 411. Upon the point of notice he referred to Consol. Stat. of Upper Canada, ch. 126, sec. 10. *Wright* v. *Horton*, Holt N. P. C. 458; *Morgan* v. *Palmer*, 2 B. & C. 729.

In the following term *S. Richards*, Q. C., supported his rule. He addressed himself particularly to the objection of want of notice of action, contending that this was a case within the 9th and 10th sections of the the Consol. Stat. U. C., ch. 126. He cited *Davis* v. *Curling*, 8 Q. B. 226; *Joule* v. *Taylor*, 7 Exch. 58, and urged that under those cases the court might view the non-return of the conviction as amounting to proof of his acting in the discharge of his office of magistrate, and so might come within the words, "any thing done by him in the execution of his office," in which case he was entitled to notice.

DRAPER, C. J.—I think this case clearly distinguishable from those cited by *Mr. Richards*. It is an action for a penalty, the foundation of which is, that the defendant has disobeyed the plain provisions of the statute requiring him to make a return of the conviction. It is not a wrong to the plaintiff individually, which is the cause of action, and where that wrong might be deemed, even though an act of omission, something done in the execution of the office, but it is a breach of a duty prescribed by law, for which a punishment by way of penalty is inflicted. *Charlesworth* v. *Rudgard*, 1 C. M. & R. 896, appears to me to decide this case, and *Wright* v. *Horton* (Holt N. P. C. 458) is the same in effect.

I think the rule should be discharged.

Per cur.—Rule discharged.

HUGH FRASER AND MATTHEW CROOKS CAMERON v. JOHN GLADSTONE AND ALEXANDER MORRISON.

Assignment—Registry of—Consideration in—How far necessary to show the consideration in the registered instrument.

Held, that an assignment (registered under the statute) for the money consideration of five shillings, with a separate declaration of trust referred to and forming part of the instrument (not registered) was invalid, and that the conveyance registered must shew the true and full consideration for which it is given. The decision in *Arnold* v. *Robertson*, 8 C. P. U. C. 147, affirmed.

Interpleader issue to try whether certain goods taken in execution by the sheriff of York and Peel on a *fieri facias* delivered to the sheriff on 1st March, 1859, in a suit brought by defendants against one John Hutchison, were the property of the plaintiffs as against the defendants.

The trial took place at Toronto in April, 1860, before *Hagarty*, J. John Hutchison in the interpleader order, was the only witness called. He produced and proved an assignment dated 28th December, 1857, made by himself to the plaintiffs, whereby, after reciting that he was indebted to the plaintiffs and to divers other persons that he was unable to pay, and being desirous of having his estate and effects applied for the benefit of his creditors, had agreed to make a general assignment to the plaintiffs upon the trusts contained in a certain other indenture of assignment of the same date, made between the same parties, and the creditors of him, the said John Hutchison, who became parties to the said assignment within two months from its date, and that for the more convenient filing, according to law, of the assignment of the goods, chattels, and household furniture, of the said John Hutchison assigned to the said parties of the second part, for the benefit of creditors upon the trusts contained in the other indenture, he had agreed to execute the bill of sale of his goods, chattels, and household furniture, in and about the dwelling-house and premises occupied by him, in &c., and mentioned in schedule annexed marked A. B. and C. It was witnessed that in consideration of the premises and of the trusts and release in the other indenture, and of 5s., he granted, &c., unto the plaintiffs, the goods, &c., described in the schedules A. B. and C.

Habendum to the plaintiff's upon the trusts contained in the other indenture. This indenture was filed in the office of the clerk of the county court on 27th December, 1857. The witness stated the household furniture still remained at his house; that a great number of his creditors had executed the other assignment; that about £27,000 had been paid to the creditors. All the creditors for sums under £60, and all accommodation paper had been paid, and three dividends to general creditors; that his assets were estimated at £100,000, and his debts at £50,000; that he was allowed to draw a salary of £500 per annum, but had not drawn so much; that he attended to the business and received and paid moneys; that after all the creditors who had signed were paid, he was to receive the balance; that a considerable part of his real estate was mortgaged, and the mortgage creditors were paid with the others.

Various objections were raised on the defence, but it is only necessary to notice one, namely, that this assignment, which is the only one filed according to law, contains no trusts, but it is declared to be upon the trusts set forth in another indenture not filed; that the trusts contained in that other indenture form part of the consideration for this, and therefore that this assignment is void according to the decision in *Arnold* v. *Robertson*, 8 C. P. U. C., 147.

The learned judge expressed his opinion to that effect, and it

was agreed that a verdict should be enter for the defendants, with leave to the plaintiffs to move to enter a verdict for them.

In Easter term last, *M. C. Cameron* obtained a rule *nisi* on the leave reserved.

In Hilary Term, *Eccles, Q. C.*, shewed cause.

M. C. Cameron contra.

DRAPER, C. J.—I have heard nothing to distinguish this case from *Arnold* v. *Robertson* (8 U. C. C. P.) and therefore think it unnecessary to say more than till that decision is overruled, we ought in my opinion to be governed by it.

Per cur.—Rule discharged.

DICKSON, DEFENDANT, (APPELLANT,) V. PINCH, PLAINTIFF, (RESPONDENT.)

Appeal—Witness—Competency of a party to suit when called by opposite party.

Held, that a party to a suit called and examined as a witness at the instance of the opposite party is rendered competent as a general witness, and that his incapacity by reason of interest is thereby wholly removed.

See *Lamb* v. *Ward*, 18 Q. B. U. C. 305, where the contrary is decided.

Appeal from the county court of the united counties of Peterborough and Victoria.

Writ issued August 9th, 1860.

Declaration.—Common counts, for money payable, work done, money received, interest, and account stated.

Pleas 1st. Never indebted. 2nd. Satisfaction and discharge by payment. 3rd. Set-off.

The following were the particulars of the plaintiff's claim as endorsed on the writ.

$86 01c. balance due on a due-bill, dated the 16th day of November, 1857, made by the defendant, and now over due, with interest; also $18 25c. being for the wages of the defendant for work and labour done for the plaintiff between the 1st. of January and 1st. of March, 1860. and also for 38 days' work of the defendant for the plaintiff as engineer, from the 22nd of March, to the 4th of May, 1860, $48 89c.

The plaintiff claims interest on $86 01c. from the — day of November, 1859, on $18 25c., from the 1st day of March, 1860, and on $43 78c., from the 8th day of May, 1860, until judgment.

Particulars of defendant's set-off.

	Rent due, May 1860,	£5	0	0
1858.	Paid William Wood,	8	10	0
1859.	" B. Reynolds,	7	10	0
		£16	0	0

At the trial, Samuel Dickson, the defendant, was called and examined by *Mr. Weller*, on behalf of the plaintiff, and stated that the due-bill produced made by Wood, on his behalf, is correct, also the shanty time.

On cross-examination by Mr. Dennistown, the following question was asked and objected to by Mr. Weller as inadmissible:

"Whether the defendant made any other payment than the payment endorsed on the due-bill?" This question was allowed by the learned judge with leave for the plaintiff to move against the verdict, and if the question should be found improper, and no other evidence offered by the defendant of the payments spoken to by him, the verdict should be amended by adding the amount spoken to and proved by the defendant alone, to the plaintiff's verdict.

To the best of my recollection I paid the plaintiff $30 on the due-bill; I paid Reynolds for him; it was not included in the settlement; I paid him $3, $8, or $10, and $5 at different times on shanty time.

The learned judge directed the jury to find for the plaintiff without reference to amount but to inform the court how much was to be deducted on Mr. Dickson's statement.

The jury found a verdict for the plaintiff for $66, leaving $48 struck off on account of the allowance of Dickson's testimony.

On the first day of term at the sitting in term of the county court of the united counties of Peterborough and Victoria, Mr. Weller, pursuant to leave reserved, moved for a rule *nisi*. to which cause was shewn by Mr. Dennistown, and the court gave the following judgment: "The question in this matter is whether the defendant—who was placed in the witness box by the plaintiff in order to prove the making of a due-bill part of the plaintiff's cause of action, and not for the purpose of proving any other fact—could afterwards be made use of in his own behalf by being cross-examined as to whether he (the defendant) had not reduced the amount apparently due on the face of the due-bill by other payments of a subsequent date to those which appeared allowed on the face of the due-bill itself admitted.

"The question allowed, subject to the leave reserved to the plaintiff at the trial, has been fully argued. and, I think, on the authority of *Lamb* v. *Ward* et al., 18 Q. B. U. C. 304, the only case in which, as far as I am aware, the point has been the subject of adjudication, must be found in favour of the plaintiff.

"The ruling of the majority of the court of Queen's Bench, and some of the cases suggested by his lordship the *Chief Justice*, if I construe them correctly, leave no other course open.

"I cannot draw the line between a defendant proving one payment, and proving a general set-off, or his proving his endorsation, and his freedom from liabillity by reason of time given by the holder to the maker of a promissory note, of which he was the endorser, and the making of a due bill, as in this present instance, and the making payments which do not appear to have been otherwise credited upon it.

"The payments on the time bill would necessarily fall under the same rule.

"I may, and do individually prefer the judgment and reasoning of the dissentient to the judgment of the majority in Ward's case, but as long as it stands unshaken, it, in my opinion, is binding upon this court, and the plaintiff's rule must be made absolute."

This judgment was appealed from on the following grounds:

That the questions asked the defendant on cross-examination were properly admissible, and that the judgment of the judge of the county court of the united counties of Peterborough and Victoria on making the rule absolute to increase the verdict, is erroneous and should be reversed.

The case was argued by *D. B. Read, Q. C.*, for appellant, citing 16 Vic., ch. 19, sec. 1, and referring to Lamb v. Ward.

Eccles, Q. C., contra.

DRAPER, C. J.—We cannot reverse the judgment of the learned judge of the county court, without coming into conflict with the opinion expressed by the Court of Queen's Bench in *Lamb* v. *Ward et al.*, 18 Q. B. U. C. 304.

It is the more usual, as well as the more convenient practice, where a question of law has been decided by a court of co-ordinate jurisdiction, to treat that decision as a binding authority until it shall be reversed by a higher tribunal. This practice, however, is subject to exceptions. In *Henderson* v. *McLean*, 16 U. C. Q. B. 630, the Court of Queen's Bench expressed their regret that they could not concur in some of the opinions expressed by this court in *Henderson* v. *McLean*, 8 U. C. C. P. 42; so in *Reynolds* v. *Harris*, 8 C. B. N. S. at p. 289, Cockburn, C. J., observes "if our decision could be taken to a Court of Error, we should feel bound by that case" (one which he had referred to) "as a precedent," but he adds, "doubting whether the record could be framed so as to raise the point, and seeing that it is one of a class which rarely finds its way into a Court of Error, we think we ought to deal with the case as one in which there is no appeal, and act upon our own judgment." In one respect these words apply exactly to the present case. There is no appeal from our decision. We are sitting as a Court of Appeal to which the appellant, having a right to go to either of the superior courts of common law, has elected to apply for a review of the judgment of the court below.

I am fully alive to the inconveniences that may arise from opposing judgments being rendered in the two courts on this question, the greater, because the point is one that may frequently arise at *nisi prius*. We can only hope that either a decision of the Court of Appeal, or a declaration of the legislature, will speedly remove them. But I do not perceive on what ground we can withhold from this party the expression of the conclusions at which we have arrived.

A very few years back witnesses were held to be incompetent to testify for any of the following causes:—want of understanding—want of religious belief—for infamy to character, or for interest

It was moreover considered a privilege of parties to a suit that they might refuse to give evidence, and a disqualification of, that they were not permitted to swear in their own favour

The first change in these respects made in Upper Canada was by passing the statute, 12 Vic., ch. 70, which following the British statute, 6 & 7 Vic., ch. 85, enacted that no person offered as a witness should be excluded by reason of incapacity from crime or interest from giving evidence, but on this rule a proviso was engrafted containing some exceptions, namely, any party to an action, suit, or proceeding individually named in the record, any lessor of the plaintiff or tenant or premises sought to be recovered in ejectment, the landlord or other person in whose right a defendant in replevin made cognizance, any person in whose immediate or individual behalf any action was brought or defended wholly or in part, or the husband or wife of such parties respectively.

The 14 & 15 Vic. ch. 66, repealed this proviso, making the only exception, that no married woman should be allowed as a competent witness in any civil proceeding for or against her husband. Both these acts were repealed by 16th Vic., ch. 17; after the latter of them had been in force a little more than 14 months. During that time it certainly was found that perjury was committed to an alarming extent by parties to suits, who offered themselves as witnesses in their own behalf under its provisions. It was very probable the shock felt by judges and jurors on hearing the opposite parties in a cause, make the most contradictory and irreconcilable statements on oath as witnesses, rather than any increased difficulty experienced in coming to a decision, that made a change in the law very generally desired. Whether after a longer trial of that law, the evil experienced would have materially diminished, and the result have been, as in England, a conviction of the advantage of removing every disqualification to give evidence in civil cases arising from crime or interest, I do not profess to say; we have to deal with the law as contained in that statute, which has been re-enacted in the Consolidated Statutes of Upper Canada, ch. 32, and to which I now refer.

By section three the provisions of the first statute, 12 Vic., are re-enacted that no person offered as a witness shall be excluded from giving evidence by reason of incapacity arising from crime or interest; but (by sec. 4.) every person so offered shall be admitted and compellable to give evidence on oath, &c., thus taking away the privilege of refusing as well as the disqualification to give evidence, arising from interest in the matter under trial, or that he had been previously convicted of a crime or offence. Section five declares that the act shall not render competent or authorise or compel any party to the suit individually named in the record, or any claimant or tenant of premises named in ejectment, or the landlord or other person in whose right any defendant in replevin makes cognizance, or any person in whose immediate or individual behalf any action may be brought or defended, or the husband or wife of any such party to be called as a witness in behalf of such party, "*but such party may in any civil proceeding be called and examined as a witness in any suit or action at the instance of the opposite party;* but this does not extend to the wife of the party to any suit or proceeding named in the record.

It is upon the construction of the few words above quoted that the decision has been given which is now appealed from. The learned judge has held, contrary, as he says, to his own impression, and in deference to the case of *Lamb* v. *Ward*, that the defendant who was called as a witness by the plaintiff, in order to prove his own signature, was not a witness for all purposes, and could not be cross-examined by his own counsel to prove that he had subsequently paid a sum of money in part satisfaction and discharge of the promise to pay contained in the instrument he proved.

In construing an act of parliament it is impossible to deny that our judgments are affected and guided according to the stand point from which we contemplate its provisions. It is one thing to regard this act as based upon the principle that the attainment of truth should not, subject to certain exceptions, be impeded by incapacities created by law, but that the fullest information as to the facts in issue should be laid before those who are to decide upon them, who should exercise their judgment on the credit of the witnesses, and the truth of their testimony. It is another to view it as an innovation upon an old established rule, which rule is still to prevail where not absolutely changed, and is to be the guide for deciding all doubtful points arising on the construction of the new enactment.

I think the former is the true point of view from which to examine this question, and to ascertain the true meaning of the language used by the legislature. The reason of this law I take to be general, to remove obstructions to the enquiry after truth, arising from incapacities created by law. I take the exception, the exclusion of certain persons from being witnesses to be special, and to be considered necessary from apprehension of mischief that might result from allowing parties to institute or defend actions in in reliance on their own oaths to sustain their side of the question. And I apprehend that where the general reason of the law is limited by any special exception, such exception shall not prevail over the general reason any further than a strict interpretation of the language used in creating it will warrant, and *a fortiori* that the language of the exception shall not be enlarged by construction to overrule the general reason.

As I read this act I find three things:

1st. An express removal of all incapacity to give evidence arising from crime or from interest.

2nd. An exception to the removal of incapacity.

3rd. An exception to that exception.

I need say nothing on the first point, for nothing can be more explicit than the language of the first section, which is confirmed and amplified by the second.

The exception is contained in section three, and is expressed with equal clearness. It follows almost verbatim a similar provision in Lord Denman's act, 6 and 7 Vic., ch. 85.

The third section also contains the provision which gives rise to the controversy, and which I treat as excepting something from the operation of the former exception. The former selects certain classes of person, out of those who by the first section of the act are made competent witnesses, and declares those classes to be incompetent. The latter under defined circumstances again removes the incompetency. In other words, under sections one and two, *all* persons, including parties to suits, are enabled to give evidence. The first part of section three, excepts parties to suits, among others, from the operation of sections one and two, and then immediately provides that any party to a suit may be called and examined as a witness at the instance of the opposite party. If so called he becomes at once a "person offered as a witness," under the first section, no longer excluded by incapacity from interest, and under the second section he is to be admitted, and is "compellable to give evidence on oath or solemn affirmation." I am unable to put any other construction on the words, "at the instance of the opposite party," than this, that they remove the prevention just created to examining as a witness, a party to the suit, provided the opposite party wills it. The exception that a man shall not be offered as a witness to prove his own case is upheld, but his opponent is empowered to call him. I think the words used amount to this: every plaintiff may call the defendant, and every defendant may call the plaintiff, as a witness in the cause. If the legislature meant to limit such calling to the giving proof in support of the case of the party by whom he is called, but not to give evidence to the same extent that every other witness is required to do, I think they would have been careful to express that intention in words more suitable than "that he may be called and examined *as a witness.*" They have not even said that he may be called and examined *for* or *in behalf* of the opposite party, from which it might be reasonably inferred that the examination was to be limited to those subjects respecting which the party calling him had examined him. He is called as a witness, and so far as the language used goes, there is no distinction made between him and any other witnesses called and examined in the cause.

I do not think therefore that the mere words of the statute warrant any other limitation on his testimony than that which would apply to all witnesses. But leaving the question of strict construction, I have not been able to satisfy myself that there exists *aliunde* such an objection to the full examination of a party to the cause who is made a witness at the instance of the opposite party, that the proposed limitation ought if possible to be adopted, in other words, that we ought to assume that this was the intention of the legislature in passing the act.

The objection is twofold as urged for the respondent. 1st. That a party is not to be believed when he swears anything on his own behalf, or 2nd., that if a party who desires to examine his opponent as a witness for some particular object, by calling him makes that opponent a general witness in the cause, no one will run that risk, and so the statute will be made a dead letter.

As to the first alternative, it cannot be denied but that there are men unprincipled enough to bring unjust actions and to set up unjust defences; men of whom it might well be feared, that to maintain such suits or defences they would (if legal penalties could be evaded) swear falsely themselves or procure others to do so. Such men are not very likely to tell the truth against themselves on an occasion when, if the truth appeared, their action or defence must fail. This argument extends to the utter exclusion of parties to a suit from being witnesses.

The second alternative seems to me to present a very one-sided view of the question. By calling his opponent as a witness, the party affirms his credibility. Can he limit that affirmance to such matters as may be against the interest of his opponent, and deny his credibility as to all other matters in issue between them? Or can he admit his credibility generally, and admitting his knowledge of the whole truth of the matters at issue between them, insist that he shall only tell part of the truth, namely, that which the party calling him desires, but shall tell no more, because the statute does not make him competent to be called as a witness in his own behalf? I can understand an interested party contending for such an argument to establish that the exceptions in the third section are at variance with the principles advanced in the preamble to the 16 Vic.; but I cannot imagine that such a construction is consistent with these words, "Whereas the enquiry after truth in courts of justice is often obstructed by incapacities created by law, *and it is desirable that full information as to the facts in issue should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony.*"

It is admitted, that, provided the cross examination of a party called as a witness is confined to the subject matter of his interrogation in chief, it is to be subject to no other limitation. The practical value of the limitation claimed will depend in many instances on the astuteness of the witness, who may contrive so to shape his answers as to blend together the facts which he desires to advance in his own behalf, with those which make against him, and to which examination in chief is directed, just as an equity draftsman will so frame an answer, that it will be difficult for the plaintiff to read a passage in support of the bill, without also reading something which sustains the defence. But it seems to me a bad practice for the attainment of truth, to make the admission of the proof of important facts in any degree dependent upon the ingenuity with which answers to interrogatories can be framed, and it is not theoretically, at least, made better by compelling a party to answer just so much as it suits the interests of his opponent to ask, and preventing him from stating independent facts which will shew the whole truth, and yet nothing but the truth.

Upon the whole, I am of opinion that if a party to a suit is called and examined as a witness at the instance of the opposite party, he stands on the same footing as any other witness in the cause as to competency, that his incapacity by reason of interest is not partially, but wholly removed, and his credibility must be left to the jury.

As a consequence, I think this appeal should be allowed, and that the rule allowing the plaintiff to increase the verdict rendered for him at the trial pursuant to leave reserved should be discharged in the court below without costs.

Richards, J.—In this matter this court is the tribunal of the last resort to the parties, and they are bound by our decision without any further right of appeal. We are therefore properly asked to decide this case according to the views held by this court, notwithstanding the Court of Queen's Bench, a court of co-ordinate jurisdiction, may have decided the point raised differently from what we shall.

It was not denied in argument before us, nor am I aware that there is any intention of disputing the proposition, that the rule laid down by Mr. Taylor in his work on evidence is the correct one (vol. 2, p. 1116, sec. 1289,) as applied to an ordinary witness in the cause, viz., "that if a plaintiff call a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence."

In the United States a different rule prevails in many of the states, and there "a party has no right to cross-examine a witness except as to facts and circumstances connected with matters stated in his direct examination, and if he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause." If the rule in the American courts prevailed here, we might with more propriety be called upon to decide in favour of the plaintiff, for as he only examined the defendant as to certain matters, the latter could not in his cross-examination give evidence as to other matters on which he was not examined in chief: and if the defendant desired to give evidence in his own favour, he would be called (after his own case had been gone into) as a witness for himself, and being a party to the cause this would seem to be contrary to our statute.

If, then, the rule which prevails in England and Ireland, and which I have always understood to be in force here is to be acted upon, if the defendant was a witness in the cause, he might, on cross-examination, be called upon to state all he knew about the matters in dispute between the parties, as well what was favourable to himself as what was unfavourable.

The whole question revolves itself into this, is a party to a cause when called by his opponent, a competent *witness* in that cause? or is he only then to answer certain questions and be cross-examined as to the matters arising out of such questions?

Without reference to the object of the statute 16 Vic., ch. 19, Con. Stat. U. C., ch. 32, or any arguments deducible from the wording of the various sections of that act applicable to the point in dispute to which I shall refer presently, let us see why the defendant can properly be treated differently from any other witness. The oath he takes is the same as that administered to an ordinary witness, and by it he is bound to "depose the whole truth, so that he is not to conceal any part of what he knows whether interrogated particularly to that point or not."—3 Blackstone's Com. 372.

Can he, with propriety, and in view of his oath, refrain from stating the whole truth on the issue joined between the parties merely because such statements may be favourable to himself? In the old form of answers to a bill in Chancery, or to interrogatories under the Common Law Procedure Act, the party swore to the truth of the answers, and his opponent read them as evidence against him or not, as he pleased. But when a witness is called in open court his answers to questions if pertinent to the issues are evidence in the cause whether the party calling him wishes to make them evidence or not.

As the law formerly stood if a defendant consented to give evidence in a cause when called by the opposite party, and the other defendants also consented, he was a good witness. He was not a competent witness if tendered for himself and co-defendants, and he was not compellable to give evidence against himself, but if he consented to be examined, he was then an admissable witness. The moment he was an admissable witness, I do not see how any evidence that he might give, pertinent of course, to the issue, could be excluded from the consideration of the jury. That the evidence he gives is favourable to himself might be urged to the jury as a ground for not placing too much reliance upon it, but I cannot see that it would justify a court in rejecting it.

The change of the law in relation the admissibility of witnesses and parties to suits in England to give testimony, who were formerly excluded on the ground of interest, was no doubt caused by the adoption in a great measure by the legislature, of the views of Mr. Bentham, propounded in his work on the *Rationale of Judicial Evidence.* The whole change proceeds on the broad ground that all persons, parties to the suit or otherwise, who can give information as to the facts on which the court and jury wish to be informed may be sworn and examined; and that all those facts which were formerly considered sufficient to exclude the evidence on the ground of interest were to be taken into consideration by the court and jury in judging of the credibility of the witnesses. In that view the English statutes from time to time were passed,

such subsequent enactment limiting the exceptions by which evidence was excluded, so that now in almost all suits the parties litigant may give evidence in their own favour, and bills have been from time to time brought before parliament to extend the same principle to a certain class of indictable offences, so as to permit the defendants to be sworn in their own defence.

The preamble to our statute of 16 Vic., ch. 19, clearly refers to the obstruction interposed in courts of justice to enquiries after truth by *incapacities* created by law, and states that it was desirable that full information as to the facts in issue should be laid before the persons appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony. The first section of the act provides that no person offered as a witness shall be excluded by incapacity from interest from giving evidence on the trial of any issue joined in any court, or before any judge, jury, &c., but that every person so offered may and shall be admitted and compellable to give evidence on oath notwithstanding that such person may have an interest in the event of the trial of any issue or of the suit in which he is offered as a witness.

This section thus far seems to me in broad comprehensive terms to remove all *incapacity from interest* from any one who might give evidence; that was the ground of exclusion formerly as applicable to a party who offered to be sworn on his own behalf. He was not compellable to give evidence against himself, and the section without the proviso seems to contemplate that he might be compellable to give evidence; with the proviso, this point is beyond a doubt.

The proviso, as I read it, was not intended to give any additional right to any party, but rather to control the broad powers which were previously given in the clause. It in effect declares that the act shall not authorise or permit any party to a suit individually named in the record to be *called as a witness on behalf of such party*, but *such party may* in any civil proceedings *be called* and *examined as a witness* in any suit or action *at the instance* of the opposite party.

I think the latter part of the proviso as referred to above furnishes a strong, if not a conclusive, argument as to the meaning of the legislature. It does not say that a party may call his opponent as a witness for himself; if it had it might be contended (though I doubt if successfully) that the witness could only give evidence for the party who called him, and that he could not give evidence for himself. But framed as it now is, the section merely provides that a party may be *examined as a witness* at the instance of his opponent, there is nothing in it, or in the general principles of law to say that a witness may not be examined on any matter pertinent to the issue after he has been sworn in the cause.

To conclude my view of the statute as applicable to the point under discussion amounts briefly to this. By its provisions all persons, whether parties to a cause or not, may be called as witnesses and give evidence, but a party to the cause cannot be such witness unless called by his opponent.

When a witness is once placed in the box I see no reason why he may not give the jury all the information he has sworn to give touching the matters in question in the suit. The view taken by Mr. Taylor in continuation of the passage already quoted from, seems to me to accord with what I now contend for, he says "When it was requisite that the substantial, though not the nominal party, in the cause should be called his adversary for the sake of formal proof only, it was held that he was thereby made a witness for all purposes, and might be cross-examined to the whole cause.." He refers to *Morgan* v. *Bridges*, 2 Starkie Rep. 314, which bears out the doctrine stated, and to *R.* v. *Murphy*, 1 Arm. Mac. & Og. 206, which last authority I have not yet seen.

I am clearly of opinion that the plaintiff, in the case before us, having called the defendant and he having proved payments to the satisfaction of the jury to the amount of £12, that the rule allow-that sum to be added to the verdict found by the jury in the court below ought not to be allowed to stand, and that this appeal should be allowed, and the rule *nisi* in the court below should be discharged.

HAGARTY, J.—I wish to rest my decision of this point on the broadest ground. A party to a suit is not a competent witness in his own behalf, and merely on his own motion. Our law, I presume, considers him disqualified by interest from giving a fair narrative to the jury of matters possibly fully known only to himself, and deems it a lesser evil to rest their decision on testimony that may balance its want of directness by its possibly superior credibility. I stop not to question the wisdom of the law, but accept it as it is. It can have no other logical foundation than want of faith in human nature when truth does not square with interest. Granted his good faith, the man who positively knows the facts of a disputed point, must be the proper medium to reflect them in their clearest light on those who must accept them as the basis of decision.

The law declines to risk the enquiry on the fidelity of the interested litigant. The opponent, however, for reasons satisfactory to himself, presents him to court and jury as worthy of credence for *his* purposes. To my mind the conclusion is irresistible that the opponent once offering him as a faithworthy witness on any point involved in the trial, at once removes all incompetency from supposed inability to sacrifice interest to truth, and that he forthwith becomes not merely a compellable, but also a thoroughly competent witness for every purpose on all the facts then in issue in the cause, however diverse and distinct may be the issues to be disposed of.

I am willing to accept the illustration offered in the court from which I have the misfortune to differ, and to hold that if in the same suit one issue be as to the execution of a bond, and the other as to a charge of slander, and the plaintiff avail himself of his undoubted right to make defendant a compellable witness to disprove the plea of *non est factum*, he thereby removes all objection to his adversary as a competent witness to prove or disprove any fact connected with the other issues as to slander or other disputed matter.

I think a party to a suit is necessarily either a competent or an incompetent witness to all the matters involved in any one trial as a whole, and that his incompetency once removed for any purpose is gone as to all.

No separation of competency as to parts of the matters to be tried is intelligible to my mind, nor can it be, I think, to a jury anxious to have the truth from the surest and most reliable sources. But for the judgment of the majority of the Court of Queen's Bench, which makes me pause long in maturing my opinion, I would entertain no shadow of doubt on this point.

I think we must allow the appeal, as our decision is final.

Per Cur.—Appeal confirmed.

CHAMBERS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

WHITE ET AL. V. SHIRE.

Rule for costs of the day—From what office to be issued—When defendant entitled to costs of the day.

Held—1. That under sec. 225 of the C. L. P. Act, authorising a rule for costs of the day to be drawn up on affidavit without motion made in Court, that the rule should be drawn up in the principal office of Toronto.

2. That Deputy Clerks of the Crown have no power under the 120th Rule of Practice to issue rules for costs of the day.

3. That where a cause is called on for trial, counsel for plaintiff and defendant both being present, counsel for plaintiff states he is not ready, and counsel for defendant states he is ready, and plaintiff not being ready the cause is struck out of the docket, defendant is entitled to his costs of the day.

(July 19, 1861.)

The record in this case was entered for trial at the last assizes for the county of Wentworth, before Mr. Justice Richards.

On the last day of the Assizes, the learned Judge read over the names of the untried cases, in open court, and asked if the parties were ready in any of them.

When this cause was called on, the counsel for plaintiff and defendant were both present. The counsel for plaintiff said he was not ready, but the counsel for defendant said he was ready. Plaintiff not being ready, the cause was struck out of the docket.

Afterwards, on 28th May last, defendant caused a rule for costs of the day to be issued from the office of the Deputy Clerk of the Crown at Hamilton. The rule, which was signed by the Deputy Clerk of the Crown, was in the usual form, directing that "the costs when taxed shall be paid by the plaintiff, if it shall appear to the Master that costs ought to be paid."

Both parties attended the Deputy Clerk of the Crown under this rule, and he, thinking that defendant should have asked for a nonsuit, refused to tax any costs whatever to defendant under the rule.

Defendant then, on 21st June last, issued a rule in the usual form for costs of the day, from the principal office in Toronto. Plaintiff attended the Master, and objected to the Master taxing any costs to the defendant, on the ground that the former rule for the same purpose having been issued and adjudicated upon, the second rule was irregular; which objection the Master overruled. Plaintiff then objected that under the circumstances of the case defendant was not entitled to any costs whatever. The Master ruled that defendant was entitled to the costs of the day, and taxed them under the rule.

Jackson obtained a summons on the defendant to show cause why the rule for costs of the day issued from the principal office in Toronto, and the taxation of costs thereunder, and all proceedings subsequent thereto, should not be set aside; or why all proceedings on the rule should not be stayed till term, on the ground that the rule was irregularly issued after a rule had been issued from the office of the Deputy Clerk of the Crown at Hamilton, for the same reason and purpose and to the same effect as the rule sought to be set aside, and the Deputy Clerk of the Crown decided upon hearing the parties that defendant was not entitled to costs; and on the ground that, under the circumstances of the case, defendant was not entitled to any costs of the day whatever against plaintiffs.

Harrison shewed cause, and contended that the rule sought to be set aside was regularly issued, and that defendant was entitled to the costs of the day. He referred to Consol. Stat. U. C., cap. 22, sec. 225; Rule Pr. 120; Har. C. L. P. A. 646; *Morgan* v. *Fernybough*, 11 Ex. 205; *Scott* v. *Crosthwaite*, 6 U. C. L. J. 151.

Jackson, contra, contended that the second rule was irregular, and that as defendant failed to nonsuit plaintiffs he was not entitled to costs of the day. He also referred to *Morgan* v. *Fernybough*, as reported in 1 L. J. N. S. 374.

Burns, J.—It appears to me, under the 225th section of the C. L. P. Act, that a rule for costs of the day should be drawn up in the principal office. The rule of court (No. 120) authorizing Deputy Clerks of the Crown to sign rules, were such rules as were side bar rules, &c., before the statute was passed. And before the statute was passed, a rule for costs of the day required to be moved in court. The statute abolished the motion, but leaves the rule to be issued by the Master. The case was properly disposed of by the Master. This summons must be discharged with costs.

Summons discharged with costs.

PRACTICE COURT.

Latta v. Wallbridge.

Award—Setting aside—Referring back—Grounds—Mistake—Discovery of new evidence.

Held—1. That the Court will not set aside an award on the ground of mistake, unless the mistake be admitted or clear.

2. That an award will only be referred back on the same grounds that would formerly have justified its being set aside.

3. That under the circumstances of this case, the arbitrator was justified in allowing as a set off the judgment of defendant against the plaintiff and another, as against any claim that plaintiff had against defendant.

4. That the Court would not interfere, either to set aside the award or refer it back, on the ground of the discovery of new evidence.

(Sittings after Easter Term, 24 Vic.)

In Easter Term last, *Jellett* obtained a rule calling on the defendant to show cause why the award in this cause, should not be set aside on the following grounds:—

1. That the arbitrator allowed a judgment recovered in the County Court of Hastings, wherein the present defendant was plaintiff, and the present plaintiff and one Gilbert Latta were defendants, to form the subject of the set off in this action.

2. Or why the award should not be referred back to the arbitrator for re-consideration, as to the item of $122 27 mentioned in such award, or the item charging the plaintiff with the balance of the said judgments or both such items, on the grounds that the sum of $122 27 was not a proper charge against the plaintiff, he having retired the note out of the defendant's hands and paid the same to him after he had taken the same up from the Bank, and that the judgment aforesaid was between different parties than those in this action and could not be set off, and then, for that, the balance of judgment was improperly charged against plaintiff: that the said sum of $122 27 and the said judgment represent the same debt, and because the award was contrary to evidence.

3. And because of the discovery of new evidence the note which the defendant retired, with the sum of $122 27 now being in plaintiff's hands, found since the arbitration closed, and on the ground that the arbitrator considers it ought to be referred back.

The arbitrator in a certificate stated that, in his opinion, the matter should be again opened, because he was not sure that the judgment charged in the award made against the plaintiff, was not not based on a debt identical with the defendant's cheque mentioned in the award (viz., $122 27): in other words, his apprehension that the plaintiff was in the award charged twice with the same liability.

Affidavits were filed on behalf of the plaintiff, with a view of shewing that the judgment and the $122 27 did, in fact, represent the indebtedness arising out of the same transaction and ought not both to be allowed. The plaintiff further stated, that he had found a note which was mislaid at the time of holding the arbitration, which would aid materially in establishing the view of the case contended for by him.

Harrison shewed cause during the term, and contended that as to the judgment allowed by way of set off, was recovered in an action under our Prov. Stat., on a promissory note made by the plaintiff and indorsed by his brother, and the plaintiff's counsel admitted and consented before the arbitrator, that it should be allowed as a set-off to the plaintiff's claim for whatever balance was due on the judgment; that although plaintiff did, before the arbitrator finally closed his award, withdraw his consent, yet as the debt was the debt of plaintiff alone and defendant swears he is insolvent, the court would not set aside or refer back the award on that ground. As to referring back the award to the arbitrator on the ground of mistake as to allowing both $122 27 and the balance on the judgment, he submitted that the Court would not refer it back on the ground of mistake, unless it appeared perfectly plain that there was a mistake. As to the discovery of new evidence, he submitted that this is very rarely allowed as a ground for setting aside an award. He argued that the evidence given before the arbitrator and considered by him fully justified the award, and that although the arbitrator on being applied to and told of new evidence, might consider it desirable to re-open the case, that such a practice would be very inconvenient, and that the Courts had always ruled against it He also contended, that this case ought not to be referred back unless the Court is prepared to set aside the award on the grounds suggested by the plaintiff. He referred to *Glen* v. *G. T. R. Co.* 2 U. C. Prac. R. 377; *Phillips* v. *Evans*, 12 M. & W. 309; *Fullie* v. *Fenwick*, 3 C. B. 705; *Faviell* v. *Eastern Counties Railway*, 2 Ex. 344; *Oxenden* v. *Cropper*, 10 A. & E. 197; *Leggo* v. *Young*, 16 C. B. 626; *Hogg* v. *Burgess*, 2 H. & N 298; *Hodgkinson* v. *Fernie*, 3 C. B., *N. S.* 188; *Bagaelly* v. *Mallilliwick*, 4 L. T., *N. S.* 245.

Jellett, in moving the rule absolute, referred to *Paterson* v. *Howison*, 2 U. C. Q. B. 139; *Arnold* v. *Bainbridge*, 9 Ex. 153.

Richards, J.—The notes of evidence before the arbitrator, and the affidavits shew clearly that the question was raised and discussed before the arbitrator, as to whether the cheque or payment of $122 27 and the judgment were really for the same indebtedness, and the arbitrator did undoubtedly decide against the plaintiff. Since the award, plaintiff has discovered a note not produced before the arbitrator, which, if he had produced before the arbitrator, would have strengthened the view he pressed on him. On this being brought to the knowledge of the arbitrator, he does not say as the arbitrator did in *Burnard* v. *Wainwright*, 19 L. J. Q. B. 423 (*S. C.*, 1 L. M. & P. 455), that if the discovered documents had been produced, it would have materially affected the decision of the arbitrator; but that he is not sure his decision is right, and for that reason the case ought to be referred back.

The later cases certainly do not seem to favor the view of setting aside or referring back a matter to an arbitrator even when the mistake is clearly shewn, but in this case both parties do not admit a mistake; the plaintiff endeavors to shew that there is a mistake, whilst the defendant positively denies it. The case of

Philippe v. *Evans*, 12 M. & W. 309, seems quite as strong as the one now under decision. There the arbitrator had omitted by mistake to notice the sum of £119 7*s.* 4*d.*, acknowledged to have been levied by defendant on plaintiff's goods, and the affidavits stated that on the error being pointed out to the arbitrator, he admitted there appeared to be a mistake, and regretted he could not rectify it, his authority having expired with the publication of the award. He recommended the parties to consent to the matter being again brought before him, but the defendant refused to do so, and the Court refused to set aside the award. In referring to *Hall* v. *Hinds* where the award was set aside (2 M. & S. 847) Bolfe, Baron, said "there it was done because without controversy a mistake had been committed by substracting one sum from the other, instead of adding them both together and awarding for the plaintiff instead of the defendant," and Alderson, Baron, observed, "If we were to enter into the question of merits on affidavits, in nine cases out of ten it would be argued there was some mistake." Baron Parke in giving judgment said, referring to *Hall* v. *Hinds*, "I do not mean to say that the decision of the Court of Common Pleas in that case was not correct, as it was founded on facts which shewed a clear mistake, but I feel extremely unwilling to enlarge that rule, although we may possibly do some injustice in particular cases. I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and to open a door to enquire into the merits, or we shall have to do so in almost every case."

Most of the cases on the subject of setting aside awards in mistake or improper finding of arbitrator, were referred to for *Hodgkinson* v. *Ferrie et al.*, 8 C. B., *N. S.* 189, and nothing in that case would seem to warrant the extending the rule as to setting aside this award, as contended for by the plaintiff. It is also an authority to shew that awards will only be referred back on the same grounds that would formerly have justified their being set aside.

I am not prepared either to refer back or set aside the award, on the ground that the arbitrator has made a mistake in awarding, as to the $122 27 and as to the judgment, both in favor of the defendant, or on the ground of the discovery of the new evidence.

As to the award being bad because the arbitrator allowed the judgment to be set-off against plaintiff's claim, I am not willing to yield to plaintiff's views on that point for many reasons, amongst others, that it clearly appears that the note on which the judgment was based was the individual note of the present plaintiff, given for an individual debt which he himself had incurred, and on which the other defendant in that suit was only an accommodation indorser. At the arbitration his counsel admitted it was a proper subject for set off in that proceeding, and I am by no means prepared to decide that the judgment under our statutes so far merged the individual liability of defendant on the note as to prevent its being allowed by the arbitrator as a set off under this reference.

If I had fully made up my mind in favor of the plaintiff as to the merger of the individual liability on the judgment, I should still hesitate to set aside this award on that ground, for truly as the arbitrator says, "in equity and good conscience" the amount ought to be set off against any claim plaintiff may have against defendant.

The defendant shews in his affidavits that the case was repeatedly adjourned by the arbitrator at the request of the plaintiff; that he has been obliged to pay thirty dollars for the arbitrator's fees when taking up the award; that if the matter is referred back he will be put to more expense; and that as plaintiff is insolvent, he can get nothing from him.

Under these circumstances he contends, that the case ought not to go back to the arbitrator as for the discovery of new evidence: that having taken as much time as he chose in bringing the matter before the arbitrator, if he neglected to search among his papers for the document he has found since, he ought not to be allowed to wait till the arbitrator had dicided against him and then bring the matter up again.

On the whole, I am not prepared to make the rule absolute on any of the grounds taken by the plaintiff.

If defendant, after the matter has been fully considered, is advised that he can enforce the award, and plaintiff considers that from anything that appears on the face of it, he can legally resist the payment of the amount thereby directed to be paid, he will have an opportunity of doing so when defendant attempts to enforce the award against him.

In the meantime, the rule *nisi* will be discharged with costs.

Per Cur.—Rule discharged with costs.

RITCHIE v. WORTHINGTON ET AL., ADMINISTRATORS OF DAVIDSON.

Held, 1st. That a judgment deliberately taken by the plaintiff against the defendants, as administrators, in September, 1858, will not be opened up on the ground that certain assets have since become available for plaintiff's judgment.

2nd. That the plaintiff having his judgment may however reach those assets either in equity or at common law.

(Sittings after E. T., 24 Vic.)

In Hilary Term *Bruce* obtained a rule on behalf of the plaintiff, calling on the defendants to shew cause within the first four days of Easter Term, why the judgment roll in this cause should not be amended, by enabling the plaintiff to pray and take judgment on the assets admitted in the defendants' plea, after satisfaction of the mortgages and judgments therein referred to, in addition to judgments of assets *quando acciderint*, or why the said judgment should not be set aside, and the plaintiff allowed to reply to said pleas, or to take such judgments thereon as he may be advised.

A copy of the pleadings was filed on moving the rule.

The action was commenced in 1858. Several promisory notes are set forth in the declaration, and the plaintiff claims £1,200 damages. The defendants pleaded on the 20th April, 1858, setting up judgments recovered against the intestate in his lifetime, and mortgages made by him outstanding for large amounts, and that they had not sufficient goods or chattels of intestate come into their hands to satisfy the same. On the 20th September, 1858, plaintiff admits defendants' plea, takes judgment *quando*, and replies lands. There was also an affidavit filed by the plaintiffs' attorney. He stated that judgment was entered on the 27th September, 1858; that at the time of pleading, the plea by defendants and of the taking judgment in this suit, the judgment and mortgages in the plea mentioned were outstanding, and being aware that they amounted to a sum sufficient to exhaust any assets then on hand, the plaintiff was advised to take judgment of assets *quando*, and took such judgment instead of taking judgment of the assets then unadministered, after satisfaction of such mortgages and judgments, and of assets *quando*: that the mortgages have been foreclosed without resort to the personal estate of intestate, and the judgments mentioned in the plea have been satisfied from other sources, and in consequence, he was informed and believed a large amount of assets remained in defendants' hands, which, but for the form of the judgment so taken might be made available for the plaintiff's claim in this action, and that a considerable portion of the judgment recovered by the plaintiff remains unpaid.

During Easter Term *Harrison* shewed cause, and contended that the rule ought to be discharged; that there is no ground for the interference of the court, and that the parties cannot now be placed in *statu quo*: that the defendants have paid other debts since the pleadings were filed, and that they desired to plead the retaining of their own debts, which they would be deprived of if this amendment was allowed to be made. He referred to *Cameron* v. *Reynolds*, 5 El. & B. 301; Williams on Executors, 1692; 6 Taunt. 45; *Burroughs* v. *Stevens*; 5 Taunt. 556; 1 Wms. Saund. 336.

Burton in support of the rule.

Harrison for defendants filed the affidavit of defendant, Worthington, in which he stated that plaintiff had issued an execution against the lands of intestate on the judgment, under which 500 acres of land in the township of Harvey, in the United Counties of Peterboro and Victoria were sold in the month of December, 1859, to the agent of plaintiff's attorney, for $500: that since the recovery of plaintiff's judgment the defendants, as administrators, have in good faith paid on account of the judgment set forth in their plea, and on account of taxes due the City of Hamilton in respect to the estate of the intestate, much more than the amount of assets that have hitherto come to their hands to be administered.

That the payments so made were from the proceeds of the sale of intestate's effects and from their own money, and that intestate in his lifetime was indebted to defendant, Worthington, in $800: that all the payments referred to have been made in good faith, and long before the defendants had any notice or knowledge that plaintiff intended to apply to vacate his own judgment in this action; and further, if plaintiff is allowed to relinquish his present judgment, and obtain now the money so paid by said defendants, it would inflict great hardship and injustice on them, and embarrass them in the administration of the assets of the estate.

Anthony Copp, another of the defendants, by his affidavit also filed, stated that he believed all the statements in Mr. Worthington's affidavit were true, and that intestate at the time of his death owed him $400, which is yet unpaid.

RICHARDS, J.—In this case the plaintiff, after having deliberately taken judgment for assets *quando acciderint*, and replying lands, and issuing an execution against and selling the lands of the intestate, now seeks to vary his judgment in such a way as to reach assets that have become available since his judgment was entered, though in the meantime the defendants have changed their position by making payments on account of the estate they were administering. Other parties, creditors of the intestate, may, for anything I know, have had their proceedings in recovering their debts influenced by the course the plaintiff chose deliberately to take in entering his judgment.

The plaintiff has not produced any authority which would justify me in directing the course he desires to have carried out to be taken. *Burroughs* v. *Stevens*, in Taunton, would seem to be an authority against him. In *Cameron* v. *Reynolds*, 5 El. & B. 301, the court in setting aside a judgment entered by mistake when the defendant knew of the error, and which would have had the effect of depriving the plaintiff of a considerable portion of a just claim, went a great way to aid the plaintiff; but then what the plaintiff did was done under a clear mistake as to a fact, and the application was made promptly, and clearly no injustice could be done; but there the proceedings were taken deliberately, and at the time it seemed to be the best course for the interest of the plaintiff that judgment should be entered as it was, for thereby he was able to reach certain lands of the intestate, which we are told have been sold for his benefit. Now after a lapse of three and-a-half years, he thinks it would be better for him if he had taken, or could now get a different sort of a judgment. If he is permitted to do this, I do not feel that all parties are placed in the same position they would have been in had plaintiff taken the judgment he now wishes to get. In *Cameron* v. *Reynolds*, Coleridge, J. says, "The court in its discretion, certainly would not set a judgment aside unless the circumstances were such that they could place the parties in the same position in which they would have been but for the mistake:" and in the same case, Lord Campbell, C. J., in giving his judgment, says, "We are asked what are the limits of our jurisdiction, and whether we could do this at any time? I answer that lapse of time becomes after a season a bar as soon as the court in its discretion sees that it has been such as must work prejudice." I think, if for no other ground, the lapse of time here, and what has since been done, must in the language of Lord Campbell, "work prejudice."

As to the plaintiff's position, he has his judgment to recover the amount due him, from assets that may come into the hands of the administrators after the plea pleaded. If the payment of the mortgages or judgments set up in the plea of the defendants, renders whatever was then in their hands *now* assets for the satisfaction of this judgment, the plaintiff can proceed under the judgment to reach them. If they are not in law assets to answer a judgment entered in this way, they must be in equity, and the plaintiff can seek his remedy there. But either in law or in equity, the administrators ought to have an opportunity of shewing if they can, that these assets are not now liable to satisfy the plaintiff's claim, either because they have a right to retain the amount to satisfy their own debts, or because they have paid the amount to discharge liabilities that they were bound to pay before they satisfied this judgment. On the whole I cannot doubt that I ought to discharge this rule.

Rule discharged, with costs.

COUNTY COURT.

(In the County Court of the United Counties of Frontenac Lennox and Addington, Before His Honor JUDGE MACKENZIE.)

PARKER v. HOWELL.

Judgment—Irregularity—Fraud—Right of subsequent Judgment Creditor to attach—Issue—Undue Preference.

Quære, Is the want of the Clerks signature at the foot of an execution an irregularity?

Held, 1.—That however available an objection for irregularity might be if urged at the instance of the defendant in a cause it cannot be pressed by a third party, such as a subsequent execution creditor.

2.—That a subsequent judgment creditor may attach a prior judgment on the ground of Fraud.

3.—That an issue may be directed between the parties to try the question of Fraud.

4.—That merely allowing a judgment to lie signed for want of appearance is not of itself an undue performance.

(Chambers 7th July, 1861.)

Agnew obtained a summons calling upon the plaintiff to show cause why the judgment entered up in this cause together with the *fi. fa.* issued thereon, and all subsequent proceedings should not be set aside on the grounds—

1st. That the judgment was fraudulent, collusive and void; or why an issue should not be ordered to try the *bona fide* of the judgment.

2nd. That no *bona fide* debt was due to plaintiff when action was commenced

3rd. That if any debt was due, it was incurred for the fraudulent purposes of this action.

4th. That at the time of obtaining the judgment, the defendant not being able to pay his debts in full, voluntarily, or by collusion with the plaintiff, allowed the plaintiff to obtain judgment against him (the defendant), with intent to give the plaintiff fraudulent preference over one Thomas Tweed, who had recently obtained a verdict against the defendant for $150, and his other creditors, and for the purpose of preventing Tweed from securing his verdict, and so defeat him in his remedy; and for the purpose of fraudulently covering the goods and chattels against Tweed's execution.

5. That the execution is not signed by the Clerk of the Court at the foot thereof; and on other grounds disclosed in affidavits and papers filed,

It appeared by the affidavits filed that Thomas Tweed obtained a verdict for $150 against the defendant at the last Kingston Assizes, in the month of April last, 1861. That proceedings were instituted in November, 1860, and judgment entered on the verdict of Tweed, on the 30th day of May, 1861, and a *fi. fa.* issued thereupon against the goods of the defendant. The verdict was rendered in favour of Tweed on the 25th April, 1861. That the defendant was, and is, in the employment of the plaintiff as shopman in the city of Kingston.

Parke showed cause, and filed affidavits on the part of the plaintiff, as well as a statement of account between the plaintiff and defendant, showing a balance of $172 6c. in favour of the plaintiff; and cited *Farr* v. *Ardley*, 1 U. C., Q. B. 337, *Jones* v. *Jones*, 1 D. & R., and *Young* v. *Christie*, 7 U. C. Ch. R, 312.

Agnew contra, cited *Wilson* v. *Wilson* 2 U. C. Pra. R., 374, *Brook* v. *Hodson*, 7 M. & G., 529, *Imray* v. *Magnay*, 11 M. & W. 267, and *Ferguson* . *Bond et. al.*, 10 U. C. C. P., 493.

MACKENZIE, Co. J.—The case of *Wilson* v. *Wilson*, 2 U. C. P. R. 384, is in point. It is in principle like the present case. The result of the present application must be governed by it. Mr. Justice Burns, in his judgment, held that the Commercial Bank, the applicants, could not be allowed to urge a defect or irregularity as a ground to set the proceedings aside, as they were no parties to the judgment; the defendant himself or those claiming as privy under him could only take such advantage.

In the cases of *Farr* v. *Ardley* and *Jones* v. *Jones*, cited in the argument, it was held that, however available an objection for irregularity might be, if urged at the instance of the defendant himself, it could not be pressed by a third party, such as a subsequent creditor.

I am not ready to say that the want of the Clerk's signature at the foot of the writ of execution would amount to an irregularity. It is unnecessary, however, to decide the point now, as I am of opinion that Thomas Tweed, the present applicant, cannot be

allowed to press such an objection, being no party to this judgment. The second ground is very important, and deserves careful consideration.

Hanod v. *Benton*, 8 B. & C., 217, *Martin* v. *Martin*, 3 B. & A., 1,934, *Sharpe* v. *Thomas*, Bing 516, establish that a subsequent creditor may attack a judgment obtained on a warrant of attorney on the ground of fraud, upon application to the court, by a motion.

In *Wilson* v. *Wilson*, In delivering judgment made use of the following remarks:—"The recent enactment, allowing the plaineiff to take a final judgment at once, upon filing a writ of summons specially endorsed with an affidavit of personal service, has opened the door to collusion and fraud, quite as wide as may be used with cognovits and warrants of attorney, and I think the non-intervention of the defendant in the obtaining of the judgment, together with the activity of the plaintiff, should be considered by the Court as strong a reason for inferring as where the judgment is obtained by the activity of the defendant in the matter, where it requires no interference of the Court to assist in obtaining the judgment, should, it appears to me, not place others who are interested in questioning whether such conduct is for the purpose of enabling the plaintiff to perpetrate a fraud in a worse position than if the defendant had actively assisted the plaintiff to do it, by giving a confession of judgment or warrant of attorney."

According to the dates giving in the statement of account filed by the plaintiff, the defendant owed him nothing until the 16th April last. There are charges to the amount of $289 and 74 cents after the 1st April, and to the amount of $229 and 89 cents after the 16th April. The charge of 50 dollars paid to Mr. Parke on the 16th of April was on account of costs of defence in the case of *Tweed* v. *Howell*, which was not tried until the 25th, and the charge of $112 and 50 cents, for furniture, made on the same date, 16th April, is not explained. Taking into consideration that a verdict was standing against the defendant at the suit of Tweed at the time the present judgment was entered up, and that entries exceeding the balance claimed by the plaintiff were made on account after the 16th April, 1861. I think there is ground of suspicion against the plaintiff's claim. I do not feel satisfied with the manner in which the account of the plaintiff is made up.

In *Wilson* v. *Wilson*, Mr. Justice Burns stated—"If the parties were subjected to an examination before a jury, the truth would be much better ascertained." I think this matter should be settled by an issue between the parties, as suggested by Lord Tenterden in *Hanod* v. *Benton*, and ordered by Mr. Justice Burns in *Wilson* v. *Wilson*. A jury, then, will decide whether the plaintiff's claim is an honest one, or a contrivance to prevent the effect of the judgment obtained by Tweed against the defendant. The issue should be between Thomas Tweed, as plaintiff, and Edward Henry Parker, defendant; and should be to try whether the judgment obtained by Edward Henry Parker against the defendant Howell was obtained by fraud and collusion between Edward Henry Parker and Thomas B. Howell, in order to defeat the effect of the verdict of Thomas Tweed; or whether the judgment is an honest one, founded upon a valid and *bona fide* consideration, and the present summons to set the judgment aside be enlarged until after the determination of the issue.

In the case of *Young* v. *Christie*, Grants Ch. R. 312, it was held that the allowing of a judgment to be signed for want of an appearance, is not an undue preference of one creditor over another as will render the judgment void under the statute—22 Vic. cap. 96, sec. 18 and 19.

NOTE.—The jurisdiction of a County Judge in vacation or judge in chambers to grant an issue of the kind suggested does not seem to have been questioned but to say the least of it is is very doubtful. The power of a Judge in chambers to order an interpleader issue is expressly conferred by statute.—EDS.

L. C. REPORTS.

SUPERIOR COURT.—MONTREAL.

GRANT V. ÆTNA INSURANCE COMPANY.

Law of Fire Insurance—Jury Trial—Admission of illegal and rejection of legal evidence—Contemporaneous representations by insured to other insurers—Valuation in cases of Loss—Representations or Warranty.

Held:—1st. That letters written by the agent of the defendant, a Fire Insurance Co., to his principal after the loss had accrued, cannot be used in evidence against the Company.

2nd. That contemporaneous representations made by the assured to other insurers of the same subject, may be legally proved by the defendants.

3rd. That the loss under the policy stipulating: "That the loss or damages shall be estimated according to the true and actual cost value of the property at the time the loss shall happen," must be ascertained from proof of the money value of the subject in the existing market.

4th. That the following words written upon the face of the policy, "of the steamer Malakoff now lying in Tate's dock, Montreal, and intended to navigate the St. Lawrence and Lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter at a place to be approved of by the company, who will not be liable for explosions either by steam or gunpowder," is a warranty and not a representation.

5th. That such warranty not having been complied with by the assured, the policy is void, and an action for the loss will be dismissed upon motion, *non obstante veredicto*.

(Judgment rendered, the 31st March, 1860.)

BADGLEY, Justice:—Three motions having been submitted in this cause, the first in arrest of judgment, the second for entry of judgment for defendant, *non obstante veredicto*, and the third for a new trial, all predicated upon a verdict found in favour of the plaintiff upon his action against the defendants for the recovery of $4,000 on an open Policy of Insurance effected with the defendants upon portions of the steamer Malakoff. The motions are severally based upon special grounds detailed in them respectively, and will be adverted to particularly in the course of my observations. The contract of insurance between the parties is in the following terms and conditions contained in the defendants policy: The defendants agreed to insure the plaintiff "for $4,000, namely, $2,400 on the hull and cabins, $1,200 on the engines and boilers, and $400 on the tackle and furniture of the steamboat Malakoff, now lying in Tait's dock, Montreal, and intended to navigate the St. Lawrence and Lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter in a place approved by this company, who will not be liable for explosions either by steam or gunpowder. The company agree to make good to the insured any loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, from the 30th July, of 1858, to the 30th of July, 1859, the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen." The other stipulations were those generally contained in policies: namely, the exemption of the defendants from liability for loss occasioned by civil commotion, &c.: the avoidance of the policy for want of notice to the defendants and of indorsement on their policy of any other insurance effected by the insured on the same subjects; in case of other insurances, the defendants' liability only for such sum as their insurance should bear to the whole amount insured on the said property; and the acceptance of the policy subject to the printed conditions annexed thereto. It is proper to state that two other insurances were also effected by the plaintiff, the first with the Equitable Office for $2,400 on the hull and cabins, and $1,600 on the engines and boilers, together $4,000, of the said steamboat Malakoff, and the other with the Home Office for £1,000, to wit—$2,400 on the hull and cabins, $1,200 on the engines and boilers, and $400 on the tackle and furniture of the said steamboat, making the total insurance £3,000, distributed as follows—£1,800 on the hull and cabins, £1,000 on the engines and boilers, and £200 on the tackle and furniture of the Malakoff. Of these the defendants had ⅓ of the first, 3-10 of the second, and ⅓ of the third. The insurance with the Equitable is noted in the defendants' policy, and it is admitted that they had notice of that effected with the Home Office. It only remains to add that all these policies were open policies, without special valuation of the subjects insured by them.

The verdict was found upon special issues; articulations of facts, as follows:—1st. The defendants' execution of the policy; 2nd. The destruction by fire of *nearly all* the subjects insured, except the bottom of the vessel and the remains of the engines and boilers; 3rd. The plaintiff's ownership and his loss of £3,000; 4th. Namely, £1,800 on hulls and cabins, £900 on engines and boilers, and £300 on furniture and tackle, with estimate of the remains worth as old iron, £300; 5th. Plaintiff's compliance with terms of the policy; 6th. The fitness and proper condition, or nearly so, of the Malakoff to navigate at the date of the policy, but that she had not navigated; 7th. That she was in running

order at that date; 8th. That there was no greater risk in the Dock than if navigating; 9th. That she was put in order and required no further outlay; 10th. The defendants' knowledge of other insurance effected; 12th. Absence of concealment by plaintiff from defendants of the sameness of the hull of the Malakoff with that of old steamer North America, and the immateriality of that fact; and 13th. The finding for plaintiff of the sum demanded, £1,000, less £100 for ½ share of the value of the remains. The 11th finding is peculiar; the special issue inquires: "Did the plaintiff declare or represent to the defendants that the Malakoff would and should navigate, as aforesaid, and be laid up for the winter in a place to be approved by the defendants, and was the said representation material, and was it complied with?" The finding is, "No, he conformed to the conditions of the policy.

The contract and findings have been stated, the motions under discussion will be examined; 1st. that an arrest of judgment is grounded upon the irregularity and inconsistency of the findings generally, and the failure of the jury to answer several of the articulations of fact submitted, and specially the 3rd and 4th, and the consequent impossibility to make up a judgment in plaintiff's favour. In my view of the case the 11th articulation was not matter for the jury at all, being part of the contract itself, and forming part of the policy. The subject matter could not be affected by evidence of fact upon which the jury could legally pass; but, as it was submitted to them, they should have given a sensible and applicable finding; but as it stands the finding is no answer to the special issue. The defendants general objection to the other findings, and particularly to those to the 3rd and 4th special issues, cannot be sustained; and, inasmuch as the 11th as above, should not have been submitted, and the other findings are not apparently objectionable, the motion in arrest of judgment upon the grounds stated will be rejected. The second motion to enter up judgment for the defendants, *non obstante*, and the third for a new trial, will be considered together; and to get rid of a little written superabundance, the grounds which require least remark will be taken up first, and these are among the number set out in the third motion that for a new trial, which object to the rulings of the Judge at the trial, in his alleged admission of illegal and rejection of legal testimony, misdirections in law, and erroneous instructions upon the evidence and points submitted. Now, of these, the 5th and 6th objections are untenable; they refer to the rulings as to the proof of ownership in the plaintiff by the customs certificate and other proof adduced. But these do show both title and possession in him; his interest in the subjects insured is satisfied by the proof adduced, and that proof is uncontradicted. The plaintiff appears, therefore, as the registered owner of the Malakoff under the public document, and as in possession of her at the time the insurance was effected, as well as at time of the accident. 1st. Taylor on Evidence, p. 126, says, that "in an action on a policy of insurance of a ship and her cargo, the plaintiff may rely on the mere fact of possession, without the aid of any documentary proof or title deeds, unless rendered necessary by the adduction of contrary evidence." The 10th objection of concealment and its materiality, is likewise untenable. Whether the hull of the Malakoff was or was not that of the North America was unimportant in an insurance against fire: it might have been otherwise in a purely marine risk, inasmuch as in this latter case the unseaworthiness or incapacity to perform the voyage would have given operation to the implied obligation upon the assured, of not concealing something important, within his own knowledge, and any loss or damage would, therefore, have fallen upon the insured himself. The fact in evidence, however, in this respect is satisfactory, inasmuch as the old hull had been almost altogether renewed at the time of the insurance, when indeed the Malakoff had become a strong serviceable steamer. Moreover, this implied obligation relieves the insured from volunteering such spontaneous information—(*a*) however material it might be under other circumstances, although it is quite true that the insured would have been held to disclose all he knew had the information been particularly demanded of him by the insurers. So far from this being the case the latter waived the enquiry, and forestalled the information about the Malakoff by reference to documents in possession of defendants' agent. The jury found the fact not to be material, and their verdict in this respect will not be disturbed. (*b*)—The 11th objection has been already mentioned, and the very general and unimportant grounds contained in the 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th and 21st objections need not be dwelt upon, nor prevent an immediate reference to the really important objections contained in the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 18th & 14th grounds. The four first of these have reference to the admission of illegal and the rejection of legal evidence: Nos. 1 and 2 refer to the former, Nos. 3 and 4 to the latter. As to the admission of illegal evidence: it appears that Mr. Wood, the defendants' agent, who had taken the risk, was examined by the plaintiff as his witness, and with the purpose of negativing the warranty contained in the policy pleaded by the defendants, the witness was compelled to produce to the jury certain private letters and reports to his foreign principals from himself as their agent, but written after the loss had occurred. This evidence is not legal, and the requisition to produce it is not warranted by law. The general principle cited, *arguendo*, by plaintiff's counsel, from Paley, on Agency, 322, and 1st Taylor, sec. 539 and page 755, is undoubtedly correct "that no agents, however confidentially employed, are privileged from disclosing the secrets of their principal, except Counsel and attorneys." But the limitation of the general principle is also stated by them who echo the unanimous opinions of text writers and of judicial decisions, that the generality of the rule does not apply to such circumstances as the present. From the leading case of *Fairlie* v. *Hastings*, decided by Sir William Grant, Master of the Rolls—Paley, 269—to be found in 10 Ves., Jr., p. 123, to the present time no difference of opinion exists. He lays it down as a general proposition of law, that what one man says not upon oath cannot be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declaration. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of his principal, or the representations or statements made may be the foundation of or the inducement to the agreement. Therefore, if writing be not necessary by law, evidence must be admitted to prove that the agent did make that statement or representation. So with regard to acts done, the words with which those are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act must be affected by the words. But except in one or other of those ways, he observes, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot be proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent. The admission of the agent cannot be assimilated to that of the principal. A party is bound by his own admission and is not permitted to controvert it. But it is impossible to say that a man is precluded from questioning or contradicting any thing any person has asserted as to him, as to his contract or his agreement, merely because that person has been his agent. If any fact rest in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertions. Lord Kenyon carried this so far "in 1 Esp. Cas. 375, *Maesters* v. *Abram* as to refuse to permit a letter by an agent to be read to prove an agreement by the principal holding that the agent himself must be examined. If the agreement were contained in the letter, I should have thought it sufficient to have proved that letter written by the agent; but if the letter were offered as proof of the contents of a pre-existing agreement, it was properly rejected,"—see Taylor sec. 539—The letter in this cited case was, in fact, subsequent to the contract. In the cases in 4 Taunt. 511 and 565 of *Langhorn* v. *Allnott*, and *Kahl* v. *Janson*, the Court of Common Pleas decided that the letters of an agent abroad to his principal, containing a narrative of the transactions in which he has been employed, were not admissable in evidence against the principal as the mere representation of the agent, because they were not part of the *res gestæ*, but merely an account of them. See also *Reyner* v. *Pearson* Ibid. 662—where the general rule is this, when it is found that

(*a*) 1st. Arnould, Nos. 567-8.

(*b*) 1st. Arnould, No. 570.

one is the agent of another, whatever the agent does, or says, or writes at the making of the contract as agent, is admissable in evidence against the principal, but what this agent says or writes afterwards is not admissable. So also 4 Rawl., 294 per Rogers, J.: *Hough* v. *Doyle*—so this same principle will be found in *Betham* v. *Benson*, Neil Gow's R. 45. Ch. J. Dallas there says it is not true that when an agency is established, the declarations of the agent are admitted in evidence merely because they are his declarations; they are only evidence when they form part of the contract entered into by the agent on behalf of his principal, and in that single case they become admissable, these declarations, at a different time, have been decided not to be evidence; numerous English and American authorities may be cited in addition; a few will suffice:—1, B. and C., 473; 8, Bing, 471; 19, Pick, 220: 7, Cranch, 336; 2, Hill, 464; 3 Hill, 362; and lastly, Taylor on Evidence. Considering these authorities as the true exponents of the law on this point, it follows that the evidence in question was not legal and should not have been submitted to the jury; it was not contemporaneous with the contract, not *dum fervet opus*. It may also be remarked that, as that evidence was intended to disprove the existence of a warranty written in the policy, its admission controverted another established rule of evidence, which prohibits the admissibility of parol or extrinsic evidence to contradict, vary or control written contracts. Nos. 3 and 4 refer to the rejection of evidence offered. The defendants proposed to show, by the witnesses Tait and Lunn, that the insurance effected by the plaintiff with the first insurer, the Equitable Company, was accompanied by false and fraudulent misrepresentations at the time of making the insurance with that Company, as to the condition and circumstances of the Malakoff, and as to the stipulation of her navigating. The judge *in limine* stopped the question and prevented any answer from being given. As the ruling is reported, without stating the legal ground taken for it, the authority from 3 Kent Com. p. 284, cited by plaintiff's counsel, *arguendo*, upon the motion may probably be the support for it, and is as follows:—"This rule has not been favourably received by latter judges, and it is strictly confined to representations made to the first underwriter, and not to intermediate ones. Nor does it extend to a subsequent underwriter on a different policy, though on the same vessel and against the same risks." See, also, 2 Johns, 157. The facts in the evidence in relation to this ruling are as follows: Wood, the witness above spoken of, was the agent of the Ætna, the defendants, and of the Home Office, and was applied to by Tate, the plaintiff's agent, to ascertain the rate of insurance. Tate intimated to Wood his desire to effect insurance upon the Malakoff for £3,000, to be distributed among three different offices for £1,000 each. Having effected insurance on the 30th of July with the Equitable, he, on the following day, the 31st, applied to Wood to complete his original purpose; stated his previous insurance with the Equitable, and obtained from Wood insurance with the defendants for another £1,000, as above, and with the Home Office for the third £1,000. The original purpose and intention intimated to Wood, was in this way perfected, and the insurance with the Equitable was noted in the defendants' policy. In England these insurances would, of course, have been effected with the underwriters by the usual slip process, showing the signature of the Equitable as first insurer, and those of the defendants and the Home Office as second and third insurers, and there, any false or fraudulent representation made to the Equitable would avail to the defendants in resisting the claim against them. In *Barber* v. *Fletcher*, Dougl. 305, Lord Mansfield said, "it had been determined in divers cases that a representation to the first underwriter extends to all others." (1) So also Phillips commenting upon this rule, at No. 554, says:—"The principle on which this rule rests is, that in offering to a party a policy subscribed by another, the insured implies a proposal that the party to whom it is offered shall enter into the same contract which that other has entered into whose name is already upon it, unless such a presumption is rebutted by what passes between the parties to the subsequent signature; and the contract will not be the same if there are certain conditions between the parties to the prior subscription which do not form a part of the contract between those to the subsequent one. The rule is usually stated, generally, that a representation to the first underwriter is such to the others, and the meaning evidently is, that the subsequent subscribers may avail themselves of the rule in defence against a claim on the policy, and this is the result of the jurisprudence on this matter." The exigencies and necessities of trade in the extensive and busy marts of England, and the number and variety of insurance transactions that must be effected within short periods of time, have established the system of slip certificates, by which each subscriber in effect becomes an individual insurer, though on the same policy, and the usages of trade, then come in and give effect to the separation; hence it becomes necessary to recognize the influence of "such a rule, which is grounded upon the reasonable presumption that the subsequent underwriters subscribe the policy from the confidence reposed by them in the skill and judgment of him whose name they see stand first in the policy, and from their belief that he had duly ascertained and weighed all the circumstances material to the risk." (1) It is true there are limitations to the rule, as "that it is strictly confined to these matters of intelligence relating to the subject insured, with regard to which it is reasonable to suppose that the first underwriter would require information, and without which it may be presumed he would not have subscribed to the policy." The rule is also confined to the first underwriter, and to underwriters on the same policy. It has not been extended, nor is the presumption on which it rests made applicable, to underwriters on a second policy on the same interests and risks, *unless*, (2) perhaps, it could be clearly shown that the second policy was fraudulently obtained by the exhibition of the first. (3) This latter remark shows that the rule is not altogether absolute against the admission of evidence to sustain fair dealing between the parties, and rests authoritatively upon the broad legal principle that fraud annuls contracts. (4) The rule, with its restrictions and limitations by English decisions, is adopted as unquestionable, and Mr. Duer, with his usual perspicuity and learning, observes:—"In the United States, although from the disuse, almost total, of private underwriters, the application of the rule is now of rare occurrence, its validity has been often recognized; and, however strongly we may be disposed to question the sufficiency of the reasons on which it was introduced, it stands on too firm a basis of precedent and authority to be now shaken. I confess my own adherence to the rule, on the *ground of reason as well as of authority*. I regard the presumption on which it is founded as reasonable, sound and practical. It springs from an acute knowledge of men, and of the usual mode in which business is conducted, and as will appear hereafter, it is the very presumption on which other decisions, of which the propriety and wisdom have never been doubted, are solely placed, and can alone be vindicated." Now, this is made to rest upon presumptions only: how can such presumptions be reasonably refused their operation in this case, under our legal system? The aggregate insurance, whereof that of the defendants was a part, was in effect one insurance, as originally contemplated and designed by the plaintiff; the influence of the insurance effected with the Equitable Company, as the first insurer, must have been felt by the defendants, and the benefit of the plaintiff's false and fraudulent misrepresentations to that first insurer, may not in reason be refused to the defendants under the circumstances of the case. It may be that the first policy may have been exhibited to the defendants, or other facts adduced, showing that or other implications against the plaintiff; at all events false representation and fraud have been pleaded to this action, and the preventing of the introduction, *in limine*, of testimony tending to support these allegations and the rejection of the questions proposed to the witnesses, Tate and Lunn, appear to have been at least premature and not consonant with law, the more so as our legal system is more enlarged than that from which we derive our commercial law of evidence, because it partakes more of the equity than the common law principles in practice in England. A casual remark upon the 9th objection, that all material representations had been made by the

(1) See also other cases—*Pearson* v. *Watson*, Cowp. 785:—*Stockpool* v. *Simon*, Park, 932:—March, 772; *Tyre* v. *Parkinson*, 4 Taunt, 449 and 849:—*Forrester* v. *Pigou*, 1 M. and S. 9:—3 East. 572;—2 Camph.—544.

(1) Arnould, p. 531:—19 Pick, 402;—1 Peters, S. C. 185.
(2) 1 Arnoud, p. 537.
(3) Duer, 68-9:—*Tibbald* v. *Hall*, 2 Dow, p. c. 262.
(4) 2 Duer, p. 673.

plaintiff to the insurer will suffice. It is quite true that all such matters are within the sole province of the jury and not for the judge to express his judicial opinions upon them, and thereby in effect to substitute his opinion for their findings. It is undeniable that the judge cannot pass either upon the existence or extent of misrepresentations put in issue as matters of fact. The same observations apply to the 11th objection as to the fact of the plaintiff's concealment in relation to the hull of the Malakoff. It is not, however, meant to be asserted that judges are precluded from the expression of their own opinions to juries upon facts submitted; but even then the latter are independent of such opinions, and themselves weigh the effect and importance of the evidence adduced. In a recent case in England (1) it was held that strong comments by the judge to the jury on the facts of the case was no ground for a new trial; and Pollock, C.B., said—"I know of no rule of morality which tells a judge that he is not to make observations on the evidence in a cause. He may tell the jury it is strong or weak, if really it is so. I can go farther and say, it is a dereliction of duty if he does not." (2)—As to concealment and its legal bearing upon the insurance, it may be observed that where there is entire good faith, non-disclosures are not to be deemed material simply because their communication might have excited suspicion in the insurer. Where there was no intention to deceive, but the non-disclosure was withheld solely from the conviction of its unimportance, it should appear clearly, in order to avoid the policy, that the facts would have been deemed material by every prudent underwriter as really embracing the risk and justifying an increase of premium. The insured should not be required at the peril of his contract to anticipate all the suspicions that might arise in the mind of the insurer, by disclosing facts which he reasonably believes could have no effect in varying the risks he desired to cover. It is true that an erroneous belief will not protect him; but the error, wholly unmixed with fraud, that is to deprive him of an indemnity, ought to be conclusively established. The 13th and 14th objections refer to the ruling in the first instance, by which the decision of the jury upon the value of the subjects was to be based, on; "*their intrinsic value to be made out from the evidence of Merritt and the engineers; and, in the second instance, that their value was to be the fair value at the time of the loss, unaffected by local circumstances or by other accidental causes of depreciation.*" The defendants' evidence of the market price and sale of other steamboats similar or nearly so to the Malakoff, and at or about the time of the accident, as the policy criterion of the value of Malakoff was rejected by the judge, who said that he could not accept the defendants' view of the law, who wished to estimate the value by bringing a steamboat into the market and selling her suddenly for cash. Now these rulings are not in conformity with the contract or with law. The stipulation in the policy, the binding contract between the parties, is, *that the loss or damage shall be estimated according to the true and actual cash value of the property at the time the loss shall happen.* What, then, is that cash value, and by what other fair mode of ascertainment can it be found than by its cash price in the market? Old Hudibras expounds the rule perfectly, "The value of a thing is what it will bring." It cannot be by taking the intrinsic cost of the subject, there can be no intrinsic value of such a thing, nor by separating the subject from the circumstances of time and place, which alone can give it a current value. If the destruction of the subject render it not available for appreciation by actual sale, its cash value may be found by ascertaining the price obtained in cash for like or nearly like subjects at the time. The abstraction of time and place from the estimation would make it impossible to know the cash or even the fair value of any thing, and specially of the subjects in this case at the given time of the contract, as ruled in this case. The money value in the existing market is the only rule and guide to carry out the stipulation of the contract, and this rule is moreover supported by authority. 2. Phillips, No. 1176, says: Insurance being a contract of indemnity, the underwriters are not liable to pay any loss except such as the assured has actually sustained; whether the loss be total or partial, its amount cannot be ascertained without determining the value of the subject. In No. 1245 the author says—The value of a building or of any article in a fire policy is what it could be sold for, since its value must be proved; and it does not appear what other value than this could be satisfactorily shewn. He remarks that the obvious presumption is that the rule is the same in a fire policy as in a marine insurance, namely, that the value of the subject at the beginning of the risk is referred to *where the policy by its provisions* or the description of the subject does not require a different construction. The authorities from Hammond and Ellis, cited to the jury, rest upon the general rule of the value at the beginning of the risk, but do not apply to this and similar cases in which the policy contracts expressly for an exception; the effect of the ruling would absolutely set aside the policy stipulation of the true and actual cash value at the time of the loss, and substitute for it, either that of intrinsic value or the mere fair value at the time of the loss, independent of all circumstances regulating or applying to it. Angell on Fire Insurance, secs. 264–5, says, "that loss or damage to goods is to be estimated according to the true and actual value of the property at the time the loss happens," and cites a judgment in Louisiana, by which a fair sale at auction, after notice to the insurers, may be considered by the jury in estimating the damages and ascertaining the indemnity. 1. Bell's Com. on the Law of Scotland, p. 643, says the loss is estimated of the distructible parts on the whole value of the house as it would have sold in the market, &c., and so, also, the French authorities are equally precise. (1) "Mais que doit-on entendre par la juste valeur des choses? Ce n'est ni la valeur de convenance, ni celle d'affection, ni même le prix d'achat, c'est la valeur venale, c'est-à-dire, le prix qu'on en pourrait retirer si on les mettait en vente. *Valere res dicitur quantum vendi potest.* Dans la règle le juste prix est auquel les choses de pareilles nature et qualite sont vendues dans les mêmes lieux, dans le mêmes temps, dans les mêmes circonstances et a toutes sortes de personnes sans avoir egard à la valeur extraordinaire, c'est-à-dire au prix qu'on peut obtenir en certain cas, et sous certain rapports. Le contrat d'assurance n'etant pas une mesure conservatoire des objets assures mais seulement un contrat d'imdemnité, etc. Eu un mot l'assureur garantit l'assuré contre la perte réelle qui resulte de l'incendie mais cette perte payee son obligation est étiente." (2) The writers cited hold that the contract would be one against public policy and morality if the contrary doctrine were maintained. This policy, then, having expressly stipulated for the kind and time of valuation, any other judicial instruction to the jury upon the matter is not warranted, and hence the ruling and instruction as above are illegal. There only remain the questions of representation and warranty. The written words of the policy in connection with these points are as follows: after stating the particular amounts upon particular parts "*of the Steamer Malakoff, now lying in Tate's Dock, Montreal, and intended to navigate the St. Lawrence and Lakes from Hamilton to Quebec, principally as a freight-boat, and to be laid up for the winter in a place approved of by this Company, who will not be liable for explosions, either by steam or gunpowder.*" This statement must necessarily be subjected to legal construction to determine its nature, whether of representation or warranty. Then, as to its being a representation, the language is plain, simple, and explicit, adverting to navigation during the season, the course of that navigation, the principal manner of conducting it, and because of the date of the policy, providing for laying up the steamer during the intermediate winter period between the open summer periods. It is impossible for such language to require constructive explanation. But if it be a representation, testimony is admissable with reference to it, but to what purpose here, where it is in writing and in plain and clear phraseology? Angell, p. 194, condensing other authorities, remarks, "A representation in the technical sense in which that term bears to the law of insurance, and, as distinguished from warranty has been well defined, a verbal or written statement made by the assured to the underwriter before the subscription to the policy, as to the existence of some fact or state of facts, tending to induce the underwriter more readily to assume the risks, by diminishing the estimate he would otherwise have formed of it." He elsewhere observes, "it is of

(1) 40 Eng. Rep., p. 359. (2) Dunr, 396.

(1) See Bouqonsquié.

(2) See. also, Grun and Joliot, p. 25: Perall, p. 90; Nos. 71, 72: Emerigon, Meredith's Translation, cap. 9, sec. 1: and Gouget and Merger vo. *Assurance Maritime*, p. 364.

some matter extrinsic to the contract, and generally, if not always, relates to the present state and condition of the subject insured. The term in insurance, it has been considered, as in the nature of a collateral contract either by writing, not inserted in the policy, or by parol, and is a communication of facts and circumstances relative to the insurance made to the underwriters with the view to enable them to estimate the risk and calculate the premiums to be paid." "It is asserted that it is said to be material when it communicates any fact or circumstance which may be reasonably supposed to influence the judgment of the insurer in undertaking the risk or calculating the premium, and whatever may be the form of the expression used by the insured or his agent in making a representation of it, have the effect of imposing upon or misleading the underwriter, it will be material and fatal to the contract. There is a material difference between a representation and a warranty; the former being a part of the preliminary proceedings which propose the contract, and only a matter of collateral information on the subject of the insurance, and makes no part of the policy; the warranty is a part of the written contract, as it has been completed, and must appear on the face of it. The former may be substantially correct, but renders the contract void on the ground of fraud; the latter must be strictly and literally complied with, and non-compliance with it is an express breach. Fraud is an element which vitiates every contract, and a want of truth in a representation is fatal or not to the insurance, as it happens to be material or immaterial to the risk undertaken; but when a thing is warranted to be of a particular character or description, it must be exactly such as it is represented to be, otherwise the policy is void and there is no contract. This may be considered, as a first principle in the law of insurance." These representations have been classed as positive representations and as statements of belief, expectation or opinion; the latter not representations of what is stated to be intended or expected or believed as a matter of fact to be made good by the assured, and will not affect the contract, though the fact proved otherwise, if the statement is made honestly and not fraudulently with intent to deceive the underwriter and draw him into a contract which he might decline. On the other hand, positive representations are affirmative and promissory although the distinction is one more of form than substance, as in fact most positive representations, even when in terms affirmative are, in effect, promissory, and whenever it is a positive statement of the actual or evident existence of some first material of the risk, it is only distinguishable in form from a warranty by not being on the face of it. At the trial the statement in the policy was assumed as a representation, and as such parol evidence was admitted in relation to it. That evidence clearly proved that Tate, the agent, did represent the Malakoff to be in Tate's Dock temporarily for repairs, and that when completed she would navigate between Hamilton and Quebec, principally as a freight boat, affirming the written statement on the policy. In spite of written and parol testimony the jury find that plaintiff made no such declaration or representation; the finding is manifestly contrary to clear evidence adduced by parol and is singularly contradictory of the written evidence of the statement afforded by the contract, thereby in opposition to a rule not of law alone, but of common sense, that what is contained in the policy or other instrument, or written upon it, purporting to belong to it, at the time of signing, is part of the contract and is adopted by the signature. Both parol and written evidence concur with the result of the common sense and legal construction of the statement; representations must be construed by the same principles by which all other contracts in writing are expounded, in which the intention of the parties is always to be sought for in the instrument. In this statement the plaintiff's intention to navigate the Malakoff so soon as the repairs should be completed was understood by both parties, whilst it is equally manifest that no intention existed on plaintiff's part that she should be kept in the dock during the entire insurance year; and the jury, moreover, find her at the date of the policy to be in running order. Whether this intention of navigation could be considered as influencing the insurer's estimate of the character and degree of the risk to be insured against is not doubtful, in as much as Mr. Wood swears positively that he would not have taken the risk at all had the intention existed to keep her in the dock. The finding of the jury upon this special point and its materiality is either negative or nonsense, to which no legal meaning can attach. Under all these circumstances of the judicial rulings and instructions, above adverted to, and the irregular and incorrect findings of the jury, the motion for a new trial has been sustained, and a new trial would unhesitatingly be ordered, did not the remaining motion, that for entering up judgment for the defendants, *non obstante veredicto*, urge its importance upon the Court, because the final determination and judgment of the Court mainly depends upon the subject matter of this motion. Although the same point is contained in the motion for a new trial, it appeared advisable to consider it in connection with the motion *non obstante*, as being its more legitimate position, free from minor technicalities or argumentation. The grounds taken in this motion are the special warranty and condition written in the policy, that the Malakoff should navigate, &c, and the plaintiff's non-compliance and breach with them, the Malakoff having, in fact never left the Dock from the time of effecting the insurance in question. The judicial ruling and instruction declared the statement to be merely permissive. Bearing in mind the express written statement in the policy, it must be observed that the person who sought and obtained the insurance was himself the proprietor in possession of the Malakoff at the time of the insurance, and must himself have known what was to be done with the boat during the season of navigation; that being in dock for repairs, she was there to fit her for the only purpose for which she was originally built, that of navigating; that having possession of the Malakoff, he was not only open to an offer, but actually bargained for the hiring of her for navigation purposes without reference to the defendants. Moreover, why was the intention to navigate so particularly stated, specifying the line of voyage and business travel that she was to follow; the manner of the business to be done principally as a freight boat; the stipulation that after her navigating done, she should be laid up in some place to be approved by the defendants; finally, that defendants should not be liable for explosions by steam, her usual mode of propulsion, or by gunpowder, which might possibly form part of her freight. Permission to navigate does not seem to form any ingredient of these stipulations; on the contrary, taking the contract in the fair and obvious import of words and equivalent to an express statement of all the inferences naturally and necessarily arising from it, a positive promissory representation, and, in fact, a warranty, becomes plainly manifest, which it is proved had not been complied with, and the contract has, therefore, been rendered inoperative. It must be remembered that the statement is not a mere verbal representation extrinsic and collateral to the contract, a mere verbal explanation previous to the contract; but, on the contrary, that it is written into and forms part of the contract itself, and that as a Court of law will only construe not reform a policy, the construction adverted to above in the discussion of the question of representation gives to the written statement the significant character of a warranty. Now Phillips on Insurance, No. 544, says: "it is law that promissory representations of material facts made and referred to in the policy usually have the effect of express warranties and come under that head." Arnould, p. 490, says: "that the same statement indeed, whilst when made verbally or in writing *distinct from the policy* by the broker to the insurer is construed as a positive representation and would if written in the face of the policy in almost all cases amount to warranty, the insertion in the policy causing it to be so construed;" and Ellis p. 89, says: "it is the practice of most offices to insert the statement or representations made at the time of effecting the insurance on the body of the policy. By this means they become a warranty and prevent questions from arising on the subject of the materiality or immaterality of the statements." In this case the statement being written on the policy, it is for the Court to decide upon its legal bearing as a warranty and condition, and upon the general effect of its nonfulfillment upon the rights and remedies of the party in fault. The provinces of court and jury are plainly distinct, here the Court decides upon the sense and construction of the common words and phrases of the language where no peculiar meaning is proved. Arnould, p. 142, says: "a warranty in a policy of insurance in whatever form created is a condition or contingency, and unless performed there is no contract. It is styled a condition precedent which means that it is perfectly immaterial for what

purpose the warranty is introduced, and that no contract exists unless the warranty be literally complied with." Any direct or even incidental allegation of a fact relating to a risk has been held to constitute a warranty. "It is simply sufficient and ought to be sufficient," observed Lord St. Leonards, "to avoid the policy, that only one thing warranted is not true." In this case the stipulation undertakes for the performance of a future act,—the navigating of the "Malakoff"—and is therefore classed among promissory warranties. The contract depends on the event taking place literally, and Phillips, at p. 762, says: "it is held that the intention of the parties in a warranty, except as to the meaning of the words used, is not to be inquired into. The assured has chosen to rest his claims against the insurers on a condition inserted in the contract, and whether the fact or engagement which is the subject of the warranty be material to the risk or not, still he must bring himself strictly within that condition. The rigid construction put upon warranties, in this particular, has perhaps arisen in part from the maxims of the Common Law, that conditions are to be severally construed in regard to the party imposing them upon himself." And Ellis, p. 29, concludes the matter thus—"A breach of warranty will avoid the contract. The doctrine of warranties has been a more frequent subject of discussion in cases of marine policies; but, so far as is applicable to the subject, that doctrine is of equal authority in cases of life and fire insurance. A warranty is a stipulation or agreement on the part of the insured in the nature of a condition precedent, and as applicable to fire policies, is usually of an affirmative nature, as that the property insured is of the nature described in the policy. A warranty being in the nature of a condition precedent, it is quite immaterial for what purpose or with what view it is made; but, being once inserted in the policy, it becomes a binding contract on the insured; and, unless he can show that it has been strictly fulfilled, he can derive no benefit from the policy. The meaning of a warranty is to preclude all questions whether it has been substantially complied with or not; if it be affirmative it must be literally true; if promissory it must be strictly performed. The breach of warranty, therefore, consists either in the falsehood of an affirmative, or the non-performance of an executory stipulation. In either case the policy is void, and whether the thing warranted be material or not, whether the breach of it proceeded from fraud, negligence, misinformations, mistakes of an agent, or any other cause, the consequence is the same. With respect to the compliance with warranties, there is no latitude nor equity. The only question is whether the thing warranted has taken place or not, or be true or not; if not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of the warranty." Considering the statement in the policy to be a warranty, the Court is constrained to go beyond according the motion for a new trial in this cause, and to adjudge finally upon the motion *non obstante*, and order the judgment to be entered upon the record for the defendants, notwithstanding the verdict in favour of the plaintiff, with costs against the plaintiff.

Mackay and *Austin*, for plaintiff.

Rose and *Ritchie*, for defendants.

UNITED STATES LAW REPORTS.

OYER AND TERMINER, PHILADELPHIA.

COMMONWEALTH v. ROBT. THOMPSON.

Murder—Rule for a New Trial.

Although the alienage of a juror is a good cause of challenge, the Court will not set aside the verdict of the jury in a criminal case on that ground, where the trial has been allowed to proceed without any objection having been made to the juror's disqualification, even when there is evidence, from the affidavits of the juror and the prisoner, that the fact of alienage was not disclosed by the one, nor known to the other, before the trial.

Separation of the jurors after they have been sworn in a capital cause, will authorise the Court to set aside their verdict, but the separation must be clear and substantive, and it cannot be established by the testimony of any member of the jury.

After-discovered evidence, to be of no avail in an application for a new trial, must be material in its object, and not merely cumulative, corroborative or collateral—it must go to the merits of the case, and not to any technical ground of defence—and it must be such as ought, naturally, to produce a different result upon another investigation of the merits of the cause.

Judge ALLISON read the opinion of the Court, as follows:

The defendant stands convicted, by the verdict of the jury by whom he was tried, of murder in the first degree; or having, with wilfulness, premidation and malice, taken the life of John Capie.

A rule for a new trial having been entered, we are asked to make it absolute, and the reasons upon which the application is based are, mainly, the alienage of one of the jurors by whom the defendant was convicted, a separation of the jury after having been sworn, and before the rendition of their verdict, and after-discovered evidence.

We will consider these several reasons upon which this rule has, in a great measure, been rested, in the order in which they have been presented and urged upon the consideration of the Court. It may not be out of place to remark that, owing to the gravity of the questions upon which we are required to pass, we have given to them long and anxious consideration, desirous only, in deciding the points which have been presented for our determination by the learned and able counsel for the defendant, that the law in its integrity may be maintained, and that no possible injustice be done to the prisoner at the bar.

The first suggestion is, that one of the jurors was an unnaturalized foreigner, and for that reason disqualified to try the question of the guilt or innocence of the defendant, of which fact the defendant by affidavit supports the assertion he was ignorant, when he accepted Aaron Israel as a juror at the trial of the cause.

The qualifications, and the mode of selecting jurors, are specified in the Act of the 28th of April, 1858, wherein it is provided that there shall be furnished to the Board appointed to select and draw jurors to serve in the several Courts of the City of Philadelphia, certified lists of all the taxable inhabitants of the City, from which a sufficient number of sober, healthy and discreet citizens must be selected to constitute the several panels of jurors required for the ensuing year. There is, therefore, nothing in this Act of Assembly which conflicts with the principle that every man is entitled to be tried by his peers; that a citizen may demand, when charged with the commission of an offence against the laws, a jury of his equals, citizens like himself, to say whether the charge be true or false; for it will be seen that from the lists of taxable inhabitants, citizens are to be selected to serve as jurors. But upon the lists furnished to the Board, there is nothing to indicate who are taxable inhabitants being aliens, and who are citizens, and whether native-born or naturalized; that mistakes therefore will be made is extremely probable, and that some who are not citizens may be selected to serve as jurors is to be expected; so also, many may be chosen who possess not the qualifications of being sober, healthy or discreet. But what of all this? Does error or mistake like this vitiate the panel of jurors? This much has not been asserted; the position, however, has been broadly assumed, that if one who is not a citizen be sworn upon a jury and join in a verdict, the verdict is bad and that no judgment can be entered thereon. Alienage is a good cause of challenge; it is so at common law. Blackstone, vol. 3, page 302. But this much conceded, the question yet remains, whether after a juror has been sworn, without objection to his want of citizenship, and after a verdict, such verdict *must* be set aside.

Courts are required to exercise great caution in the allowance of technical or purely legal reasons for setting aside verdicts, after trial fully and fairly had; and where, upon the review of the whole case, the conclusion is that in sustaining the verdict substantial justice is done, and that the verdict is such a one as ought to have been rendered, in view of all the facts proven upon the trial of the cause. So also ought it to be acted upon as a rule, having its exception, it is true, but still a rule, which in its general recognition, should require that challenges for cause should not be inquired into after verdict for a different principle adopted and carried into practical effect, would be to occupy the attention of Courts in setting aside verdicts after the time and expense incurred in a trial, instead of settling the question of a juror's competency when called to the book to be sworn; for it is a principle well recognized as being against the policy of the law, to allow an objection to be taken at a later period of the proceedings, that could have been taken before the trial. If it were otherwise, parties would be encouraged to take their chance of a verdict in

their favor, without having first exercised due diligence in the investigation of the qualification of the panel of jurors; for they could rest upon the assurance that an after assignment of what would have been good ground of challenge before trial, would stand as a valid objection to the verdict, which would be required to be set aside, because no judgment could be entered thereon. Thus would the greatest uncertainty be introduced into the trial by jury, and much that is now considered of inestimable value, in the settlement of controversies between man and man, or between the law and its alleged violator, be swept away, for the trial by jury would thus be well nigh overturned.

In support of the reason now under consideration, we have the deposition of Aaron Israel to the effect that he is not a citizen of the United States, nor of the State of Pennsylvania; that he was born in London, England; that he has never been naturalized, and that when summoned to attend as a juror, he supposed he was bound to do so under a penalty, and that he first mentioned the fact of his alienage after the trial. If the facts which go to the question of disqualification had been inquired into when the juror was called to be sworn, and a challenge for cause had been based thereon, the challenge would unquestionably have been sustained; for it is by the oath of a juror in most instances, before he is sworn in the cause, that the question of qualification is determined. But when we are asked to set aside a verdict upon this ground, the Commonwealth are entitled to take issue with the defendant, upon the fact of alienage of the juror, and they are entitled to show, if it can be shown, that this statement thus sworn to is not true. Now, how can this be done? If the affidavit of the juror is sufficient to throw upon the Commonwealth the burden of disproving its statements, it is equivalent to saying that in many instances the question of granting or refusing a new trial, must be settled by the affidavit alone; for it might be impossible for the Commonwealth to learn any fact relating to the birth-place of an affiant, and without such knowledge to prove a negative, could not in the nature of things be done. And although in *Gwyhawskin* v. *the People*, 1 Scammon, 476, it was held that the affidavit of a prisoner upon a motion for a new trial is *prima facie* evidence of the truth of the statements it contains, yet we cannot say that we are prepared to recognize the principle which would require us to take as proved, every fact sworn to by a defendant, or by a juror, after verdict, in support of a rule for a new trial, and to consider ourselves bound by such sworn statements, unless disproved by countervailing testimony. This would be a dangerous power to place in the hands of a juror, or of a defendant, having the strongest possible motive to actuate him in making the necessary affidavit.

This rule is further supported by the oath of the defendant, to the effect that he was ignorant of the alienage of the juror at the trial of the cause; and this it is argued, entitles the defendant to have the present rule made absolute. But from this conclusion we feel bound to dissent; for the doctrine, which to us seems most consonant with reason, and which is not without authority to support it, is, that facts of which a knowledge is only obtained after trial, shall not be allowed to overthrow a verdict, where the objection ought to have been taken at the trial; and where it is of such a nature as ordinarily to require the party to be ready at that time to prove it. As we have already stated, this fact could have been proved when the juror was called to the book—that alienage is a good ground for challenge is admitted by every one; and that the defendant could by proper inquiry, made of the juror himself or of any one who knew the fact, have been prepared with his objection before the juror was sworn, is plainly evident, and therefore, upon principle, we must hold, that this is not a sufficient reason for setting aside the verdict in this case.

In *Collingsworth* v. *Duane*, J. W. Wallace's Reports, 147, this question is very fully considered, and numerous cases bearing upon it examined, the ruling of the case is that alienage is a cause of challenge, but is not, *per se*, sufficient to set aside a verdict, and this, whether the party complaining new the fact or not. It is not asserted anywhere that we know of, nor do we desire to be understood as holding that in every case, what would be sufficient cause for challenge, must be taken advantage of in that way; for there may be many causes of challenge, which cannot be known to the party entitled to make them; causes which are secret in their nature, and against which no one can be supposed to be upon his guard; but as to the usual disqualification of the jurors, such as the formation or expression of an opinion, citizenship, relation to, or connected with any party interested, and every objection to a juror's qualification, of a general nature, and such as usually suggest themselves, and are capable of being ascertained by ordinary inquiry, are disallowed as valid grounds for setting aside a verdict, for the reason, that they were unknown at the trial; what a defendant can do by ordinary care to protect himself when charged with the commission of a crime, the law holds him to the obligation of doing, or of seeing that it is done, and if he fail in this, he shall not have the chance of a trial resulting in his favor, and in case of failure, be allowed the benefit of objections that ought to have been made before verdict.

Several cases were cited upon the argument, in which a contrary doctrine seems to have been recognized. In *Shoemaker* v. *The State*, 5th Wisconsin, 324, and in *Gwyhawskin* v. *The People*, 1 Scammon, 476, it was held that an unnaturalized alien is not a competent juror, and the objection was allowed after verdict; but the contrary we believe it to be the correct doctrine upon the question under consideration, and to which we feel ourselves bound to adhere.

The right of every citizen to be tried by his peers, we have already referred to as beyond question, but that it is anything more than a right, which may be insisted on or waived by the defendant, we feel compelled to deny; for the Act which says that citizens shall be selected to serve as jurors, requires that they shall be possessed of certain requisites. It is not every citizen, therefore, who is qualified to perform jury duty; and the same rule which is sought to be established in this case would require us to set aside a verdict if it could be shown that any one who sat upon the jury was neither discreet, nor healthy, nor of sober habit. Either, or all of these reasons, would be a good and valid ground of challenge, because each is made by the Act a requisite qualification in a juror, but would it not go far towards bringing the law into contempt, if on its being shown after trial, that one of the jurors was given to habits of intemperance, or that he was not in all respects healthy, or that he was not esteemed to be a discreet person, we should for these reasons declare the verdict vitiated, without requiring proof that it was in some way tainted, or its credit impaired, for the causes assigned; this would be giving importance to the shadow greater than to the thing itself; and this too, in view of the fact, that the law places in the hands of the defendant, before trial, the names, residences and and occupations of the jurors, so that he may be advised when he comes to trial, whether they be sober, healthy and discreet citizens, or otherwise.

If we accept the doctrine contended for, that one incompetent juror vitiated a verdict, consistency would require us to hold to the converse of this rule—that if there was a verdict of acquittal, such verdict should go for nothing, because the trial would be by eleven only, and not by the required number of jurors, and a defendant thus situated could again be placed upon trial for his life.

The reason next in order, is the separation of the jury. As a general rule, a verdict will not be set aside on account of the misconduct or irregularity of a jury, unless it be such as might affect their impartiality, or disqualify them for the proper exercise of their functions. Wharton, in his Criminal Law, 895, says, "While on the one hand the present practice in England, and in a portion of the American Courts, is to sustain the verdict when the separation has been inadvertent, and no abuse has resulted from it; on the other hand, it has been considered in several instances, that the mere separation is in itself *prima facie* reason for a new trial."

In *Peiffer* v. *Commonwealth*, 8 Harris, 468, which was a trial for murder, the jury after being impanneled and sworn, were by agreement between the prisoner's counsel and the counsel for the Commonwealth, the Court also assenting, allowed to separate and go to their respective homes; the judgment of conviction was reversed on this account. This case settles the law in Pennsylvania, that where there is a clear case of separation of a jury, after being sworn, in a capital case, the verdict is vitiated, and no judgment can be entered thereon. Does the evidence taken in support of this reason, show such a separation as will require us to set the verdict in this case aside? The depositions prove, that upon one occasion, after the jury was impanneled, the janitor of the Law

Buildings, where they were confined during the recess of the Court, saw one of the jurors in this case, on the vestibule of the ground floor of the building; none of his colleagues were near him, nor were any of the officers having the jury in charge; the juror was at the time, engaged in conversation with a lady; the only thing said in the hearing of the witness was, the question, "How do you do?" The juror was seen to remain in that situation for several minutes. The deposition of Richard Gorman, one of the jurors, has also been submitted, to show that eleven of the jurors left deponent in the third story of the building, with the two officers having the jury in charge; and that they ascended to the fourth story, but whether any other person was there he does not know. This deposition, if taken into consideration, does not show any actual separation, for the officers having the jury in charge gave them the range of the upper stories of the building, keeping guard so as to prevent any person going where the jury were. But the testimony of Gorman cannot be received, to impeach the verdict in which he joined, or to show misconduct on the part of his fellow jurors. The question must, therefore, be disposed of upon the deposition of Gilllingham alone.

Admitting that a separation of the jury would be a good ground for making absolute this rule, we must inquire whether there was a clear and actual violation of the rule of law settled in Peiffer's case. The District Attorney, to explain this alleged separation, called the juror Hergesheimer, and his wife, and their testimony was, that the wife had gone up to where she knew the husband was confined, to ascertain how he was, and to furnish him with a change of clothing; the testimony of the officers failed to shed any light upon the point thus raised for our determination.

In Virginia the decisions do not seem to have been uniform in regard to casual or constructive separation of jurors. The case of the *Commonwealth* v. *McCall*, 1 Va. cases, 271, seems to stand arrayed against *Sprouse* v. *The Commonwealth*, 2 Va. 375; *McCarter* v. *Commonwealth*, 11 Leigh. 633, and *Kennedy* v. *Commonwealth*, 2 Va. 510.

In New York the rule seems to be, that to vitiate a verdict, reasonable suspicion of abuse must exist; and that before a verdict will be set aside for this cause, the Court must be satisfied that the party complaining has sustained some injury from it.

In New Hampshire, Connecticut, North Carolina, and in Indiana, the same rule has been adopted.

In Mississippi, it seems that a verdict will be set aside after separation, unless it affirmatively appear there was nothing communicated to the jury on the subject of the trial; *McCann* v. *State*, 6 Sm. & Mus. 465.

The testimony of both Hergesheimer and his wife was, that no conversation passed between them upon the subject of the trial, and consequently no injury could have resulted to the defendant from this violation of his duty as a juror. It has been held that the testimony of the parties in fault shall not be received to explain what actually took place whilst one or more of the jurors may have been separated from their fellows; this is a strict rule, recognized nowhere that we have knowledge of, but in one case in Virginia; a rule that we do not feel disposed to follow, because the only light that can in most cases be shed upon a case of this kind, must be obtained from the only parties who have knowledge on the subject. Looking then to the testimony of the juror implicated, the inference to be drawn from the deposition of Gillingham, and that of Hergesheimer is, that whilst it is true, that the officers having the jury in charge were guilty of a gross neglect of duty in exposing the cause then upon trial to this risk, yet inasmuch as we are satisfied that no injury has been sustained by the defendant, and no actual separation of the jury, as in Peiffer's case, occurred, we do not see our way clear to recognize in this a sufficient reason for setting the verdict aside. If we hold that in every case a momentary absence of one juror from his fellows, however harmless in its results, however wall intentioned, however pressing the necessity, will of itself work the destruction of a verdict, although satisfied that it is not in any degree affected by what may have occurred during the momentary absence from the custody of the officer, it will be most difficult to sustain any verdict in a capital case, where there may be a design to vitiate it in this way; for with our insufficient accommodations—the juries compelled to occupy a building used for many other purposes—the distance they are compelled to pass in going thereto and in returning to the Court room, and this space often traversed in the night time, there would be but few verdicts that might be so vitiated as to render them of no value, after the expenditure of much time and trouble, and expense, in obtaining them. These considerations require us to lend, not too ready an ear to suggestions, which, whilst in individual cases they might have the effect of saving life, would in the end, and in their general effect, destroy the value of the jury trial, by allowing the guilty, even those who with deliberation and malice, imbue their hands in the blood of their fellow-men, to go free from the punishment which their crimes merit, and which is required for the defence and safety of society.

The remaining ground upon which this application rests, is that of after-discovered evidence.

Evidence of this character to avail in an application for a new trial, must be such as could not be secured at the former trial, by reasonable diligence on the part of the defendant. It must be material in its object, and not merely cumulative nor corroborative or collateral; it must go to the merits, and not rest on merely technical defence: and it must be such as ought to produce, on another trial, an opposite result on the merits.

This new testimony fulfils the first requirement of the law; it is after-discovered, and could not have been ascertained before the trial; for the witnesses themselves say, they did not make the facts of which they speak known until after the verdict was rendered.

The testimony of Chas. Gillingham is, that on the night on which Capie was shot, after twelve o'clock, he was in Shippen street, and that he saw Robert Thomson and Byerly, (a witness examined on the trial for the defendant,) in Shippen street, more than half way to Eleventh street, on his way from twelfth street, going east; that he heard two shots fired, and they were the first two; and that the defendant could not have been at Twelfth street by that time. This evidence is wholly cumulative; it corroborates Byerly and other witnesses examined for the defence; it states no fact not testified to on the trial, and therefore, under the law, it cannot avail to make the rule absolute.

James C. Devir's testimony is, that upon the night upon which John Capie came to his death, he was standing upon the north-east corner of Twelfth and Shippen streets, and that he saw a man with a light coat on standing on the west crossing of Twelfth street, and fire the first two shots that were fired that evening, and that that man was not the defendant: about the same time or immediately afterwards, there were one or two shots fired from the north side of Shippen street. Thomas Thomson corroborated this statement to the extent of hearing the two shots fired, and directly afterwards seeing a man with a white coat on, running away, and several officers in pursuit of him.

Is this testimony such as ought to produce on another trial, a different result on the merits? We regret to be compelled to say that we do not think it ought, and the conviction remains, after an anxious and most attentive examination of the facts presented upon the trial, in connection with the statements sworn to by the witnesses in support of the pending rule, that upon the testimony now before us, the verdict ought to stand; and that the after-discovered evidence does not, in our judgment, in any way shake or cause us to doubt the correctness of the verdict, which upon the conclusive testimony of the Commonwealth, was rendered against the defendant. The answer to the case of the Commonwealth was an attempt to prove an alibi, covering not more than a minute or two of time; this failed, either because the witnesses called to support it were not credited by the jury, or because they were believed to be mistaken in the facts sworn to by them. And now the testimony of Devir is proposed to be added to testimony offered on the trial, on behalf of the defendant, and we are required to say whether with the evidence thus offered the verdict ought to be changed; with the most sincere desire to give to the defendant the full benefit of every intendment or presumption of law or fact in his favor, we are reluctantly forced to the conclusion that when this evidence is placed by the side of that of the witnesses for the Commonwealth, who were within a few feet of the man who fired the pistol and the man who was shot, this testimony ought not to secure for the defendant a verdict of acquittal.

We conclude what we have to say upon this subject, by quoting from the remarks of Judge Rodgers, in the *Commonwealth* v. *Flan-*

nigan, 7 W. & S. 423. He says: Granting new trials, does not depend upon the whim or caprice of the Judge, but upon well established and fundamental principles of law. In the trial of issues of fact, the Court judges of the competency, the jury of the effect, of the testimony. But after the verdict, when a motion for a new trial is considered, the Court must judge not only of the competency but of the effect of evidence. If with the newly discovered evidence before them, the jury ought not to come to the same conclusion, a new trial may be granted; otherwise they are bound to refuse the application. The question therefore is, (supposing all the testimony new and old before another jury,) not whether they might, but whether they ought, to give a different verdict." Our judgment on this point we have already stated.

We are therefore compelled to discharge the pending rule, with the general remark, that in the objections taken to the empannelling of the jury, and what was then done, as set forth in the first four reasons, nor in the sixth, seventh or eighth reasons, relating to the admissions of evidence, and the removal of defendant from the Court room—the latter being unsupported by evidence—nor in the ninth, tenth, eleventh, twelfth and thirteenth specifications, when the answer of the Court to the defendant's points are fully and correctly stated, nor in the sixteenth point, that the verdict was received after the expiration of the term for which the jury had been summoned, do we find any sufficient reason for setting aside the verdict and granting a new trial.

In discharging this rule, founded upon the various and important questions which have been argued in support of it, and anxious as we have been to arrive at a correct conclusion, we yet feel it to be a relief to know that if we have committed any error, it is open to examination and review, before the Supreme Court, and it may not be out of place to say, that for our future guidance, and for the purpose of settling the law upon these points, an opportunity ought to be afforded for their re-examination by the highest tribunal in the State.

GENERAL CORRESPONDENCE.

NEW CHANCERY ORDERS.

Chancery practice—Payment of Money—Motion for decree—Filing Reports.

TO THE EDITORS OF THE LAW JOURNAL.

Hamilton, July 17, 1861.

GENTLEMEN,—The Chancery Orders of the 29th June last, direct that mortgage money shall be paid into a bank, instead of to the party entitled to it, according to the present practice. Their Honors the Vice-Chancellors have no doubt seen good reason for the alteration, but to those unacquainted with such reason, the alteration appears to be uncalled for, and will probably work some inconvenience, if not expense and delay. Suppose, for example, the banks refuse to receive such payments (and there is nothing to compel them to do so), what then? The money cannot be paid at all, for in the face of the order no one will be authorized to receive it. If the diminution of costs is the object, that object will probably be defeated; because it is not to be supposed that the banks, if they consent to receive the money, will do so without charging a commission, which in many instances will exceed the costs of the present proceedings. If the money is not paid, will they be at the trouble of certifying the non-payment? I am inclined to think not; for why should they mix themselves up in proceedings in which they have no interest? In case they decline to grant such a certificate, what is then to be the course of proceeding? It seems to me that in all cases in which the banks refuse to receive money or to grant a certificate of non-payment, an application to the Court for further directions will be absolutely necessary, by which an increase of costs and further delay would be incurred.

The first paragraph of the order on this subject directs that the money shall be paid to the joint credit of the party to whom the same is made payable, and of the Registrar. The second paragraph gives the party paying the money the option of paying it either to the credit of the party to whom the same is made payable, or to the joint credit of such party and the Registrar. The first part of the order on this point is imperative; the second part is totally at variance with it. Which direction is to be followed? If the payment is made to the sole credit of the party entitled, then the Master's directions will not be complied with. If paid to the joint account, how is payment of it to be obtained by the party entitled? Will not an application to the Court be necessary?

Motion for Decree.—Will not *three weeks' notice* still be required?

Filing Reports.—Where are they to be filed?—at Toronto or with the Deputy Registrar, with whom the other proceedings in the suit have been filed?

Your opinion, and any explanation you may be able to give on this subject, will oblige

Your obedient servant,

A SOLICITOR.

[We think that the order as to the payment of mortgage money, will be found to be of great practical advantage to the profession. It will assuredly lessen expense, and relieve plaintiffs residing out of the jurisdiction, of the trouble and annoyance of granting powers of attorney, which are often imperfectly executed, and which tend rather to embarrass and delay the suit than otherwise. We anticipate no such difficulty as that the banks will refuse to receive the money, or to give the certificate of non-payment—1st. Because nearly every solicitor keeps a banking account, and has, we presume, sufficient influence with his bank to make the arrangement authorized by the order. 2nd. But should his bank refuse, other banks, either in his town or at their head office, will accept the duty. And, 3rd. It would be an exception to find a bank that would refuse even a temporary deposit. As to banking commission, the practice is to receive deposits without commission, except when the deposit is to be paid out at another office. If any bank should refuse a certificate, a subpœna and an examination before a master or examiner would give the necessary evidence, and obviate the necessity of any application to a judge in chambers to appoint a new day for payment (not to Court for further directions).

Although the Master's report may direct the money to be paid to the joint credit of the plaintiff and Registrar, yet the order goes on to say that notwithstanding such direction, "it shall be competent to the party paying in the same to pay the same to the credit of the party to whom the same is made payable, or to the joint credit of such party and the Registrar;" thus allowing an option which, if exercised in favor of the party only, allows such party to withdraw the funds without an order of court; but if exercised in favor of the party

and Registrar, requires an application in Chambers to obtain the money.

The new orders do not vary the old practice requiring three weeks' notice of motion to be given, or three weeks to elapse from the date of the order *pro confesso*, before a decree can be obtained; but simply require that all such causes shall be entered with the Registrar ten days before the day of hearing. Cases under order xvii. of the 3rd June, 1853, are excepted.

All Master's reports must be filed at Toronto, the same as heretofore: we presume for the same reason that affidavits are to be filed with the Registrar there in cases where the Court or a judge in Chambers is applied to for decrees or orders founded upon the evidence contained in them.

We think these new orders will be found productive of much good, and only regret that the reforming hands of the Vice-Chancellors were not more bold and active in regenerating the fossilized practice of Chancery.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. Reg. v. White. *June* 12.

Coroner—Power to take a second inquisition.

A coroner cannot take a second inquisition upon the same body, the first inquisition being valid, and subsisting.

C. P. Philey v. Hayle. *June* 18.

Attorney's signed bill—Agreement for lump sum for attorney's labour as an Attorney.

An agreement by a client with his attorney, that the latter is to receive a lump sum for labour done as an attorney in the event of success, and costs out of pocket only on failure, is void; and a bill delivered claiming the lump sum in one item, under such an agreement, is not a sufficient bill to deliver a month before action.

Ex. Watson v. Beaven. *June* 8.

Award—Reference under Common Law Procedure Act—Enlargement of time after expiration of time limited by Act.

The Court has power, by virtue of the Common Law Procedure Act, to enlarge the time for making an award where a cause has been referred by a judge's order under the 4th section of that Act, notwithstanding more than three months has elapsed, since the arbitrator was appointed; and has made a void award after the expiration of such three months.

Ex. Chinery v. Viall. *Feb.* 25.

Damage—Sale—Re-sale by Vendor—Trover.

Where sheep were sold, but not delivered, and before the price had been paid, the credit not having expired, were re-sold by the vendor to a third person.

Held, that trover would lie, but that the measure of damage ought not to be the price of the sheep, but the damage actually suffered.

Ex. Cross v. Durell. *March* 7.

Costs—Taxation—Allowances for witnesses—Expenses not paid—False affidavit of increase—Review of Taxation.

An attorney told his client before action that costs of witnesses must be paid previous to taxation, and gave him a list containing the names of his witnesses and the amount of their expenses. The client afterwards gave him receipts of the different witnesses for such sums. The attorney in the affidavit of increase swore that he had caused the witnesses to be paid. The master allowed the expenses upon taxation. It was afterwards discovered that the witnesses had not been paid until after taxation. The court directed the master to review the taxation, and to disallow all such expenses as had not been actually paid at the time of the previous taxation.

Ex. Jones v. Davis. *April* 23.

Merger—Estate by courtesy.

A lease for years in the husband does not merge in his estate by courtsey initiate on the birth of a child.

Ex. C. Russell v. Thornton. *June* 19.

Shipping—Insurance—Time policy—Withholding material information—Waiver—New contract.

A time policy was affected between A. & B. to ensure from January 21, 1857, to January 20, 1858. The defendant B. subscribed it on January 19, 1857. Plaintiff A. had effected the insurance through C. & Co., his brokers. On January 15 A. had received notice that the ship had been on shore on January 2, 1857, and was forced to go into port for repairs. A. communicated this fact to C. & Co., his brokers, who did not communicate it to B.; B. afterwards heard of it, and wrote to A. as follows:—"Understanding that the ship has been on shore, I do not consider that my risk commences until the vessel has been surveyed and repaired." The ship was repaired by April 2, and was afterwards lost.

Held, affirming the judgment of the Court of Queen's Bench—1st. That the non-communication of the fact of the ship having been on shore being material to the risk, and thus avoiding the policy, the letter of defendant B. did not act as a waiver of this non-communication, B. being ignorant of such non-communication at the time. 2nd. That even supposing the terms of the above letter to be sufficiently explicit for such a purpose, there was no new contract between the parties for want of acceptance of its terms by the plaintiff A.

CHANCERY.

M.R. Lewis v. Pennington. *May* 7.

Discovery—Solicitor and Client—Privileged Communication—Exceptions to answer—Pleading.

Where a client has made a confidential communication to his solicitor, the latter is not protected from giving discovery, if, before or after the confidential communication, he has acquired the same knowledge from another source. The fact of the confidential communication from the client does not merge the other sources of information.

Everything which is pleaded must be taken most strongly against the person pleading.

V.C.S. Griffiths v. Cowper. *June* 12.

Practice—Substituted service—Decree directing payment of money—Defendant abroad on Her Majesty's service.

The court will order substituted service of a decree, which directs payment of money by a defendant, who is stationed abroad on Her Majesty's service, without evidence of any attempt to serve him personally

V.C.S. Borton v. Dunbar. *May* 31.

Will—Construction—"Remainder of my money and effects"—"Suitable present for my Godson."—Reversionary Interest.

A testator, while returning to England on sick leave, made his will, by which, after bequeathing two legacies of £10 each, and directing that his portmanteaus, &c., should be sent to his father, proceeded thus: "I beg that the remainder of my money and effects be expended in purchasing a suitable present for my God-

son, H. F. D." At the testator's death, which took place the day after the date of his will, he was entitled to reversionary interests in two considerable sums of stock.

Held, that the stock to which he was so entitled did not pass under his will to his godson.

V.C.S. CHAPMAN v. LAMPORT. *May* 25.

Married Women—Fund settled by Court.

The Court will not disturb a fund which has, by its order, been settled on a married woman to her separate use without power of anticipation.

M. R. JONES v. ASHTON. *June* 8.

Will—Legacies and Annuities—Charge on Real Estate—Exoneration of Personal Estate—Charity—Gift of Money secured on Tolls—Statute of Mortmain.

Although the rule is that a testator, who must be taken to know that his personal estate is the primary fund for payment of his legacies and annuities, must use clear and distinct words to exonerate it from such payment, it is not necessary that he should say in precise words, that he exonerates it, if an intention to exonerate can be gathered from the will.

A gift to a charity, of money secured on the tolls, payable under an act for improving the haven of Hedon, is void under the Statute of Mortmain.

M. R. JEFFREYS v. CONNOR. *June* 5.

Will—Construction—"Die without having a child"—"Die without a child"—Effect given to each expression—Gift over.

A testator by his will gave certain property to his son and daughter, and directed that if his son should *die without having any child or children*, the whole of the property left to him should go to his (the testator's) daughter and niece equally. And he provided that if his son and daughter should *die without any child or children*, then the whole property should go to his (the testator's) niece.

Held, on the principle of giving to each clause its own effect, that the words in the first clause, "die without having any child or children," meant "die without having had any child or children;" so that the testator's son having had several children who were dead, the gift over to the niece did not take effect; and that the words in the second clause "die without any child or children," meant "die without leaving any child or children living at their deaths," so that the gift over to the niece would take effect if the testator's son should die without leaving a child living at his death.

V. C. K. *May* 6, 7, 22, 23, 24, *June* 12.

PARKINSON v. HANBURY.

Mortgage—Redemption—Power of Sale—Notice—Trustee.

P. Mortgages certain leaseholds to C. with power of sale, and in such power is contained the condition of three months' notice in writing, with indemnity to a purchaser upon the vendor's receipt, and with respect to seeing that the notice is given, and the expediency of the sale. P. afterwards conveys the same, to H. & Co. upon trust to sell, and to secure a sum advanced, and gives a written authority to H., & Co., to receive the rents and to make payments. P. dies, and having no representative, C. sells under his power, to H. & Co., but the three months' notice is not given. Administration is then taken out to P's. estate, and H., & Co. render an account to the administratrix, who, fourteen years after, files two bills, one against C. for redemption, and gets a decree for redemption, but not prosecuting it is foreclosed; the other against H. & Co., to set aside the sale as at an undervalue and invalid, by reason of the relative position of the parties, and being without the prescribed notice.

Held, that the ground of undervalue was not made out; that it was a grave question, whether a sale by persons in such a position, and under such circumstances, was valid; but that the three months' notice not having been given, inasmuch as both parties knew that it could not be given, the indemnity clause did not protect the purchasers who were mortgagees and not owners, and that the plaintiff was entitled to redemption.

L. C. PERRY v. HALL. *May* 25, 26.

Power of Attorney—Power to Mortgage—Payment to Agent—Solicitor for opposite Parties—Constructive Notice.

A. gave to B. a power of attorney to receive A.'s rents and official salary, &c., and to act generally in his affairs as fully as he himself could.

Held, that this power, taken together with certain correspondence, authorised a mortgage of policies.

B., an agent under a general power of attorney, had in his possession certain moneys of C., and also two policies belonging to A. his principal. B., representing that he acted by the direction of A., borrowed a portion of those moneys, and assigned one of the policies as security, but never paid any portion of the money to A.

Held, that as between A. and C., there was a good payment to A.

V. C. K. TELFORD v. RUSKIN. *June* 12.

Practice—Exceptions—Schedule to answer—Commission Agents—Privilege.

A defendant is required to set forth an account of assets, liabilities, at and up to a particular period, in an ordinary trade, and he sets it out in a book, and claims a right to refer to that, and that he is not bound to append it to his answer by way of schedule, claiming likewise privilege, in that setting forth the names of customers was disclosing private matters which were privileged. An exception to this answer, on the ground that the account was not appended to the answer by way of schedule, allowed.

V. C. K. DAGGE v. PATRICKSON. *June* 15.

Will—Construction—Executors taking beneficially.

A testator who is illegitimate, and dies without issue, gives al his personalty to three persons, their executors and administrators, upon trust to lay out £1000 in building and endowing a church, with certain devisees of his real estate, and appoints them executors. Two of the executors disclaim, and the third files a bill, raising the question whether the charitable gift was void, and if so, whether the plaintiff took the personalty for his own benefit.

Held, that he did not, but that the crown was entitled to it.

L. C. RANKIN v. LAY. *May* 26, 28.

Specific Performance—Agreement for a Lease—Breaches of Covenant.

Where there had been an agreement for a lease of a farm, and in a suit for its specific performance, there was a conflict of evidence whether certain husbandry covenants had been broken by the plaintiff (the proposed lessee) specific performance was granted, the lease being ante-dated so as to enable the lessor to have his remedy at law.

This court will not decide a question of fact as to the breach or forfeiture where there is any such conflict of evidence as to leave the matter in reasonable doubt.

V. C. W. LEWIS v. ALLAN. *June* 22.

Practice—Parties—Administration.

In a suit against the surviving trustee and the representatives of the deceased trustee by a residuary legatee for administration of the estate. *Held*, that the assignees of the surviving trustee who had misapplied the funds and become bankrupt since bill filed, were necessary parties.

TO CORRESPONDENTS.

"A SOLICITOR"—Under "General Correspondence."

DIARY FOR SEPTEMBER.

1. SUNDAY ..... *14th Sunday after Trinity.*
2. Monday ..... Paper Day, Q B. Last day for notice of trial in County Court.
3. Tuesday..... Paper Day, C P. Chancery Exam. Term Toronto commences. Last day for notice for Sandwich and Whitby.
4. Wednesday ..... Paper Day, Q.B.
5. Thursday ..... Paper Day, C.P.
7. Saturday ..... Trinity term ends.
8. SUNDAY ..... *15th Sunday after Trinity.*
10. Tuesday ..... Last day for notice for Chancery Examination, Chatham and Cobourg. Quarter Sessions and County Court Sittings in each County.
15. SUNDAY ..... *16th Sunday after Trinity.*
17. Tuesday ..... Chancery Examin. Term. Sandwich and Whitby, commences. Last day for notice for London and Belleville. Last day for service of Writ for Toronto.
22. SUNDAY ..... *17th Sunday after Trinity.*
24. Tuesday ..... Chancery Examin. Term. Chatham and Cobourg. commences. Last day for notice for Chancery Examin. Term, Brantford and Kingston.
27. Friday ..... Last day to declare for Toronto.
29. SUNDAY ..... *18th Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

SEPTEMBER, 1861.

CERTIFICATE FOR FULL COSTS.

It is by section 328 of the Common Law Procedure Act enacted, that "In case a suit of the proper competence of a county court be brought in either of the superior courts of common law, or in case a suit of the proper competence of a division court be brought in either of such superior courts, or in a county court, the defendant shall be liable to county court costs, or to division court costs only (as the case may be), unless the judge who presides at the trial of the cause certifies in open court, immediately after the verdict has been recorded, that it is a fit cause to be withdrawn from the county court or division court (as the case may be), and if the judge does not so certify, so much of the defendant's costs, taxed as between attorney and client, as exceed the taxable costs of defence that would have been incurred in the county court or division court shall, in entering judgment, be set off and allowed by the taxing officer against the plaintiff's county court or division court costs to be taxed, and if the amount of costs so set off exceed the amount of the plaintiff's verdict and taxable costs, the defendant shall be entitled to execution for the excess."

We propose to make some remarks on this enactment. Though not obscure in its terms, it is in some places misunderstood. Examined by the light of adjudged cases we shall see that its meaning is throughout reasonably clear.

The superior courts of common law have an inherent jurisdiction over all causes, be they great or small. By the statute of Gloucester, damages, whether great or small, carry costs. The Legislature has appointed inferior courts for the trial and determination of smaller causes. Wherefore it is only proper that the time of superior courts should not be occupied in the trial of causes which can be more conveniently, cheaply and expeditiously determined in the inferior tribunals. It is, however, not only necessary to declare that such causes ought to be tried in the proper tribunal, but that the party carrying them to another court shall be punished, and to declare also the mode of punishment.

It is the design of the Legislature to effect, by the enactment under consideration in specific terms, that which we have in general terms mentioned.

The subject of the enactment is "a suit of the proper competence of a county court, or of the proper competence of a division court." It is not our purpose here to explain what suits are of the proper competence of the courts indicated. We refer the reader to Consol. Stat U. C., cap. 15, secs. 16, 17, and Consol. Stat. U. C., cap. 19, sec. 55, which are the general enactments on the subject. If such a suit be brought in either of the superior courts of common law or in a county court, as the case may be, the defendant shall be liable to the costs of the inferior court only, unless the judge who presides at the trial of the cause certifies in open court, immediately after the verdict has been recorded, that it is a fit cause to be withdrawn from the inferior court and brought in the superior or county court.

The rule laid down is to take effect in all the cases specified, unless the judge, in his discretion, certify in the manner prescribed. The amount of the verdict in each case is *prima facie* against plaintiff's right to full costs. The burden is cast upon him to make out a proper case for a certificate. The verdict without the certificate (if the subject matter of the suit be of the proper competence of the inferior court) is, under the statute, conclusive against plaintiff's right to full costs. (See *Gardner* v. *Stoddard*, Dra. Rep. 101; *King* v. *Such*, 5 U. C., O. S., 81; *Washburn* v. *Longley*, 6 U. C., O. S., 217; *Hinds* v. *Denison*, 1 U. C. Ch. R., 194; *Hamilton* v. *Clarke*, 2 U. C. Pra. R. 189.

Some persons—relying upon English cases, which are not always applicable—suppose that the amount of the verdict is conclusive so as to prevent the giving of a certificate.

There can be no greater mistake. So to read our enactment would be to make it absurd and inconsistent. If a plaintiff, in good faith and on probable grounds, seek to recover an amount beyond that which the jury award him, he has a right to the exercise in his favor of the discretionary power vested in the judge. The object of the enactment is not to inflict injustice, but to punish wilful contravention. Wherever it appears to the satisfaction of the judge that the plaintiff did sincerely urge, and upon reasonable grounds, a demand for a debt or damages greater than could be recovered in the inferior court, although the jury may have given a verdict for a sum within the jurisdiction of the inferior court as to amount, it is usual for the judge to certify. Where there is no precise computation to be formed on the evidence, and where the evidence would have warranted a verdict beyond the mark as well as below, it would be hard indeed that the plaintiff should be compelled, at the peril of losing his costs, to relinquish a large portion of what he may fairly claim, lest the jury, preferring the testimony of one witness to another, or forming an arbitrary estimate of their own, may bring his verdict within the lower jurisdiction. The Legislature never intended to work such hardship. So to construe the act is to convert a remedial measure into one of oppression.

Take a case for example: a plaintiff sues to recover damage, in trespass for a horse taken from him, and having given $60 for the horse, and honestly valuing him at that price brings his action in a county court. The jury, upon contradictory evidence as to value, or from lenity to the defendant, chose to give him only $40. Would it not be hard that he should lose his costs, when if the jury had chosen to value the horse one shilling higher it would have shewn him to have resorted to the proper tribunal; and when the valuation of the horse at $60 might have been more consistent with the evidence than the valuation at $40? The verdict of $40 may be correct; plaintiff, rather than have further litigation, may be satisfied with it; but to refuse him a certificate for costs would be, in all probability, as we shall hereafter show, to deprive him of every farthing of his verdict.

Take another case. A builder brings his action upon an agreement for a specified price which would entitle him to $120. He proves the agreement and the work done under it, and thus makes out a case which he could not, without abandoning the excess, have proved in a division court. Having, therefore, necessarily brought his action in a higher court, it may happen that defendant calls a witness to declare his opinion that the work is ill done or the materials bad, and then make out a claim to a reduction in the value. The plaintiff's witnesses swear the contrary. The matter is left to the determination of the jury. Upon evidence which would warrant a determination either way they think fit to reduce the price, and give a verdict for $80. Ought it to follow in such a case that the plaintiff must lose his costs, because he did not foresee that the defendant would produce such witnesses, and that the jury would believe them in preference to his own? It may in truth be rather hard that the decision should be against him upon the point of damages; but to say that he should be prohibited from advancing his claim and producing his witnesses would be hard indeed; and yet it must be so, if the judge in the case supposed should refuse a certificate for county court costs!

It seems reasonable that the plaintiff should lose his costs only where there is good reason to suppose that he proceeded unnecessarily in the higher court for a demand which he might have recovered in the lower jurisdiction. The enactment, we repeat, is directed against cases of wilful contravention, not cases of accidental verdicts. The very power to certify is granted by the Legislature for the protection of the plaintiff who, in good faith and with reasonable grounds of success, enters a demand for more than he recovers. We can well understand why a plaintiff suing in a county court upon a promissory note for $80, should be deprived of his costs, but fail to see any analogy between such a case and the cases of the nature above supposed. (See remarks of Robinson, C. J., in *Stratford* v. *Sherwood*, 5 U. C., O S., 169.)

In some cases rules have been laid down for the exercise of the discretionary power to certify. If a debt exceeding the jurisdiction (as to amount) of a county or division court is reduced below that amount before action brought, it is usual to refuse a certificate: (*Donnelly* v. *Gibson*, 5 U.C., O. S., 704.) But if the proof of the payments involve matters of difficult investigation, or if made after action brought, it is usual for the judge to set the matter right by granting his certificate: (*Mearns* v. *Gilbertson*, 6 U. C, O. S., 573; *Turner* v. *Berry*, 5 Ex., 858; *Kilborn* v. *Wallace*, 3 U. C., O. S., 17.) So if the jurisdiction of the inferior court be doubtful, (*Fisher et al* v. *The City of Kingston*, 4 U. C. Q. B., 213), or there be no judge to preside over the court, (*Jennings* v. *Dingman*, T. T., 405 Vic., M. S., R. & H. Dig., Costs, I (1) 13; *Willis* v. *Merriton*, *Ib.*, Costs, I (1) (14), or a judge who is a party to the cause, (*Jones et al* v. *Wing*, 3 U. C., O. S., 36; *Holland* v. *Vincent*, 20 L. & Eq., 470), or, as to Division Courts, if it be necessary to issue a commission to examine witnesses (*Comstock* v. *Leary*, 3 U. C. L. J. 13). But it would seem that it is not of itself a ground for a certificate that defendant's set-off could not be tried in the inferior court, or involved difficult matters of investigation (*Goodeham* v. *Chilver*, 5 U. C., O. S., 496.)

The exercise of discretion cannot be reviewed by the court. All that the court can do is to inquire whether the case was a proper one for the exercise of discretion. (See *Barker* v. *Hollier*, 8 M. & W. 513; *Shuttleworth* v. *Cocker*, 1 M. & G. 829.)

It is provided that the certificate shall be given "immediately after the verdict has been recorded." By this is meant "within a reasonable time:" (*Page* v. *Pearce*, 8 M. & W., 677.) Whether the judge may certify after another trial has been commenced has not yet, we believe, received judicial determination: (Marshall on Costs, 18) Clearly it is too late after other causes have not only been commenced but tried: (*McKee* v. *Irwine*, 1 U. C. Q. B., 160.) He may, however, certify on the same day, and before the trial of another cause, notwithstanding an adjournment of the court, (*Thompson* v. *Gibson*, 8 M. & W. 287), and even after the jury in the next succeeding cause have been partially sworn: (*Nelmes* v. *Hedges*, 2 Dowl, N. S., 350.) But he cannot certify after the lapse of several days: (*Gillet* v. *Green*, 7 M. & W., 347.) It has been held that the judge has power to examine witnesses for the purpose of satisfying his mind as to the propriety of granting the certificate: (*Handcock* v. *Bethune*, 2 U. C. Q. B., 386.)

The certificate when granted should be to the effect that the cause is "a fit cause to be withdrawn from the county court or division court (as the case may be) and brought in the the superior court or a county court (as the case may be)." The word "withdrawn" cannot be taken literally. It must mean "not instituted" as if enacted that "the cause is a fit cause to have been instituted in the superior court." (Per Macaulay J., in *Gardner* v. *Stoddard*, Dra. Rep. 102.) The word "withdrawn" is scarcely appropriate. The intention would perhaps have been better expressed by the word "withheld" than "withdrawn" for that is the real meaning of the word as used in the enactment. (Ib. per Robinson C. J.)

The judge is to certify not only that the cause was a fit one to be "withdrawn" from the county or division court, but "brought" in the superior or county court By this is meant, that unless the judge of the superior or county court (as the case may be) in which the cause has been tried shall certify that the cause was properly commenced in the court in which commenced, the defendant shall only be liable to the inferior court costs. It is not intended to enable the judge to give the costs of the intermediate court where the cause has been improperly brought in the highest court. Thus, where a cause had been improperly brought in a superior court and a verdict rendered for an amount with in the division court jurisdiction, it was held that the judge had no power to order county court costs, the suit not having been commenced in the county court, (*Cameron* v. *Campbell* 11 U. C. Q. B. 159).

Where a certificate is necessary and no certificate granted, the act is express that "the defendant shall be liable to county court costs or division court costs *only* (as the case may be), and that "so much of the defendant's costs taxed as between attorney and client as exceed the taxable costs of defence which would have been incurred in the county court or division court, shall in entering judgment be set-off and allowed by the taxing officer against the plaintiff's county court or division court costs." The excess of costs to which defendant by the improper proceeding of plaintiff is subjected, is thus made the subject of set-off, but so far as we have quoted a set-off only against the plaintiff's county court or division court costs;" but the section proceeds, "and if the amount so set off exceeds the amount of the plaintiff's *verdict and taxable costs*, the defendant shall be entitled to execution for the excess." It will be observed that no express provision is made for those cases in which it may happen, that the excess of costs of defence exceeds the plaintiff's taxed costs against the defendant, and yet does not also exceed the whole amount of his verdict. Still the intention is palpable. It is that the defendants should receive from the plaintiff any excess above his costs, whether such excess shall cover a part or the whole of the plaintiff's verdict or more. (*Cameron v. Campbell* 1 U. C. Prac. R. 170. Ib. 12 U. C. Q. B. 159.)

TRINITY TERM, 1861.

The following gentlemen, having passed the necessary examination, were on the first day of Term called to the degree of Barrister-at-Law:—

George Hemings, Toronto; John Michael Tierney, London; William Ralph Meredith, London; William Stephens Senkler, Brockville; Warren Rock, Welland; Alexander Robert Morris, Kingston; William Nicholas Miller, Galt: William Douglass, Chatham; Nicholas Monsarrat, London; George Edward Moore, London; Peter O'Reilly, jr., Kingston; William Pryor Atkinson, St. Catharines: Edmund John Hooper, Kingston; Henry Robertson, Barrie; William Oliver Meade King, London; F. A. Stayner, Toronto; William Fuller Alves Boys, Barrie.

EDWIN JAMES.

We observe by our Exchanges that this well known but now much disgraced English barrister is in New York.

MR HARRISON'S DIGEST.

Mr. Harrison's Digest having been at length completed by the Editor, is now in the hands of the Publisher, H. Rowsell, and its publication is being rapidly pushed forward.

JUDGMENTS IN ERROR AND APPEAL.

On Thursday, 23rd August, the Court of Error and Appeal met for the delivery of Judgments.

The following Members of the Court were present:—Robinson, C. J.; Draper, C. J.; Burns, J.; Esten, V. C.; Spragge, V. C.; Richards, J.; Hagarty, J.

The following is a list of cases in which judgments were delivered:—

Topping, appellant, and Joseph, respondent.—This was an appeal by Topping, one of several defendants, against a decree of the Court of Chancery. The question involved was one of marshalling assets. ROBINSON, C. J.—Appeal ought to be dismissed without costs. DRAPER, C. J.—Appeal ought to be dismissed on terms mentioned by the Chief Justice. BURNS, J., of same opinion. SPRAGGE, V. C.—Appeal ought to be affirmed. RICHARDS, J., concurred with BURNS, J. HAGARTY, J.—Appeal ought to be dismissed. *Per Cur.*—Bill dismissed as against Topping, without costs.

Robertson et al., appellants, Moffatt, respondent.—This was an appeal from a decision of the Court of Queen's Bench. The action was brought by respondent against the apellants as the respective maker and indorser of a promissory note. The plea was a joint one. One of the defendants proposed to call the other as a witness, but his evidence was rejected. On an application for a new trial, the Queen's Bench held that the rejection of evidence was improper and that a new trial should be granted. So, per DRAPER, C. J., SPRAGGE, V. C., and HAGARTY, J., concurred. *Per Cur.*—Judgment reversed without costs, and new trial ordered.

Corporation of the Town of Dundas, appellants, Great Western Rai way Company, respondents.—This was also an appeal from Queen's Bench. DRAPER, C J.—Appeal should be dismissed with costs. ESTEN, V. C., concurred. SPRAGGE, V. C., concurred. ROBINSON, C. J., concurred. *Per Cur.*—Judgment affirmed, and appeal dismissed with costs.

Macdougall, appellant, McCoy, respondent. Per Cur.—Appeal dismissed with costs.

Mountjoy, appellant, and The Queen, respondent.—This was an appeal from a *pro forma* judgment of Queen's Bench. The question raised was as to the width of East North Street where it passes the Church Block in London. According to decision of Queen's Bench, in conformity with that of Common Pleas, East North Street should at the point indicated be 120 feet wide. Defendant, contending that East North Street should be only 100 feet wide, appealed. ROBINSON, C. J.—Appeal must be dismissed. DRAPER, C. J.—Appeal ought to be dismissed. *Per Cur.*—Appeal dismissed. HAGARTY, J., dissentiente.

Quinlan, appellant, Gordon et al., respondents.—This was an appeal from Court of Chancery. A loan on mortgage had been made after 16 Vic. c. 80, and before 22 Vic, c. 85. The question was whether apellant, having taken notes for excess of interest beyond 6 per cent. and been paid same, was entitled to enforce payment of his mortgage security with 6 per cent. interest, or whether the excess should go in reduction of principal. The Court of Chancery held the affirmative. Plaintiff appealed. ROBINSON, C. J.—Appeal allowed ESTEN, V. C., delivered no judgment. SPRAGGE, V. C., dissentiente.—Appeal ought to be dismissed. *Per Cur.*—Appeal allowed.

On Monday, 9th September, the Court met and delivered judgment in *Norton, appellant, Smith, defendant.*—An action for dower. The question raised was as to right of widow to dower when deed and mortgage made same day. *Held* that widow was entitled to recover.

Smith & Henderson, appellants, Greaves, respondent. — Stands over.

FALL CIRCUITS.

EASTERN CIRCUIT.

The Hon. Mr. JUSTICE McLEAN.

Brockville	Tuesday,	1st October.
Perth	Tuesday,	8th October.
Ottawa	Tuesday,	15th October.
L'Orignal	Thursday,	24th October.
Cornwall	Tuesday,	29th October.

MIDLAND CIRCUIT.

The Hon. Mr. JUSTICE RICHARDS.

Whitby	Monday,	30th September.
Peterborough	Monday,	7th October.
Cobourg	Friday,	11th October.
Belleville	Monday,	21st October.
Picton	Wednesday,	30th October.
Kingston	Monday,	4th November.

HOME CIRCUIT.

The Hon. Mr. JUSTICE HAGARTY.

Owen's Sound	Tuesday,	1st October.
Milton	Monday,	7th October.
Niagara	Monday,	14th October.
Welland	Tuesday,	22nd October.
Barrie	Monday,	28th October.
Hamilton	Monday,	4th November.

OXFORD CIRCUIT.

The Hon. Mr. JUSTICE BURNS.

Brantford	Tuesday,	1st October.
Cayuga	Wednesday,	9th October.
Simcoe	Monday,	14th October.
Woodstock	Monday,	21st October.
Stratford	Monday,	28th October.
Berlin	Monday,	4th November.
Guelph	Monday,	11th November.

WESTERN CIRCUIT.

The Hon. SIR J. B. ROBINSON, BART., CHIEF JUSTICE.

Goderich	Tuesday,	1st October.
Sarnia	Tuesday,	8th October.
St. Thomas	Monday,	14th October.
London	Friday,	18th October.
Chatham	Monday,	4th November.
Sandwich	Monday,	11th November.

TORONTO AND COUNTIES OF YORK AND PEEL.

The Hon. CHIEF JUSTICE DRAPER.

County of the City of Toronto	Monday,	30th September.
United Counties of York and Peel	Monday,	14th October.

LAW SOCIETY OF UPPER CANADA.

TRINITY TERM, 1860.

ARTICLED CLERKS' EXAMINATION.

SMITH'S MERCANTILE LAW.

1. Will the discharge of an indorser of a bill or note discharge any other, and if so, what parties to the instrument? Give your reasons.

2. When a forged cheque is paid by a banker, has the banker any remedy against his customer, whose signature has been forged? Is there any exception to this rule?

3. How far is an auctioneer the agent of the vendor and vendee respectively, so as to make a contract binding within the Statute of Frauds, and what, if any, difference does the fact of the auctioneer suing the purchaser in his own name, make in this respect.

3. What is the distinction between the common law liability of a carrier of passengers and goods.

WILLIAMS ON REAL PROPERTY.

1. Distinguish between executory interests and contingent remainders, and give examples of each.

2. In what manner can executory interests be created?

3. What is meant by "tenant by the courtesy?"

4. State the rule in Shelly's case.

5. What are the rights of aliens with respect to the ownership of real property?

6 What is meant by an "equitable estate in fee simple?"

STORY'S EQUITY JURISPRUDENCE.

1. Distinguish between "mistake and "accident" and give examples of each.

2. Under what circumstance will a verbal contract as to lands be enforced in equity?"

3. Mention some matters in which the courts of law and of equity have concurrent jurisdiction.

4. Explain the maxim that equity follows the law.

5. What is meant by constructive fraud? How far is fraud of this nature affected by Provincial Statute.

BLACKSTONE'S COMMENTARIES, VOL I.

1. What are the common law duties of a coroner, and what additional duty has the Statute law of Canada imposed on coroners

2. What is meant by rights of persons, as distinguished from rights of things; and what is the distinction between absolute and relative rights of persons?

3. In what light is marriage considered by the law of England?

STATUTES AND PRACTICE.

1. Where provisions of the Consolidated Statutes differ in effect from the statutes for which they are substituted, which provisions are to prevail?

2. In what, if any, cases can a writ of replevin issue without an order of a judge?

3. What is the rule with regard to costs of an issue found for the plaintiff, upon which judgment is arrested?

4. What is the proper mode of enforcing the attendance of witnesses before an arbitrator, when the submission has been made a rule of court?

5. When some instalments only of the mortgage money are due, can a foreclosure suit be instituted?

6. By what process can subsequent incumbrancers obtain a decree for sale when a prior incumbrancer prays for a decree of foreclosure?

7. By what process is a guardian *ad litem* appointed?

8. How is a decree registered.

EXAMINATION FOR CALL.

WILLIAMS ON REAL PROPERTY.

1. What are the principal interests of a personal nature arising out of real estate?

2. What is meant by "covenants running with the land?" and give examples.

3. What are the rules of descent as to real property in cases of intestacy?

4. Distinguish between a "use" and a "trust," and between a "joint-tenancy," and a "tenancy in common?"

5. How are estates tail created, and how barred?

6. Are words of limitation necessary, in order to create an estate in fee simple?

STORY'S EQUITY JURISPRUDENCE.

1. What is meant by "constructive frauds?" and state the ground of the interference of Courts of Equity in cases of this kind.

2. How far are such frauds affected by Provincial Statutes?

3. Mention the principal incidents of "suretyship?"

4. What are the various grounds of defence to a suit for specific performance?

5. Under what circumstances will a verbal contract relating to lands be enforced?

PRACTICE AND STATUTES.

1. Give the provisions of the provincial statute, which is commonly known as the "dormant equities act?"

2. How are corporations, foreign and domestic, served with process in Chancery?

3. What effect has the receipt of rents and profits during the progress of a foreclosure suit before the final order is obtained?

4. When some instalments only of the mortgage nearly are due can a foreclosure suit be instituted?

5. When two or more mortgages became united in one mortgagee can the mortgagor redeem one or both at his option? and give reasons for your opinion.

6. What is the proper course to be taken by a plaintiff when an equitable plea is pleaded which cannot properly be dealt with by the court?

7. What is judgment *non obstante veredicto*, and in what cases is it granted

8. In what cases, in which an appeal lies from the common law courts, is it necessary to obtain leave to appeal?

9. What is the effect of demurring to evidence?

TAYLOR ON EVIDENCE.

1. In what case, if any, is *hearsay* admissable as evidence?

2. What are the two main classes of presumptions? give an instance of each.

3. In what cases is secondary evidence of an instrument admissible? and mention what is necessary to be done in each case to entitle the party relying on it to offer it.

4. When, if at all do the declarations of co-conspirators become admissible against each other?

5. When a contract has been made by a broker, what constitutes the contract to satisfy the statute of frauds?

BYLES ON BILLS.

1. What is the effect of the gift of a bill note, first, as to the donees right to sue the donor upon it; second, as to his right to retain it against the donor; third, as to his right to sue other parties upon it.

2. What must a notice of dishonour contain?

3. Upon what principle does the discharge of a drawer and indorser for want of notice of dishonour respectively depend?

4. What is the effect in an action by the holder of a bill against the acceptor, of the bill having been paid by the drawer.

SMITH'S MERCANTILE LAW.

1. What is the distinction between a voyage and a time policy as regards any implied warranty of sea-worthiness?

2. What is stoppage in transitu; does it *revest* the property in the goods in the vendor?

3. What is the distinction between a factor and broker, and what is a *del credere* agent?

ADDISON ON CONTRACTS.

1. Enumerate the contracts required by the *Statute of Frauds* to be in writing. To what extent has this been extended by subsequent statute?

2. What is the difference, in its effect, upon a contract, of the *consideration* being partly legal and partly illegal, and the *contract itself* (for a valid consideration) being partly legal, and partly illegal?

3. Where a contract is made by parties residing in different places, by the medium of letters, what determines the *locus contractus.*

EXAMINATION FOR CALL WITH HONORS.

DART'S VENDORS AND PURCHASERS.

1. What are the requisites of an agrement relating to real estate, which equity will specifically enforce.

2. Can a purchaser who has been let into possession pending a discussion as to the title be sued for use and occupation if the contract go off through defect in the title? and give reasons for your answer.

3. If no no time is fixed for the completion of the purchase, is the purchaser liable to pay interest?

4. What are the requisites of a "perfect abstract" of title?

5. By what representations is a vendor bound?

6. Is marriage any part performance of a parol agreement entered into previously but in contemplation of it? give your reasons for your answer.

COOTE ON MORTGAGES.

1. In what respects do mortgages of real property, of ships, of chattel property, and of property consisting both of realty and personalty differ: and what are the necessary formalities of each of these kinds of mortgages?

2. Distinguish between "legal" and "equitable" mortgages?

4. How far do registered judgments partake of the the nature of mortgages?

4. What are the rights and remedies of a mortgagee against a tenant in possession of the mortgagee after default?

5. Is the mortgagor entitled to the benefit of an insurance effected by the mortgagee, when called upon to pay the mortgage debt? and give reasons for your answer.

JARMAN ON WILLS.

1. Does a will in all cases speak only from the decease of a testator?

2. Is a will of realty executed abroad under a power governed by the *lex domicilii* or the *lex loci rei sitæ?*

3. How far does "domicile" effect a testamentary disposition?

4. What are the statutory provisions affecting wills in Upper Canada?

5. Can extrinsic evidence be referred to either as to the execution or interpretation of wills?

6. What are estates by "implication," and when do they arise?

JTSTINIAN'S INSTITUTES.

1. In what manner was the contract of mandate (*mandatum*) formed?

2. Distinguish between "Obligatio ex contractu," "obligatio quasi ex contractu," and give examples of each.

3. What was the "lex Aquila"? Was it in any, and if so in what manner affected by the "lex Cornelia?"

4. Distinguish between the right of use and of usufruct?

5. Explain the term "familia?"

STORY'S CONFLICT OF LAWS.

1. What is meant by the *lex loci contractus, lex fori, lex loc solutionis;* and when do they respectively apply.

2 What two things are necessary for the *acquisition* of a domicile? Is residence necessary for *retaining* a domicile once required?

3. By the law of what country is the descent of real and personal property respectively governed?

4. Can the same person be in any way liable to the *criminal* laws of two countries at the same time? If so, how.

5. What is the position in this country of a child born in Scotland before marriage, whose parents subsequently marry, as regards the right to inherit property?

RUSSELL ON CRIMES.

1. What is the *common law* definition of forgery? Is it a felony or misdemeanor? How has the statute law with regard to forgery of the several instruments therein mentioned altered it in this respect?

2. If a person is acquitted on an indictment bad on the face of it, can he plead such acquittal as bar to a subsequent indictment for the same offence? Give your reasons.

3. What is the distinction between robbery and larceny from the person? Is it necessary to constiute robbery that the goods should be actually taken from the person? If not what taking is sufficient?

4. How many kinds of homicides, justifiable and excusable, or culpable are there?

5. How many kinds of crime are there in which one witness is not sufficient for a conviction? Does this depend upon *statute* or *common law* in each case.

STORY ON PARTNERSHIP.

1. If the firm of A. B. C. make a promissory note, payable to the firm of B. E., (the two firms having a common partner), can the firm of B. E. sue upon the note? Does this apply to indorsers of the latter firm? Upon what technical rules does this depend?

2. Is the right of one partner to bind another by negotiable instruments a legal incident to the existence of a partnership? If so, in what cases does it not exist?

3. Mention some instances in which a firm may be liable for the tort of a single partner.

4. Distinguish between the right of partners in partnership property and—1st, of that of joint tenants; 2nd, of tenants in common in the property held under their respective tenures, where joint tenants of property agree to embark the joint property in trade. Are their interests those of partners or joint tenants?

PLEADING SEVERAL MATTERS.

From "The Pittsburgh Legal Journal."

At a recent term of the Supreme Court in Bangor, the case of *Newcomb* v. *Inhabitants of Newburg*, for damages for alleged defect in the highway, came up for trial, when the defendants put in the following specifications of defence:

1. No such town as Newburg.
2. No such man as Newcomb.
3. No road.
4. No hole in the road.
5. No horse injured.
6. Horse injured did not belong to the plaintiff.
7. Plaintiff's finger not hurt.
8. Plaintiff's finger injured two years before.
9. Plaintiff injured his own finger by pounding it with a rock two years previous to the alleged cause of action against town.

NEW ORDER IN CHANCERY.

Each statement in an affidavit, which is to be used as evidence at the hearing of a cause or matter, or of a motion for a decree or other motion, or on any other proceeding before the court (or before the judge in chambers), shall shew the means of knowledge of the person making such statement.

Wednesday, 10th July, 1861.

SELECTIONS.

THE LATE LORD CAMPBELL.

(From "The Jurist.")

Several biographies of the late Lord Chancellor have appeared in the newspapers since his decease. We do not propose to follow this example, but shall merely direct attention to that part of his chequered career in which he appears as a legislator; in order to see how far, in that respect, he has redeemed the debt which, according to Lord Bacon, every man owes to his profession.

There are several statutes known in the Profession by the title of "Lord Campbell's Acts," namely, the 6 & 7 Vict. c. 96, relative to defamation; the 9 & 10 Vict. c. 93, for compensating the families of persons killed by accidents; and the 14 & 15 Vict. c. 100, the Administration of Criminal Justice Improvement Act. Of these statutes it may fairly be said, that although not long, they, and especially the two first, have introduced new *principles* into our law. The first relates to the law of defamatory words and libel, which before that statute was certainly in a state anything but satisfactory. Its objects are declared by the preamble to be, "for the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty." With these views, the statute (*inter alia*) allows the defendant in any action for defamation to give an apology in evidence in mitigation of damages; and where the action is for a libel in any public newspaper or periodical publication, he may plead that it was inserted without actual malice or gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted an apology, and may pay money into court as amends. The 6th section, putting an end to the absurd and immoral dogma, "the greater the truth, the greater the libel," enacts, that on criminal proceedings for libel the truth may be pleaded, with an averment that it was for the public benefit that the facts should be published; and the court, in passing sentence, shall take into consideration the truth or falsehood of those facts. Another very beneficial enactment is contained in sec. 7, that in criminal proceedings for libel the defendant may rebut a *prima facie* case of publication by an agent. Previous to this statute, if the servant of a bookseller sold in his shop a libellous publication, without either the knowledge of, or carelessness in the master, he was nevertheless criminally responsible for the publication; and the common opinion was, that he could not by any evidence remove that responsibility. (See Ph. & Am. Ev. 466.)

The second of these acts (9 & 10 Vict. c. 93) introduced into our law a principle previously unknown. By the ancient law, when a person was killed *per infortunium*, the instrument which caused his death was forfeited, which forfeiture was in after times commuted for a sum of money. This species of forfeiture was called a "deodand;" which, according to Mr. Justice Blackstone (1 Bl. Com. 300), "seems to have been designed, in the blind days of Popery, as an expiation for the souls of such as were snatched away by sudden death, and for that purpose ought properly to have been given to holy church, in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul." With the Reformation this of course came to an end, but the practice of inflicting a nominal deodand still continued. It is, however, worthy of observation, that for some short time before the abolition of deodands by a statute of the same session, the 9 & 10 Vict. c. 62, juries had begun to impose deodands to a real, and often serious, amount. That statute abolishes them altogether, the Legislature probably deeming that all that was really valuable in the system was more effectually attained by the provisions of the 6 & 7 Vict. cap. 93.

Previous to the 9 & 10 Vict. c. 93, if a party received personal injury from the carelessness of another, he might bring his action, and recover damages; still, as that action died with the person, and did not survive to the personal representative, the relatives of the deceased, whose position and prospects were injured by his death, were without remedy. The two following reasons for this are assigned by Parke, B., in *Armsworth* v. *The South-Eastern Railway Company* (11 Jur. 758), which was, we believe, the first decided case under the statute: "First, because the law provided a remedy for such mischiefs only as affected rights; and a man has not such a legal right in the life of his parent as he has in his own—the relation between parents and their children giving rise merely to what moralists call 'imperfect obligations.' Another reason was, that it was considered impossible to form an estimate of the value of human life, either to a man himself, or to others connected with him."

The statute in question, the principle of which was probably taken from the law of Scotland, enacts, "Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." It then goes on to provide, that the damages recovered "shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." It provides also "that the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct."

In the construction of this statute, the difficulty, or rather the impossibility, of ascertaining the value of a man's life has been avoided. For instance, in the case already referred to, Parke, B., told the jury, "You cannot estimate the value of a person's life to his relatives. No sum of money could compensate a child for the loss of its parent. . . . . You must estimate the damage by the same principle as if a wound had been inflicted. Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life. . . . . I therefore advise you to take a reasonable view of the case, and give what you consider a fair compensation."

The remaining statute (14 & 15 Vict. c. 100) was passed for the purpose of improving the administration of the criminal law, chiefly by removing technical difficulties, which frequently operated most seriously to the defeat of justice. With this view, powers of amendment are given to the court; the extreme particularity required in describing the crime in the indictment—as, for instance, in the description of the form and mode of death in cases of murder—is abolished; the old law of the merger of offences is considerably modified, perhaps we might say recast, &c.

Lord Campbell's name is also connected with the great constitutional question raised in *Stockdale* v. *Hansard* (9 Ad. & El. 1), relative to the privilege claimed by the House of Commons to publish libellous matter, if deemed by that House to be for the public good. Out of that case arose the great and most unseemly contest between the Court of Queen's Bench and the House of Commons, which resulted in the statute 3 & 4 Vict. c. 9. As a member of the House of Commons, he seems to have believed that the Court of Queen's Bench would allow the privilege; and as Attorney-General he argued the question before that court most ably, and at great length, though unsuccessfully.

Lord Campbell made some efforts at legislation which were not successful. Among these was a bill, introduced by him into the House of Peers in March, 1859, to abolish the rule requiring unanimity in the verdicts of juries. How far this project had its origin in his Scotch views and sympathies is not easy to say. The bill was ably discussed on both sides, chiefly by the law lords, but rejected by the very decisive majority of twenty-three to seven.

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 178.)

To some extent, magistrates are made the sole judges as to the fitness or expediency of things upon which they are authorized to act; but, like all other judges, they must be governed by a sound discretion in the exercise of this authority; and should they act corruptly, a criminal information would lie. (See Cole on Criminal Information, 26.)

Moreover, as the power conferred is for the public benefit—relates to the administration of justice—in case of neglect to use it within the time prescribed, or within a reasonable time, where the statute is silent on the point, a mandamus would be granted, and the courts would compel the execution of the duty imposed. (See Tapping on Mandamus, 9.) Should magistrates exceed their authority, or use it in an unauthorized manner, a writ of prohibition would lie in certain cases; but the peculiar and appropriate remedy would be to quash the order of sessions. (Archbold's Crown Office, 178.)

This, there can be no doubt, the superior courts of common law would do, if an order was made without jurisdiction, or if the conditions precedent to an order, as set down in the statute, were not properly complied with.

Magistrates cannot *acquire*, any more than they can *exceed*, the jurisdiction given in respect to the Division Courts, their authority in respect to these courts being purely statutory. (Stone's Petty Sessions, 11.)

The proper mode of quashing an improper order of sessions would seem to be, by writ of certiorari to bring up the order, with a view to its being quashed—a rule to show cause being first issued, calling upon the justices to show cause why the writ should not issue. (Archbold's Crown Office, 178, 188.)

At common law, every court must have a style and seal, and such style and seal must be necessarily used in all acts of the court; and process under the wrong style of the court is void, and the officer executing it a trespasser, and therefore *a fortiori* if there be none at all. (*Grant* v. *Morley*, 1 G. & D. 275; and see Finch's Law, 436.) The style and seal of the several Division Courts, however, is

expressly provided for in the act. When a court is called into existence by the establishment of a division, with appointed limits and numbered, the style given by the 9th section of the act attaches, and the court is to be called "The (First) Division Court of the County of X (or, if a union of counties), "The United Counties of X and Y" (secs. 9 & 1)—the number in the title of the several courts of course corresponding with the number given to the division. The statute also expressly provides as to a seal. Sec. 4 enacts, that every court shall have a seal, with which every process of the court shall be sealed or stamped;* and that such seal shall be paid for out of the fee fund. Although authority is not, in so many words, conferred on the judge to appoint the seal, yet, as a necessary incident to giving due effect to his jurisdiction, and for carrying out the provisions of sec. 4, he has, no doubt, by implication of law, power to make the seal (2 Roll Abr. 277), and this power has been acted on throughout Upper Canada.

The design of the seal the judge determines; but whatever may be the device, the style of the court should appear on each seal, so as to distinguish it from that of any other court. *

In providing seals, the proper course would seem to be an order by the judge, making and appointing each seal as the seal of a particular court, the orders in duplicate, one to be filed with the clerk of the court, the other to be retained by the judge. It is usual also to communicate the style of seal to the Provincial Secretary.

Sec. 3 of the "Act respecting forgery and perjury" (cap. 101 U. C. Consol.), enacts that any person who forges the seal of any process of a Division Court, or serves or enforces any such forged process, knowing the same to be forged; or who delivers or causes to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of any court, knowing the same to be false, or who acts or professes to act under any false colour or pretence of the process of any such court, is guilty of felony. This enactment is taken from sec. 57 of the Imperial Act (cap. 95 of 9 & 10 Vic.), relating to County Courts, and is nearly a verbatim copy of that provision.

In a scientific division of our subject, the matters embraced in the 3rd section of the Forgery and Perjury Act might come under a separate head; but it will be more convenient to notice here some of the decisions upon the corresponding English enactment; for on this, as on many other provisions relating to the Division Courts, the judicial decisions on analogous statutory provisions, will throw much light on the matter treated of.

The main object of the enactment is to prevent fraud and oppression being practised on persons ignorant of legal documents—in the words of Lord Campbell, C. J., "to protect a class of persons, who, being poor and illiterate, are very liable to be imposed upon, against demands made upon them under pretence or colour of process." "I bear in mind," said Erle, J., "that these tribunals are intended for the poor and illiterate classes; and the object of the enactment is to protect from extortion, by means of pretended process, those who have very little knowledge of business, still less of law, and are very much exposed to such imposition."

These are the objects which our Legislature has sought to carry out in sec. 3 of the act relating to forgery and perjury, by providing against the following offences: 1st, the forgery of the seal or process of a Division Court; 2nd, the service or enforcement of forged process, knowing the same to be forged; the delivery of any paper falsely purporting to be a copy of a process, knowing the same to be false; and, 4th, the acting or professing to act under any false colour or pretence of the process of any such court.

The first and second offences provided for in the section, fall more particularly under general criminal law, and shall not be noticed. Several convictions have taken place in England for forgery, under the English act. The distinct offences under the third and fourth divisions of sec. 3 have undergone judicial investigation. The case of *R.* v. *Castle* (7 Cox, C. C. 375), was a prosecution for an offence under the third division—delivering a paper purporting to be county court process. It was decided in the Court of Criminal Appeal, in a case from the Leicestershire Court of Quarter Sessions. A paper in the following words was the document delivered to the prosecutor's wife:

"In the County Court of Leicestershire, at Melton Mowbray.

Castle, Plaintiff, and Charles, Defendant.

Take Notice, That you are required to produce at the above Court, on the trial of this cause, on the 17th day of September, instant, the several accounts and memoramdums given to you, or to your wife, by the above Plaintiff, at various times.

Dated this 3rd day of September, 1857.

By the Plaintiff.

To Mr. Thomas Charles, the above Defendant.
Balance of account, 3s. 5½d.

It was proved that no such cause was in the court, and there was evidence given to show that the document did resemble County Court process, but differed in many particulars from a summons to a witness to produce documents (of which process, it was contended, it purported to be a copy), as in the signature, omitting the penalty and number

* An impression in ink, made by means of a wooden block, is sufficient *as a seal* to an order of sessions. (*R.* v. *Inhabitants of St. Paul's*, 7 Jurist, 443.)

* A variety of devices have been adopted in the several counties—a beaver—the maple leaf—a crown; and one ardent admirer of Lord Brougham has a bust of the great law refor mer engraved on the seals of every court in his judicial district

of plaint, also the want of seal. The indictment charged "that W. C. feloniously caused to be delivered to T. C. a certain paper, falsely purporting to be a certain process of the County Court of Leicestershire, holden at Melton Mowbray, in the county of L.; he the said W. C. well knowing the same to be false, contrary to the form of the statute," &c. It was objected that this count was bad for uncertainty, and that the document in question did not purport to be a copy of process. The case was reserved, and argued before the Court of Criminal Appeal, when the following decision was given:

Crompton, J.: "This is not a summons to a witness, but a notice to a party." Cockburn, C. J.: "To support this count of the indictment, the paper must 'purport to be a process of the court,' and it is not enough that the prisoner may have intended it to be thought so. This is nothing but an ordinary notice to produce, and cannot purport to be the process of the court." The other judges concurred, and the conviction was reversed.

(*To be continued.*)

We have again to thank Mr. Durand for his very useful and well considered letter subjoined, and at the same time to apologize for its non-insertion in our last number, owing to the absence of both of the Editors from Upper Canada. While we cannot agree in one or two of Mr. Durand's views, we quite admit that he brings strong reasons to his support—has in fact well argued out the opinions expressed. Again we say, and we cannot too often repeat it, if professional men took more interest in the doings of the Division Courts, it would be better for the public, and more to the advantage of the profession. The desire for local administration of justice is every day gaining strength, and we are much mistaken if next session of Parliament will not produce legislation increasing the jurisdiction of the local Courts. We cannot but think that changes in the law are best made by experts, by law-givers, conversant with the the evils they attempt to remedy by legislation. Now, unless *they* take the matter in hand, by at least suggesting remedies, *others* less capable will attempt it, and make things worse.

We do not make these remarks entirely on the matter of Mr. Durand's communication, but take occasion to observe that if others would do as he has done, and is doing, infinite service might be rendered to the cause of uniform and sound administration. Some of the evils resulting from conflicting decisions may be remedied without recourse to the Legislature; for the 63rd section of the Act makes it the duty of the board of judges to frame rules, amongst other things, "in relation to the provisions of the act, or any future act, as to which doubts have arisen or may arise, or as to which there *have been or may be conflicting decisions in any of the courts.*" We feel assured that if each county judge would communicate to the Board a brief statement of points coming within the clause, and requiring to be settled, it would be conclusive proof of the necessity for a meeting of the Board.

In the meantime we gladly receive communications from well informed parties, such as that from Mr. Durand. We promise at an early day a notice of all the topics embraced in Mr. Durand's letter, for all deserve more attention than we can at present give them. Some of the decisions referred to are palpably unjust and indefensible on any ground—we had almost said absurd. It would seem that this "equity and good conscience" is a much misunderstood, if not a much abused power. It should not depend upon the individual notions of any judge, what character the law should assume. He best decides who draws his law from his books, rather than from his brains or his feelings. Let other members of the bar in other localities do as Mr. Durand has done, and a step is gained towards effecting a cure when the nature and extent of the evil is known.

We look for much benefit from the treatise now in course of publication in our pages, "The Law and Practice of the Division Courts." It is the work of an able and experienced law-giver, and one who has been conversant with the Division Courts for upwards of twenty years. Such communications as Mr. Durand's, we trust, will not escape his attention when he comes to treat of the subject dilated upon. They will serve to show the necessity for a clear statement of the rule of law bearing upon the points, upon which it would appear there now exists such unfortunate conflict of decision. Uniformity is the very life of the Division Courts; and with honest, educated and pains-taking judges, there can be no difficulty in securing it. The means of intercommunication available in this journal will largely aid to the attainment of this most desirable object.

CONFLICT OF DECISIONS AMONG THE DIVISION COURT JUDGES.

To the Editors of the Law Journal.

GENTLEMEN,—I now fulfill my promise, made through your columns some months ago, to make a few remarks on the subject at the head of this letter. Uniformity of decisions on legal points arising in the Division Courts, seems to me as necessary as in the higher courts. Although the sums involved are smaller, yet they are equally important to suitors, who are generally of the poorer classes, affected by small judgments as much as rich men would be by large judgments.

Professional men are also very often consulted about suits in Division Courts, especially in country places, and in giving their opinions to clients base them on the well established principles of the law. If judges of the smaller courts differ

so essentially as they do in some respects, how are lawyers to guide their clients?

I will only allude to the more prominent points in question. Knowing the variety of subjects you have to discuss, and the necessity there is, in a journal like yours, to keep a variety of interesting law news before your readers, I regret that the following remarks are so long.

1st. A question often arises as to the jurisdiction of judges over certain classes of cases. The difficulty arises in actions for newspaper debts; on notes made in the country, but payable in the city; on property sent from one county, but contracted for in another; and in cases of assumpsit, where the law from certain facts presumes a promise—such as where a man, by ill-treatment of his wife, compels her to leave his house, and seek shelter with some friend in another county, and the friend sues him for the board of the wife.

The words of our Act are nearly similar to the English County Court Act, and there have been decisions in England which bear on the question of the meaning of the words "cause of action." The 71st section of our Division Court Act says: "Any suit may be entered and tried in the court holden for the division in which *the cause of action arose*, or in which the defendant, or any one of several defendants, resides or carries on business at the time the action is brought," &c. Late cases in England decide that the whole cause of action is here meant; that if the cause of action arose partly in one division or county and partly in another, then the action can be brought in neither, unless the defendant reside in one or the other; but if he reside in neither county, then the action must be brought in the county where the defendant actually resides at the time. So if a note be made in Barrie, payable in Toronto at a bank, for £20, with the words "payable there, and not elsewhere," thus making it presentable at the bank, part of the cause of action being in Barrie and part in Toronto, the defendant must be sued in the place where he actually resides. A case somewhat similar is given in an English decision (*Hernaman* v. *Smith*), January 27, 1855 (see vol. 29, English Law and Equity Reports, 426, Court of Exchequer cases). There an action was brought for £20, to recover the amount of reward promised on the conviction of a thief. The promise to pay the reward and the apprehension were made in one county; the conviction took place in another; the latter being a part of the cause of action. Thus the cause of action arising partly in one county, where the promise was made, and partly in another, where the thief was convicted with the property, it was held that the judge could not try the case in the latter, but only where the defendant resided. So in *Borthwick* v. *Walton*, 24 *Law Journal*, Jan. 22, 1855 (a County Court appeal case to the Common Pleas), the question of jurisdiction arose on a contract for goods. Goods were ordered in Oxford, of an agent of a manufacturer in Manchester. The defendant gave a verbal order for goods in Oxford; the goods were afterwards sent from Manchester by rail to the defendant. It was held in this case that he could not be sued in Manchester, although a part of the cause of action arose there—an essential part, the order having been given in Oxford. See also *Carnes* v. *Marshall*, 21 *Law Jour.* (N. S.), Q. B. 388; *Buckley* v. *Ham*, 5 Exchequer Rep. 43. It is easy to see how this decision applies to newspaper cases. A man gives an order for a paper in Barrie, published in Toronto, which is sent to him for a year. He is then sued in Toronto, where he does not reside. Now it has been held by some judges, that in such a case he can be sued in Toronto—by others that he cannot. The same question would arise of course in every town or city where a paper is published, if the party be sued out of his county, the place where he gave the order. The English decision would go to show that he must be sued where he resides. I knew the Judge of the United Counties of Northumberland and Durham to give judgment against a defendant on a note payable at Cobourg, but made in Peterboro'. On the other hand, the Judge of the Division Court of Toronto refuses to give judgment for the plaintiff upon notes made out of the county or division, but payable in Toronto. He is governed by this English decision, and, it seems to me, properly so. In *Peacock* v. *Bell*, 1 W. Saunders, 74 A. (1), it is said that "in actions in superior courts, it is necessary that every part of that which is the gist and substance of the action should appear to be within their jurisdiction." Many judges, to my knowledge, hold that notes may be sued where they are made payable, without reference to the place of contract. A curious question arose at Streetsville, county of Peel. The mother of a woman (wife of A.) sued A. for her board. A. lived in Brant, and the woman left him there, she said, for ill-usage, and came to her mother in Peel. A. made no contract to pay the mother, but the law implies the liability of the husband to support his wife, if he expels her by his own conduct. On this implication the mother sued. The judge held (and justly, in my opinion), that the man should be sued in the county where he lived, because the fact and proof of the ill-treatment—a necessary ingredient in the evidence to support the action—arose in Brant.

Dogs Killing Sheep.—Another class of cases often arises among our rural population—one too of great importance to farmers—actions involving the liability of the owners of dogs that destroy sheep. By the strict rules of law, as lawyers well know, it is necessary to prove in an action against the owner of a dog that has killed the sheep of another person, a knowledge in the owner of the previous vicious habit of the dog—in other words, that the owner knew that the dog had been in the habit of killing sheep. Otherwise, the law says, he is not responsible. Now, at first view, nothing appears more repugnant to true equity than this rule. Consequently it is the almost universal sentiment of farmers, that wherever a dog kills sheep the owner of the dog should pay for them. Some of our County Court Judges take the same view. The late Judge Phillpotts almost granted a new trial where a jury gave a verdict against the rule of law. On the other hand his successor, Judge Boyd, thinks the rule should yield to equity, and the owner of the dog should pay for the sheep even if the "Scienter," as it is technically called, be not proved. Judge Harrison, on the other hand, held the strict rule should prevail. I have no doubt other Judges differ in the same way. If there be any case at all where the strict rule of law should yield to equity, this, in my opinion, is one. It must be remembered in all these cases that the dog is a trespasser. The sheep are killed generally at night in the farmer's fold. No fence ordinarily made can keep out dogs, and the owners can easily fasten them at night. The raising of sheep, as well for their flesh as their wool, is of the utmost importance to our country. Yet there are strong arguments in favor of the rule of law. One of our oldest Division Court Judges insists (he is an Englishman and of course favorable to the old English prejudice about dogs) that the *scienter* should be proved; yet he relaxes the strict rules of law in other cases.

Notice to Endorsers.—The commercial law says that the endorser of a promissory note of hand or bill of exchange shall not be held liable, unless notice be given to him on the third day of grace of the non-payment thereof by the maker. In courts of law, in the absence of any waiver of this notice, such want of notice is always held a good defence for the endorser. If this rule be applied to courts of record there must be wisdom in it. If such a rule be unjust it ought to be repealed. Why then should a different view of the law be taken in Division Courts? A. is sued in the County Court for $101 as endorser, he pleads the want of this notice, proves it, and goes free. The holder then throws off $2 and sues in the Division Court, and A. has to pay the note. Or an entirely new case may arise. Now some of our division court judges hold that in strict equity the rule may be relaxed, and if no injury has been sustained by the endorser, although a month

or more or less has elapsed after the maturity of the note, yet the endorser should be liable on getting notice of the default of the maker. In the Division Courts of York and Peel both Judge Boyd and Judge Harrison hold to this view. It has always seemed to me that there is a good commercial reason for the strict rule. The endorser is considered, and often is, a mere friend, who puts his name on the note for accommodation. He, if a business man, knows that his liability only attaches in the event of the non-payment by the holder and legal notice of such default. It is to be considered that this was his view, and that otherwise he would not have put his name on the note. Then to omit giving the notice and yet make him liable casts a double burden on him. The delay may cause him to fail in his resort to the maker, or put him to the proof of proving a negative, (which commercially he never contemplated,) that is, that he has sustained injury, as against contrary proof, by the maker. Why should he be put to this trouble, and why should not the maxim "*Vigilantibus non dormientibus jura subveniunt*" be applied?

I have known very great injustice done to endorsers by the relaxation of this rule. They have actually been made to prove many months after the maturity of the note (no notice having been given to them) that special damages were sustained by them by want of notice, casting the whole burden of the case on them, whereas the default of the maker is entirely passed over.

The argument used by those who would relax this rule of law in small causes is, that country people do not understand it, and consequently omit to give the legal notice. But ignorance of the law excuses in no case.

SHOULD THE PLAIN RULES OF LAW BE VARIED?—There are some judges who favor the doctrine that in division courts the rigid rules of the common and statute law should not be adhered to, that it should be left discretionary with the judges to apply them or not. I look upon this as a very dangerous doctrine. The rules of our law are founded upon justice and reason, and the equity views of any particular judge should never be allowed to set aside these well acknowledged rules. I will just mention two or three cases that came under my own observation, showing how badly the discretionary equity power works as applied to different cases. A. owned a horse and it was seized for B.'s debt, A. claiming it, the bailiff interpleaded;—whereupon it became necessary for A. five clear days before the court day to file with the clerk a statement of his claim and the grounds thereof. He made out his claim, but in ignorance of the law, left it with the bailiff instead of the clerk. On the court day the judge dismissed the claim, although A. urged the hardship of the thing, and put forward by his counsel rule 45 of the division court rules as a reason why the judge should allow an adjournment or re-service. No, it would not do, his ignorance was no excuse and A. lost his horse. Now, before the same judge, C. was sued for the debt of D., which he had verbally said he would pay, but was not legally obliged to pay. C. urged that it was hard for him to pay because D. would not pay him, and he was not legally liable, and the law required a written promise to pay the debt of another. The judge says, no, strict equity requires you to pay, and you must do so. Now it is easy to see that strict equity at all events, if not rule 45, would have warranted the judge in saving the horse of A., but he could not see the equities alike!!

So A. bought $50 worth of goods of B. but received none of them, and paid nothing, B. sued A. in the division court and the judge, notwithstanding the statute of frauds was pleaded, allowed B. to recover. This was in the face of the statute. Then before the same judge C. sues D. for fixtures in a saw mill which he had put there, and which D. had agreed to pay for if C. was not allowed to remove them; but it was held as this promise concerned real estate the fixtures could not be legally removed, and that C. could not recover. Could any one distinguish between the equities in the two cases? In both the law stood in the way.

Take one more case: A. is sued for the wages of B., a servant who was hired for a year certain, but left at nine months, without any legal excuse. B. had received three months of his wages but six months were due from his master. The judge held that the rigid rule of law made him lose the six months wages. But again: C. had agreed with D. to send him a newspaper for a year for which he was to be paid $2. C. published his paper three months and sent it to D. for that period and then failed, sending no more papers. C. sued D. for the three months, and the judge held D. liable and made him pay 50 cents debt and $3 costs!! Can any one see wherein the equities of the two cases differ? Why should not B. get his six months wages if C. got his 50 cents and costs for his paper? But apply the rigid rules of law in all such cases and you have something for the public to depend on. Either decide in all cases according to equity, or apply, where it is clear, the well established principles of law. Any other mode of administering the division court law is very unjust, if not tyrannical.

A rule of law should be upheld until it is repealed. No judge should set up a code of morals or equity of his own, which perhaps his successor or neighbor of another county would not observe.

When it is said that decisions in the division courts should be given according "to equity and good conscience," it by no means should be understood to warrant the setting aside of the statute or common law. I apprehend that what should be understood by this, is that, in view of all the facts and evidence, what manifestly appears to be justice, should be done, setting aside matters of form, judging between probabilities and weight of evidence.

It is well known that in all cases over £10 in the division courts the parties can remove the causes into the superior courts, and there have the law administered. Why should smaller causes be the mere puppets of the equity views of judges, that may be varied according to the state of the bile, or the temper of the mind in certain seasons. An old English maxim had it "that equity in the chancery court depended upon the length of the Lord High Chancellor's big toe." It may have been so many hundreds of years ago, but now that court, like common law courts, is governed by established precedents.

Truly yours,

CHARLES DURAND,
Barrister.

U. C. REPORTS.

COURT OF ERROR AND APPEAL.

(*Reported by* THOMAS HODGINS, Esq., *Barrister-at-Law.*)

QUINLAN v. GORDON.

The defendant gave plaintiff a mortgage on certain freehold property, conditioned to pay £375 with interest, meaning, according to the statutes then in force (16 Vic. cap. 80), six per cent. Afterwards the defendant agreed to pay further interest for forbearance each year, and gave notes for such extra interest, which were paid. In taking the account of moneys due to the plaintiff, the Court of Chancery credited the defendant with such payments as on the mortgage, and six per cent. Whereupon the mortgagee appealed, and it was

Held, that the mortgagor, not being entitled to recover money voluntarily paid on an illegal contract, should not have been so credited; that the account should be taken without reference to the moneys so paid. *Stimson* v. *Kerby* and *Brouse* v. *Oakley* (7 Grant, 510, 514), commented upon, and the former overruled.

Held, further, that the act 16 Vic. cap. 80, allowed parties to lend money at any rate of interest, but rendered it incompetent for them to recover in any action or suit more than six per cent.

This was an appeal from the Court of Chancery. The facts appear in the judgment of the court.

Burton for appellant. In *Stimson* v. *Kerby* (7 Grant, 510) and the cases there cited, the law considers that the party was oppressed, and advantage taken of him; that he was entitled to be restored to

his original position. These were cases under the usury laws, which prohibited more than a certain rate: but our act 16 Vic. cap. 80, recited that it is expedient to abolish all prohibitions, and only provides that extra interest shall not be enforced. Here notes were given, and voluntarily paid. In *Smith* v. *Cuff*, referred to in a note to *Gibson* v. *Bruce* (5 M. & G. 403), it appeared that notes had been enforced by a third party. He also referred to *Wilson* v. *Ray* (10 A. & E. 82); *Bradshaw* v. *Bradshaw* (9 M. & W. 29); *Horton* v. *Riley* (11 M. & W. 492).

Strong, contra, contended that the law was the same, notwithstanding the act abolishing prohibitions. That act only removed the penalties, but left the rule against excessive interest as it was. He cited *Smith* v. *Bromley* (Doug. 697); *Bosanquet* v. *Dashwood* (cases temp. Talbot, 38).

Robinson, C. J., delivered the judgment of the court.

We do not see the mortgage in this case; but it was stated, and not denied, in the argument, that the sum of £375, secured by it, is made payable "with interest," which, under the laws then in force (16 Vic. cap. 80, sec. 3), must be taken to mean six per cent.

The parties, however, had agreed between themselves, that besides this ordinary and legal rate of interest—which must be taken to be the rate agreed upon when no other is specified—there should be paid £29 1s. 4d. as additional interest, or, as the plaintiff termed it upon his examination as a witness, a premium for forbearance for a year.

For this sum the defendant gave his promissory notes to the plaintiff, payable at three, six, nine and twelve months, each note being for £7 5s. 4d.; and as the years came round he gave similar notes for the same sums, for the years respectively following the 19th June, 1856, '7, '8 and '9; and on the 19th June, 1859, he gave four notes for £8 8s. 9d. each, payable in three, six, nine and twelve months, which made up the increased rate of interest year to £35 15s. or nine per cent. on the £375. This was upon a new agreement, made in June, 1859.

The plaintiff seems to have stated the transaction with perfect candour, not hesitating to avow the excessive rate of interest which he had exacted.

"The notes," he says, "were for the excess of interest beyond six per cent. The first four were for the first year. When the year expired, I took four notes for another year for the excess, and when they expired I took four others for another year for the excess. The extension of the mortgage was from year to year; and unless Gordon had agreed to pay the excess in interest, I should not have extended the mortgage. I entered into a new agreement at the end of each year, and took these notes in pursuance of it. There is no doubt these notes did not include any part of the six per cent. secured by the mortgage. I made a new agreement for the excess in interest at the end of each year, and the notes were taken accordingly. The extension was from year to year."

This account of the transaction was confirmed by another witness, the plaintiff's solicitor.

All the notes have been paid up by the defendant Gordon,—the other defendant, Mills, being a subsequent mortgagee of the same premises; and on the 19th May, 1860, he (Mills) tendered to the plaintiff the principal, £375, none of which had been paid; but the plaintiff declined to receive it, because he did not tender also the six per cent. interest secured by the mortgage, none of which had been paid, nor indeed demanded, till July 1858, after which the plaintiff swears he did several times demand it.

After answer by the two defendants, it was referred to the Master to take an account of what was due on the mortgage; and he reported, on the 23rd October, 1860, that on that day there was legally due to the plaintiff on the mortgage only £362 12s. 8d.

The Master further certified, that he had taken the account upon the basis that all the payments which appeared in the account as credits to the defendant (that is, the sums paid on the several notes), should go in discharge of interest at six per cent. upon the £375, though it was contended for the plaintiffs that those payments (admitted as being in excess of six per cent.) should not be brought into the account in any way.

The plaintiff appealed against that report of the Master, which appeal was dismissed by the Court of Chancery without costs, and the plaintiff has appealed against that judgment.

The question brought up by this appeal may affect a large number of cases of loans made, as the one in this case was, after the statute 16 Vic. cap. 80, and before the 22 Vic. cap. 85. The latter statute leaves no room for any such question in regard to transactions subsequent to its passing (unless possibly under particular circumstances); for it repeated the 3rd section of 16 Vic. cap 80, which disabled parties from enforcing payment of any amount of interest beyond six per cent., though it made it no longer an offence to receive or contract for any such excess of interest.

The plaintiff Quinlan insists that he is entitled to enforce the ordinary legal interest of six per cent. secured by his mortgage, notwithstanding the notes have been paid up which were given for the excess of interest above six per cent., and for that only.

The defendant insists, on the other hand, that he cannot enforce payment of the six per cent. under the mortgage, because he has already received more than six per cent. interest upon the loan, through payment of the notes which were given for a premium for forbearance—in other words, for interest, and for that only; that he has already had all the law can give him, and more; and that, besides being unable to enforce the six per cent. in addition to the money he has already received, he is bound, in equity at least, to account for—in other words, to refund the excess above six per cent. which has been paid to him; and that it is right, therefore, to make that go in reduction of the principal, as is done by the Master's report.

For all that appears, the money paid upon the notes was voluntarily paid, by which I mean not under any compulsion. The notes, if negotiable, did not get into the hands of any third party for value; against whom the defence, that they were given for a consideration that was illegal and void, could not have been urged. There is no evidence of fraud, or imposition, or of oppressive conduct on the part of the plaintiff, otherwise than it seems oppressive to exact such an interest as fourteen or fifteen per cent., by refusing to forbear except on such terms.

The question, therefore, amounts to this, whether the mortgagee can reclaim the excess, having paid it, for all that appears, illegally, and without resistance, and without remonstrance.

The point has engaged the attention of the Court of Common Pleas in *Kaines* v. *Stacey* (9 U. C. C. P. p. 355), and afterwards in *Jarvis* v. *Clark* (10 U. C. C. P. 480).

Before these two decisions, the case of *Stimson* v. *Kerby* (7 Grant, 510) arose in the Court of Chancery, in which reference was made to a judgment of Vice-Chancellor Esten, in a case of *Brown* v. *Oakley*, which is stated in a note to the former case, p. 514.

The Court of Chancery, in *Stimson* v. *Kerby*, decided in accordance with *Brown* v. *Oakley*, that in taking the account in a foreclosure suit, any excess of interest that had been paid above six per cent., on an agreement to pay a higher rate, should be allowed to go in reduction of the principal; and they came to that conclusion under the conviction that an action for money had and received would lie, in any such case, to recover back the excess of interest.

In two cases in the Common Pleas, on the other hand, the defendant claimed a right to recover back the interest which he had voluntarily paid, by setting it off in an action brought for the debt and interest.

The court determined against his right so to recover back the money which he had voluntarily paid, and not, as it appeared to them, on any illegal consideration, such as would give a right to the person paying to recover it back.

We have to dispose of that question after these conflicting decisions. I have considered the able judgments delivered in the Common Pleas by Mr. Justice Richards, in *Kaines* v. *Stacey*, and that afterwards delivered by the Chancellor in *Stimson* v. *Kerby*. They set out very clearly the arguments used on one side and the other. The question is so far new to me, that I have not hitherto been called upon to give an opinion upon it. All turns upon the objec and legal effect of the 2nd and 3rd clauses of 16 Vic. cap. 80.

The 2nd clause enacts, "That no contract to be thereafter made in any part of this Province, for the loan or forbearance of money or money's worth, at any rate of interest whatsoever, and no payment in pursuance of such contract, or payment liable to any loss,

forfeiture, penalty or proceeding, civil or criminal, for usury—any law or statute to the contrary notwithstanding."

The 3rd reads thus: "Provided always, nevertheless, and be it enacted, that any such contract, and every security for the same, shall be void so far, and so far only, as relates to any excess of *interest thereby made payable* above the rate of six pounds for the forbearance of one hundred pounds, for a year; and the said rate of six per cent. interest, or such lower rate of interest as may have been agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid."

The first clause of the act is merely a repeal of some former enactments respecting interest, and the only other clause (the 4th) exempts from the operation of the statute all banks and insurance companies, and any corporation or association that had been theretofore authorized by law to lend or borrow money at a higher rate of interest than six per cent.

All, therefore, that requires to be considered, is the effect of the 2nd and 3rd clauses, which I have just given literally, and the preamble of the statute, which is in these words: "Whereas it is expedient to abolish prohibitions and penalties in the lending of money at any rate of interest whatever, and to enforce, to a certain extent and no further, all contracts to pay interest on money lent, and to amend and simplify the laws relating to the loan of money at interest."

Our Interpretation Act, cap. 5, Con. Stats. U. C. sec. 6, 28, provides, "That the preamble of every (public) act shall be deemed a part thereof, intended to assist in explaining the purport and object of the act; and every such act, and every provision or enactment thereof, shall be deemed remedied, whether its immediate purport to direct the doing of any thing which the Legislature deems to be for the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the act, and of such provision or enactment, according to their true intent, meaning and spirit."

It is clear, I think, from the preamble, if we were to judge by that alone, that the intention of the Legislature was, that individuals should be thenceforth free to lend their money not merely at the rate of interest of six per cent., to which they had before been limited, but any rate of interest whatsoever; but with this qualification only, that the lender should not be able to enforce, by by judgment of a court of justice, a higher rate of interest than six per cent. And the 2nd and 3rd clauses do in fact carry out precisely that intention; first, by abolishing all penalties against usury, and providing that no party contracting for any interest, however high, for the forbearance of money, or paying any money in pursuance of such contract, shall incur any loss, forfeiture or penalty, or be liable to any proceeding, civil or criminal, for usury.

After this enactment there could be no longer such an offence as usury in transactions between any individuals; for usury, properly speaking, consisted in extorting a rate for money beyond what was allowed by positive laws. Interest for money, but not exceeding the settled rate, being the lawful gain, and usury being the extortion of unlawful gain, so long as the statute was in force no rate could be said to be unlawful, the avowed intention of the act being to abolish prohibitions against lending money at any rate of interest whatever.

Still it is quite true, as observed in the Chancellor's judgment, that the Legislature did not intend to exclude by this act all protection from the borrower. They provided for him this protection, that whatever rate of interest he might engage to pay, no contract to pay interest should be enforced against him to a greater extent than for six per cent by the year.

This seemed to him a *locus pœnitentiæ*, that if he agreed to pay any higher rate than six per cent., and if the lender should attempt to enforce more, he must fail; for under the 3rd clause, the borrower's contract to pay will be held void for the excess.

One effect of this law is very plain, namely, that for all interest above six per cent., the parties, while that act was in force, must have dealt (so to speak) upon leave; and if the lender was not content to run the risk of the borrower repudiating his contract, as he certainly might do, he had to take care to get his bonus or extra interest in advance. But the defendant in this case contended that that is not the whole effect of the provision, for that the lender, who has received the payment of interest beyond the six per cent., may be made to refund the excess as money paid upon a venal contract. In *Stimson* v. *Kerby*, the Court of Chancery held that he could sue for it back again, and recover it on the same principle that the borrower could recover back usurious interest which he had paid while the laws against usury were in full force. If the borrower could so recover back the excessive interest, then undoubtedly in taking the account in this case before us, it would be right to give credit to the mortgagor for all the excessive interest he had paid as so much money paid by him held by the mortgagee to his use.

If it is meant by that, that the mortgagor in this case, when he had paid any of his notes, which were given exclusively to secure the excess of interest and that only, could have brought an action against the mortgagee and recovered the money back, I cannot take such a view of the statute, for that would completely nullify the provision which legalizes the payment of any rate of interest whatever, that is, permits it, though it withholds the aid of law for enforcing any contract to pay more than six per cent.; and it would limit the effect of the act to the abolition of penalties, and to securing the lender against the loss of his principal, and of all interest upon it, by taking or agreeing to take, above six per cent.

But I think it is plain, upon the whole statute, that the intention was to go further, and to permit the payment of any rate of interest that the parties might agree upon, and to divest such payment of the charge of illegality, in the absence of fraud, such as would upon general principles invalidate a contract in law or equity. I do not see on what principle an excess of interest, voluntarily paid under a contract made since this statute passed, can be restrained.

In *Smith* v. *Bromley* (Douglas, 696), Lord Mansfield thus narrated the action which was then brought for money had and received on the ground that the plaintiff had paid it upon an illegal consideration: "It was iniquitous and illegal," he said, "in the defendant to take the forty pounds, and therefore it was so to detain it." But it was not illegal, though it might be unreasonable and oppressive, for the mortgagee in this case to keep the amount which had been paid to him in the notes, for the law being in force did not prohibit any amount of interest being paid by a borrower, and I do not see how we can hold the lender bound to refund money which he was at liberty to receive without violating any prohibition; for the statute in terms says that it was intended to abolish all prohibition, and without rendering himself liable to any loss, forfeiture, penalty or proceeding, civil or criminal, for usury.

I think that there can be no distinction drawn between this case and *Dawson* v. *Remnant* (6 Esp. 26), which turned upon the statute 24 Geo. II., cap. 60, sec. 12, which prohibits any action from being brought for a debt deemed to be due for spirituous liquors sold to him in less quantities than twenty, and so to get back his money; but Lord Mansfield said, "A set-off is in the nature of a payment. Had the defendants paid money on account of this demand, could he have recovered it back again? No; it would be a payment of a demand which by law perhaps could not be enforced, but which he having paid through a motive of wrong, the law will not allow it to be recovered back." The statute of 24 Geo. II., it is true, does not say, in so many words, that the contract to pay for liquors so sold shall be void, while the 3rd clause of the statute which we are now considering does make the contract void for the excess; but there is no substantial defence. Both contracts are void in this sense, but they could not be enforced first, as a contract not in writing to pay the debt of another is void without a consideration.

There is no such general principle as that money voluntarily paid upon a void or upon a legal consideration, can always be recovered back. In *Fulham* v. *Down* (6 Esp. 26, note), Lord Kenyon is reported to have said that "where a voluntary payment has been made of an illegal demand, the parties knowing the demand to be illegal, it is not the subject of an action for money had and received In law, if so held, it would subject all accounts and settlements between parties to revision."

The case of *Philpott* v *Jones* (2 Ad. & Ell. 41) bears very strongly, I think, against what the defendants contended for in this suit, and also *Wilson* v. *Ray* (10 Ad. & Ell. 82), in which latter case, the plaintiff having given his bill to the defendant for

a consideration clearly illegal (and in that respect stronger than the present case), being asked for payment at first resisted, but afterwards paid it, and then sued to recover the money back. The court were unanimous in opinion that he must be nonsuited. "This plaintiff," the Chief Justice said, "might have refused payment; and if the drawer had brought his action upon the bill, he had the opportunity of defending himself by the illegal action of the consideration. He waived the advantage, and voluntarily paid the bill, with full knowledge of all the facts. I am of opinion that it is not now open to him to deny that he was liable."

The money paid in this case in excess of interest, was paid expressly upon the notes which had been given, and there can therefore be no question now about any right of the mortgagee to impute them to any other course of action. In *Bradshaw* v. *Bradshaw* (9 M. & W. 34), Erle and Bramwell, in argument, make this admission: "No doubt, however void the transaction was, if the money were paid by the debtor at a time when he might have resisted the payment, he cannot recover it back; but here they say the payment was made because the plaintiff had no defence against the holder of the bills." The case was a *bona fide* holder for value; the court took the same view.

I must say it seems to me perfectly clear that the Court of Common Pleas were right in holding as they did in the case of *Kaines* v. *Stacey* and *Jarvis* v. *Clark*—that the money paid in excess of six per cent. interest upon a contract made after 16 Vic. cap. 80, cannot be recovered back, and that the mortgagor has no claim on that ground to have the money paid in this case to take up the notes which were given for such excess set to his credit against the six per cent. interest secured by the mortgage and against the principal.

There is apparently more force, as it seems to me, in the clear ground which the mortgagor may take under the 3rd clause, namely, that if the plaintiff in this suit (the mortgagee) be allowed to recover his debt, together with the legal rate of interest secured by the mortgage, after having received much more than six per cent. for interest through payment of the notes, he will be in effect receiving the aid of the Court of Equity to recover an excess of interest above six per cent., contrary to the spirit if not to the letter of the 3rd clause. In considering this case, that view of it has at times struck me so forcibly, that I have sometimes thought that if my brothers, or a majority of them, were satisfied to concur in the judgment of the Court of Chancery on that ground, I would not differ from them, though I confess that the leaning of my mind has always been the other way; for, by applying the statute in that manner, we should in fact be compelling the plaintiff to refund the excess of interest, though that would not be consistent, I think, with the intention of the statute, which is expressed to be to abolish all prohibiting against "lending money at any rate of interest whatever;" and besides, the very words of the 3rd clause makes the contract void "so far, and so far only, as relates to any excess of interest thereby made payable above the rate of six pounds," &c.

Now the contract which the plaintiff comes to enforce is the covenant in the mortgage, which is, to pay £375 "and interest," which, when no other rate is mentioned, must mean six per cent. There is no higher rate made payable thereby—that is, by the mortgage—and therefore there is no authority under the act for stopping short of the full sum which by it the mortgagor promised to pay; and that is all the plaintiff wants, for the mortgagor has paid him without resistance all the interest, which he could not have been compelled to pay by legal proceedings.

And this, I think, is just what the Legislature meant; for the statute says, in effect, to lenders, "You may take whatever the borrower will agree to give you; but you can only compel him by action to pay you six per cent.; for all beyond that, a court will hold your contract void."

The lender, in this case, can truly say to the court: "As to the agreement beyond six per cent., there is no question, for I have received it, and legally received it, though the borrower was not bound to pay it. I only come to you to enforce payment of what I can legally recover, which I have not yet got."

To set off the payments made in discharge of the extra interest, against the contract for the debt and legal interest contained in the mortgage, would be carrying the power which disables the lender from enforcing at law any contract for more than six per cent., further than the Legislature seems to have intended. The effect of this view of the statute would, it is true, enable the lender to recover the legal interest in addition to the illegal, which he has received; and he thus would get in all about fourteen per cent. Whatever may be our private opinion as to such a result being reasonable or desirable, we cannot look upon it other than as the Legislature can have meant it; for they have since, by a statute that admits of no doubt, enabled lenders not only to receive but to enforce any rate of interest that borrowers may agree to pay—thus doing away with the slight check upon exorbitant interest which they had provided by the other act. No one, I think, who has seen such instances of the unfeeling abuse of this license as frequently comes to light in courts of justice, can avoid having grave doubts of the wisdom and propriety of so entire a departure from the laws of restraint of usury; but we must administer the law as we find it.

A good deal of stress was laid, in the argument, on Lord Talbot's judgment in *Bosanquet* v. *Dashwood;* but that was a case decided while the laws against usury were in full force, and is not applicable to such a state of the law as was created by our statute 16 Vic. cap. 80, which made it lawful to receive, and, as I think, to retain, any amount of interest.

In my opinion, the judgment of the court sustaining the Master's report should be reversed; and the Master should be directed to report what is due for principal and for interest under the contract, without reference to what the mortgagee received in payment of the notes.

SPRAGGE, V. C., *dissentiente.*

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, *Esq., Barrister-at-Law.*

IN THE MATTER OF TABER AND THE CORPORATION OF THE TOWNSHIP OF SCARBOROUGH.

By-law to levy rate for schoolhouse—Extrinsic objections—Refusal to quash—How the desire of rate-payers must be expressed—Consol. Stats. U. C., Ch. 64, sec 34. sec. 27, sub-sec. 10.

The Township council, by resolution, agreed to lend to the school trustees, out of the clergy reserve fund, a sufficient sum to build a schoolhouse, taking as security their debentures. This arrangement was made by the trustees without any reference to the ratepayers, but at the next annual school meeting, at which the applicant was present, the matter was discussed, and the contract and plans for the building examined. The council subsequently, on the requisition of the trustees, passed a by-law to raise a sum for school purposes, which was required to pay the interest of these debentures and redeem one of them. The applicant moved to quash this by-law, objecting that the loan effected by the trustees without the consent of the ratepayers was illegal; but it appeared that the schoolhouse had been finished and occupied, many of the ratepayers swore that they were satisfied with what had been done, and the affidavits were contradictory as to how far the applicant had acquiesced in the proceedings.

The by-law not being illegal on the face of it, the court under these circumstances refused to interfere.

Quære, whether under Consol. Stats. U. C., ch. 64, sec. 29, sub-sec. 10, and sec. 34, the concurrence of the freeholders and householders required to enable the trustees to call upon the council to levy money for the purchase of a school site, &c., can be expressed at the annual school meeting, without notice that the question will then be brought up.

(Easter Term 24 Vic.)

H. B. Morphy obtained a rule *nisi* to quash a by-law passed to levy money required for school purposes.

Helliwell shewed cause. *Burns* supported the rule.

The application depended upon affidavits, being grounded upon objections not apparent on the face of the by-law, and the facts of the case sufficiently appear in the judgment.

BURNS, J., delivered the judgment of the court.

It seems from the affidavits, which are very numerous, that in the year 1857 the inhabitants of school section No. 9 desired to change the site of the schoolhouse, and a special meeting was called of the freeholders and householders of the section to decide the point. A site was determined upon, and the trustees instructed to build the schoolhouse at the earliest apportunity. The acre of land then selected was paid for and conveyed to the trustees, and the deed of conveyance registered. I do not understand the complaint of the relator to attack those proceedings, but what was done afterwards.

In the fall of the year 1859, the then trustees made an arrangement of this kind with the council of the township. The council

agreed by resolution of the 15th of October, 1859, to loan from the proportion of the clergy reserve fund a sum sufficient to build the schoolhouse, taking in security debentures to be issued by the school trustees, redeemable at stated times. The trustees immediately advertised for tenders. A contract was entered into to to have the building erected and completed by the 1st of August, 1860.

An the annual general school meeting in January, 1860, the proceedings of the trustees were made known to those present, among whom was the complainant. The contract for the building of the schoolhouse was read, the plans exhibited and examined, and the matter discussed. On the one side it is asserted that the complainant assented to the report of the trustees, and on the other that is denied.

After this the trustees made a requisition to the council to levy by rate on the ratepayers of the section the sum of $550 for school purposes. Part of this sum was for the purpose of the interest falling due on the debentures, and to redeem the first one.

The applicant swore that the application was not made from any malicious or vindictive motive, but solely that he, and the other ratepayers and householders of the school section, might have at some special meeting, or at the annual meeting in January, 1861, an opportunity of being heard in the matter.

The council of the township on the 20th of August, 1860, in accordance with the requisition of the trustees, passed a by-law assessing the school-section for the sum of $550.

It is this by-law which is attacked and sought to be quashed in this application. The rule for that purpose was granted in Michaelmas Term last, and was answered during last term.

It is evident, we think, the chief ground of complaint made against the proceedings of the trustees, is that they have expended more money upon the schoolhouse than some of the ratepayers thought need have been done, and now the complainant falls back upon the ground that the act of the trustees in raising money by means of the loan from the clergy reserve fund to build the schoolhouse, without the sanction of the ratepayers of the section, was illegal, and contrary to the provisions of the school act.

The 30th section of ch. 64, of the Consolidated Acts of U. C., enacts that no steps shall be taken by the trustees for procuring a school site on which to erect a schoolhouse, or changing the site, without calling a special meeting to consider the matter. This was complied with in 1857, and the site settled.

By section 34 the township council is authorised to levy by assessment upon the ratable property in the school section for the erection of a school house, such sum or sums as may be required by the trustees in accordance with the desire of the majority of the freeholders and householders, expressed at a public meeting called for that purpose, as authorised by the 27th section of the act, sub-section 10.

Now when we turn to sub-section 10 of section 27, we find the provision to be, that for the purpose of providing salaries of teachers and all other expenses of the school, it may be done in such manner as may be desired by the majority of the freeholders and householders of such section, at the annual school meeting, or at a special meeting called for the purpose.

We need not discuss the point whether the mode of raising the amount necessary to erect the school house could be done at the annual meeting without first giving notice that it would be brought up at such meeting. The 34th section seems to contemplate that a meeting must be called for the purpose, and I have no doubt, if notice has been properly given before-hand, then the annual meeting might be looked upon as a meeting for that purpose, as well as for the ordinary business to be transacted at such meeting. But I can see room for argument that notice of such a matter as providing funds for the erection of the school house should be given before the annual meeting takes place, so as to constitute it one for that purpose as well, or that a special meeting should be called for the purpose, because without such notice before the annual meeting the freeholders and householders may not suppose that any other business than the election of trustees and the ordinary business will be then transacted. The procuring of a site for a school house, or change of one, is treated as something more than ordinary. The 34th section is wider in extent, embraces more matters than mentioned in sub-section 10 of section 27, and does not use the expression as in the other, that a majority of the freeholders and householders may express a desire for the purposes under the 34th section *at the annual meeting*, but it is at a meeting called for the purposes mentioned in the section; and therefore it would seem to be something more than the ordinary business which would take place at the annual meeting which was contemplated. The 10th sub-section mentioned speaks of salaries of teachers and all other expenses of the school, no mention being made of providing the means of erecting the school house.

Be that however as it may, in this case it is not shewn that the subject matter of raising funds to build this school house was taken up or discussed, or submitted to the annual meeting held in January, 1859, and it is not pretended that any meeting was called for that purpose anterior to the arrangement the trustees made with the council of the township to borrow money from the clergy reserve fund, and give the debentures of the corporation of school trustees for the money, and the resolution of the council to that effect of the 15th of October, 1859. In pursuing the course the trustees did it is quite clear they were not conforming to the provisions of the school act. They were depriving the freeholders and householders of any voice in the matter.

The school house has been finished and occupied, and a great many of the ratepayers now make affidavits, stating they are perfectly satisfied with what has been done by the trustees; and as it would now throw every thing into confusion to quash this by-law, we must see what has been done since the 15th of October, 1859, and what part the complainant took in such proceedings, in order to discover whether any thing has occurred which would disqualify him from now complaining.

Mr. Wheeler, the reeve of the township, in his affidavit states that at the annual meeting in January, 1860, he presided as chairman: that it was explained to the meeting with what funds the school house was to be built: that the contract with the builder was read, and the plans shown: that "Mr. Taber was present at this meeting, and took an active part in discussing the several questions before it. And the said complainant did not then object to any thing connected with said building, which had been done by the trustees, or which was contemplated by them to be done, neither was any objection offered by any other person, but the meeting seemed to be to deponent, as he verily believed at the time, unanimous for building the said schoolhouse in the manner proposed by the said trustees."

Some five other persons, ratepayers of the section, who were present at the meeting in 1860, confirm the statement of the reeve. There are no less than 26 of the ratepayers of the section who swear that they are satisfied with what has been done. And further, it is shewn that at the meeting held last January, since one of the debentures has been redeemed with the money levied last year, and the same appearing in the account of the trustees for the year, the report of the trustees was sanctioned and confirmed. It is said that this last meeting was the largest that has been held in the section, and that only the complainant and some two or three of his friends found fault with the item of paying that debenture by means of the assessment.

In reply to the acquiescence and consent stated in the different affidavits of the proceedings which took place at the meeting of January, 1860, the complainant has filed the affidavits of himself and another person, stating that the complainant did strongly protest that the mode adopted by the trustees for raising the money was illegal, and that they had no right to do it, as they did, without the sanction of the majority of the ratepayers at a meeting to be called for that purpose.

It is impossible for us to dispose of the matter satisfactorily to ourselves upon such contradictions as presented in the affidavits, and we have no mode of ascertaining which of them be the true statement, and therefore we must draw inferences from other matters which are not in dispute. For instance, this complaint is not made until after the school house has been finished, and the complainant with other ratepayers has been called upon to pay his proportion. He well knew at the meeting in January, 1860, of the mode proposed to build the school house, and it was then in his power to have stopped proceedings by applying to quash the resolution of the council of the 15th of October, 1856, but he waited until that was followed up by a by-law to levy a rate to pay the

first of the debentures granted by the trustees. He must have well known that such a course to redeem the debt must be resorted to, and yet he does nothing, even giving credit to what he says, but protest that they were not acting rightly, because no public meeting was convened for the purpose.

There appears to be nothing illegal upon the face of the by-law, and the question therefore is whether the court is bound to quash a by-law for an irregularity in the proceedings made out by extraneous evidence. This court has already held that it is not compulsory on it to quash a by-law thus attacked. See *Stanley and The Municipality of Vespra and Sunnidale* (17 U. C. Q. B. 69), *Janson and the Corporation of Reach* (19 U. C. Q. B. 591).

We think the rule should be discharged.

Rule discharged.

REGINA V. FITZGERALD.

Quarter sessions—New trial—C. S. U. C. ch. 113.

Defendant was convicted of an assault, at the quarter sessions, and fined; but during the same sessions he obtained a new trial, on his own affidavit, and was acquitted at the following sessions. *Held*, that the quarter sessions had authority to grant such new trial, and that this court could not interfere.

[Q. B., E. T., 24 Vic., 1860.]

An indictment was found at the general quarter sessions, held at Perth, for the United Counties of Lanark and Renfrew, in March, 1860, against the defendant, for an assault and battery, alleged to have been committed on the 1st December, 1859. The defendant was convinted on the 14th March, 1860, and the same day sentenced to pay a fine of one shilling and the costs, and to stand committed until the fine and costs were paid. On the second day after the sentence was pronounced, the defendant made an application to the sessions for a new trial, upon his own affidavit stating that he was not guilty of having committed the assault, and complaining that the evidence offered against him was contradicted, and that the jury did not properly weigh the evidence. The court set aside the conviction, and ordered a new trial, with costs to abide the event. The defendant was again tried at the sessions, held in June, 1860, and was then acquitted.

These proceedings having been removed by the Crown, upon a writ of *certiorari*, into this court, *R. A. Harrison* moved on behalf of the Crown for a rule calling upon the defendant Fitzgerald to show cause why all the proceedings subsequent to the judgment and sentence of the court, which took place at the March sessions, 1860, should not be quashed and set aside as illegal, and why he, the defendant, should not be remanded to the custody of the sheriff of the United Counties of Lanark and Renfrew, to be detained in the common gaol of the said United Counties, under the judgment and sentence of March, 1860, until he should be therefrom discharged by due course of law, or why the defendant should not be otherwise dealt with as to this court might seem meet and proper.

BURNS, J., delivered the judgment of the court.

Until the passing of the statute 20 Vic. cap. 61, a new trial could not be granted in any criminal case in Upper Canada, tried at a court af oyer and terminer and general gaol delivery, or quarter sessions. Under that act, now continued by the Consolidated Acts for Upper Canada, cap. 113, a person convicted at or before a court of oyer and terminer or gaol delivery, may make application to one of the superior courts of common law for a new trial, provided he does so not later than the last day of the first week of the term next succeeding the court of oyer and terminer or gaol delivery at which the conviction took place. The evident meaning of the Legislature was, that the court of oyer and terminer or gaol delivery should perform all its functions with regard to judgment and sentence following a conviction, with due respect to circumstances in each case; for the power of entertaining the application for a new trial is vested in another court, to which is not confided by the act the power of giving the judgment or passing the sentenco.

With respect to the court of quarter sessions, the power to entertain the application is vested in the same court; and the question therefore is, at what time the application should be entertained, or when is it limited, seeing that the act itself is silent with regard to it. It is quite clear that the sessions possess the same power that the superior courts do of altering their judgments during the same sessions or term; and for that purpose the sessions, as a term, is all looked upon as but one day. (*The Inhabitants of St. Andrews, Holborn*, v. *St. Clement Danes*, 2 Salk. 606.) The judgment and sentence, therefore, pronounced in the present case, was no obstacle against the sessions entertaining an application for a new trial at the same sessions, which was the case in this instance.

Then with regard to the grounds upon which the new trial was ordered, it is said that was done upon the affidavit of the defendant, and therefore was contrary to the decisions of this court (see *Regina* v. *Crozier*, 17 U. C. Q. B. 275; *Regina* v. *Oxentine*, *ib.* 295), and also of the Common Pleas, upheld in appeal in the case of *The Queen* v. *Grey*. The construction given to the act is, that the power of moving for a new trial is confined to points of law and questions of fact arising upon the evidence given at the trial, and not upon what may be alleged upon affidavits supplied afterwards; and no doubt the courts of quarter sessions ought to be governed by the decisions upon the subject. We must suppose in general those courts do so, and in the case before us it may have been so acted upon; for although the affidavit be returned to this court, it is not shown that the court of sessions made the order for a new trial solely upon the affidavit. The evidence given at the trial does not appear before us in any way, and it may be that a question of fact arose upon that evidence sufficient to satisfy the court that it was right to order a new trial; and if that be so, the filing and using the defendant's affidavit would amount to nothing. No authority has been vested in this court to review the judgment of the quarter sessions where a new trial has been ordered. It is only where the sessions have confirmed the conviction, that the convicted party may appeal.

As the case stands at present, there is no ground for saying that it clearly appears the sessions have transgressed their jurisdiction; it is only surmised that they have not followed the rule established in the superior courts of not granting new trials in criminal cases upon affidavits merely, and this comes now before us very nearly a year after the defendant was acquitted upon the new trial granted to him. There should be no rule.

Rule refused.

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*)

STREET V. THE CORPORATION OF THE COUNTY OF KENT.

Crown lands—Un-patented—Assessments on.

Plaintiff in the year 1853 purchased certain Crown lands through the Crown lands agent at Chatham, taking a receipt for the first instalment then paid, which stated, among other things, that in case any other person should have any claim for improvements, the sale should be cancelled; also, that no timber was to be cut on the premises in question excepting for the improvement thereot without the consent of the Crown land agent or first paying the purchase money in full.

In January, 1854, the commissioner of Crown lands, in supposed compliance with stat. 16 Vic., ch. 182, sec. 48, transmitted a list to the registrar of the county, (in the statement of case set out.)

Plaintiff paid all the instalments on the lands as they became due, but no patent lease or license of occupation has been granted for the lands, and the title thereto has always been vested in Her Majesty. The only right in plaintiff being that evidenced in the receipt, &c. The lands have never been in the actual possession or occupation of any person whomsoever, and the plaintiff has always resided out of the county in which they are situate.

In the years from 1854 to 1859 inclusive, the lands were assessed for taxes, which not being paid, the treasurer issued his warrant, and they were adversised accordingly. To prevent the sale beidg carried out, the plaintiff, under protest, paid the amount claimed for the assessments.

Held, 1st, that statute 16 Vic., ch. 159, sec. 24, (Con. Stat. ch. 22, sec. 27) (since repealed,) was not intended for Upper Canada.

2nd, that sec. 13 Con. Stat. U. C., ch. 22, was mandatory and not permissive, and that a license of occupation should be issued to every person wishing to purchase, lease or settle on any Crown land.

3rd, that the lands in question were not subject to assessment as they were vested in the Crown, no license of occupation, lease or patent thereof having been granted by the Crown.

(Easter Term, 24 Vic.)

SPECIAL CASE.

In the year 1853, certain clergy reserve lands in the township of Tilbury East in the county of Kent, in all 1715 acres, the title to which was vested in Her Majesty, were purchased by the plaintiff from the Crown lands agent for the county of Kent on the

terms mentioned in a receipt giving to the plaintiff at the time of purchase by the said Crown lands agent at Chatham, where they were sold, of which receipt the following is a copy:

Chatham 29th Sept. 1853.

"Received of Thos. C. Street. Esq., the sum of fifty-five pounds in payment of the first instalment and inspection fees on the clergy reserve lands included in the foregoing list, and containing by admeasurement 1715 acres, be the same more or less. This sale is, however, made with the express understanding that no claim to the said land exists on the part of any other person on account of improvements or otherwise, and that should such a claim be established to any of the said lots, the sale, so far as they are concerned, will be cancelled, And further, that no timber is to be used on the said premises excepting for the improvement thereof without first arranging with the agent or paying up the whole of the purchase-money, of which an instalment of one-tenth and interest from day of purchase becomes due on the first day of January in each year, without reference to date of sale.

"Signed,
J. B. WILLIAMS, Agent."

Annexed to said receipt is a list of the lands referred to in the receipt.

During the month of January, 1854, the commissioner of Crown lands transmitted to the treasurer of the said county of Kent, in supposed compliance with the 16 Vic., ch. 182. sec. 48, a list in the following form, the heading of which was all printed in the original, excepting the words in italics. Under the column headed "name of lessee, patentee, or purchaser," the plaintiff's name was inserted, following which the lots were mentioned, upon which the taxes in question were imposed; and under the column headed "remarks" the word "*clergy*" was set after them to distinguish them from *Crown* lands.

"Statement of lands granted or leased, or in respect of which a license of occupation has issued during the year 1853, in the Townships of *the County of Kent*."

Sale. No.	Name of Lessee, Patentee, or Purchaser	Part.	Lot.	Gore.	Acres.	Remarks.

The plaintiff has paid all the instalments of the said purchase money and interest on the said lands on the days they respectively became payable. No patent, lease, or license of occupation was ever granted or issued for the said lands, or any of them. The title to said lands has always since date of the said receipt been vested, and still is vested, in Her Majesty. The only right the plaintiff has or ever had to the said lands is what was acquired under the purchase evidenced only by the said receipt and the payment of the subsequent instalments, and such rights the plaintiff still possesses. No person has ever been in actual possession of, or resided on, or ever occupied the said lands, or any of them, or any part thereof. The plaintiff has never been a resident in, or had a legal domicile or place of business in the said township of Tibury East, or the said county of Kent, but has always resided in the county of Welland.

The said lands in the years 1854, 1855, 1856, 1857, 1858, and 1859, were, (for the first time) assessed and returned by the assessors of the said township of Tilbury, and were designated on the assessment rolls for said years respectively as lands of non-residents, without the name of any owner or occupant. During each of the said years they have been rated for county purposes, but no part of the taxes having been paid, a warrant was issued by the county treasurer for the sale of the said lands, and they were duly advertised for sale by the sheriff of the county of Kent. The plaintiff, under compulsion and to prevent the sale of the said lands, but protesting against the right to assess or tax the said lands, paid the defendants the amount of the said taxes, £160 10s. 9d., on the 13th November, 1860.

On the first day of May 1855, the treasurer of the county added 10 per cent. to the amount of the tax remaining due for 1854. On the 1st day of May in each subsequent year the treasurer added 10 per cent. to the amount remaining due for taxes, computing not only on the taxes for the previous year, but also on the 10 per cent. imposed or added in the preceding year.

The questions for the opinion of the court were:

1st. Were the lands on the facts stated legally liable to be assessed and taxed for county municipal purposes.

2nd, in adding the 10 per cent. to the amount of tax due on the 1st of May in each year, was it legal to compute and add the 10 per cent. not only on the tax, but also on the per cent. added on the 1st of May of the preceding year.

If the court should be of opinion in the affirmative thereof, then the plaintiff agreed that a judgment should and might be entered against him of *nolle prosequi* immediately after the decision of this case, or otherwise, as the court might think fit, but if the court should be of opinion in the negative thereof on the first question, then the defendants agreed that judgment should be entered against them by confession for £160 10s. 9d., with interest from the 13th of November, 1860, immediately after the decision of this case: but if the court should be of opinion in the affirmative on the first question, but in the negative on the second; then the defendants agreed that judgment should be entered against them by confession for £2 8s. 2d., with superior court costs of suit immediately after the decision of this case, or otherwise as the court might direct, and that judgment should be entered accordingly.

In Hilary Term last *Richards*, Q. C., argued the case for the plaintiff, and cited 16 Vic., ch. 182, sec. 48; *Henderson* v. *McLean*, 6 U. C. Q. B. 530; *Alexander* v. *Bird*, 8 U. C. C. P. 539.

Wilson, Q. C., for defendants, cited 16 Vic., ch. 159; sec. 6.

DRAPER, C. J.—According to the facts stated in the special case, the plaintiff was not the grantee or lessee of the lands in question, nor was there any license of occupation granted to him in respect thereof.

The Commissioner of Crown Lands might perhaps, under 16 Vic., ch. 182, sec. 48, have returned these lots as ungranted lots, of which no person had received permission to take possession, though from the language of the receipt for the first instalment of the purchase money, "that no timber should be used upon the premises except for the improvement thereof," without first arranging with the agent for Crown lands or paying up the whole of the price; it may be well inferred, that the purchaser, in taking possession, would not be an intruder on the Crown domain. But it would appear that the return as actually made by the Commissioner of Crown Lands, in which he sets down the name of the plaintiff as purchaser, is not within the terms of the 48th section of the assessment law of Upper Canada.

It has been argued that the 24th section of the public lands act (Consol. Stat. of Canada, ch. 22, sec. 27, since repealed) is applicable to this case. This section required the Commissioner of Crown Lands to transmit in January in each year "to the registrar of every county or registration district, and secretary-treasurer of any municipality in Lower Canada," a list of the clergy and Crown lands theretofore or thereafter sold, or for which licences of occupation had been granted in such country or registration district, and upon which a payment had been made, which said lands should "liable to the assessed taxes in the townships in which they respectively lie, from the date of such license or sale."

I think it clear that this enactment was not intended to apply to Upper Canada. The assessment act for that part of the province declared what lands should be taxable, and provided for a return to the treasurer of every county therein of lands granted or leased, or in respect of which a license of occupation had issued, and the 9th Vic., ch. 84, (Consol Stat. U. C., ch. 89, sec. 80,) required a return from time to time, to each registrar in Upper Canada, of the names of all persons to whom Crown grants for lands in the respective counties had been issued. Without these enactments I should have thought the plain construction of the sentence made the words "Lower Canada" applicable as well to the registrars as to the secretary-treasurer, and with them I think there is no room for reasonable doubt.

At the same time I think there may be reason for concluding that the 6th section of the public land act (sec. 13 of the Consol. Stat.) was mandatory and not merely permissive, and that a license of occupation should be issued to every person wishing to purchase and become a settler on any public land. It is needless to enquire whether the Commissioner of Crown Lands might not have read the word "and" as if it were "or," or have assumed that every purchaser intended to be a settler, since the last act, 23 Vic., ch. 2, sec. 16, removes all doubt in this respect, though

it follows the form of language used in the previous acts, that the Commissioner of Crown Lands *may* issue the license of occupation.

Subject to certain exceptions all land in Upper Canada is liable to municipal taxation. One of these exceptions is, all estate and property belonging to, or vested in, Her Majesty, and this exception is qualified by an enactment that the occupant of any land belonging to Her Majesty shall be liable to taxation for the land, (provided he does not occupy in some official character,) but the land shall not be chargeable for the same.

For the purposes of assessment the motive for requiring a return to the treasurers of lands granted or leased, or for which a license of occupation has been granted is self-evident. And the license of occupation, which for the licensee's benefit is declared to be *primâ facie* evidence of possession, is no doubt, for the purpose of assessment, evidence that he is occupant.

But the case shewed that the plaintiff is not occupant in fact, nor has he a license of occupation; and the land is neither granted nor leased to him. I do not see that by the fact that the Commissioner of the Crown Lands has made a return of his name in a manner not pointed out by the act, he can subject him as occupant to be taxed for this land. The land itself was evidentally not chargeable, and the plaintiff was not occupant, grantee, or lessee, the tax was not lawfully imposed, and the plaintiff should have judgment on the first question submitted.

We have not overlooked the 29th section of 16 Vic., ch. 159, referring to locations or sales made prior to that act, three months subsequent to the passing whereof this sale was made. Section 14 of Consol. Stat. Canada, ch. 22, also refers to sales made *prior* to the 14th of June, 1858.

Per cur.—Judgment for plaintiff.

Smith v. The Corporation of the City of Toronto.

By-law—Tavern license, action for breach of—Forfeiture.

Action for illegally depriving plaintiff of his tavern license.

The defendants pleaded that that plaintiff carried on business under a by-law, the provisions of which he had infringed, and thereby his license became forfeited. Demurrer, that defendants had no power to pass such a by-law.

Held, that no action can be brought for the infringement of a by-law till one month after it has been quashed.

Writ issued the 6th of September, 1860.

1st count of declaration stated that defendants wrongfully deprived plaintiff of his tavern license.

2nd. That defendants assaulted and imprisoned plaintiff, &c.

To which defendants pleaded: that plaintiff carried on his business as an innkeeper, under license from defendants, under by-law No. 5, passed on the 14th of February, 1859; and by said license plaintiff was bound to obey and fulfil the provisions of said by-law No. 5, one of which was that no intoxicating liquors should be sold on Sundays, and another that on conviction of breach of aforesaid condition, that in addition to the penalty thereby imposed, the party so convicted should absolutely forfeit his license; that during the continuance of said license, and while plaintiff kept such inn under it, he, the plaintiff, was convicted of a breach of the said by-law No. 5, and fined in the sum of $40, and did thereby forfeit his said license under said by-law, which is the deprivation alleged in the first count of the declaration. To which plea plaintiff demurred, on the grounds that the defendants had no power according to law to pass such by-law, or to deprive plaintiff of his license for the alleged offence.

Joinder in demurrer.

Hallinan, for plaintiff, referred to Consol. Stat. U. C., cap. 126, secs. 1, 9, 16, 20, p. 991; *Whitfield* v. *S. E. Ry. Co.*, 4 Jur. N.S. 688, Q. B.; 27 Law Jour., Q. B. 229.

Adam Wilson, Q. C., for defendants, referred to Con. Stat. U.C. cap. 54, sec. 254, *et seq.*

Draper, C. J.—No exception has been taken to this declaration. The only question raised before us is, whether the plea justifying what is complained of is sufficient—in other words, whether the defendants had legal authority to pass the by-law set out in the plea.

But there is no averment by plaintiff in reply to the plea that the by-law has been quashed; and conceding, for the argument's sake, that it was *ultra vires*, still, by sec. 202, no action can be brought until one month after the by-law, "illegal in whole or in part," has been quashed.

If the by-law is legal, it does not authorize the defendants to deprive the plaintiff of his license, but it absolutely forfeits the license by its own inherent force, on certain facts being established. This forfeiture is the thing complained of in the declaration, for that is the only meaning I can place on it. The necessary facts are averred, and the plaintiff admits them.

If the by-law is illegal, but not quashed, the action would not be maintainable under the 202nd section, above referred to. The plea, it is true, does not aver that the by-law was in force when the defendants did the act complained of, but sets up that the plaintiff got his license under a certain by-law, and by his license bound himself to obey the provisions of that by-law, and shows that it absolutely forfeits the license under certain circumstances. So that either way the demurrer fails.

Mr. Hallinan, in support of the demurrer, referred to the Con. Stats. U. C. cap. 126. The defendants are the Corporation of the City of Toronto, which corporation is not a justice of the peace, nor an officer, nor a person fulfilling a public duty arising out of the common law, or imposed by act of Parliament, so far as the subject matter stated in the declaration is concerned. And it does not appear to me that the 12th section of Consol. Stats. U. C. cap. 2, which enacts that the word "person" shall include any body corporate or politic, or party, "*to whom the context applies*," affects this question, for I think the whole frame of cap. 126 excludes its application to the case of a corporation.

Per cur.—Judgment for defendant.

Muir v. Lawrie et al. (Executors.)

Promissory notes—Bond given by executors on an accounting for balance due on certain promissory notes made by testator—How far an extinguishment of the original debt.

Declaration on three promissory notes given by testator in his life time for £21 5s., £55, and £40 16s., respectively.

Plea, that after testator died and the notes fell due, the plaintiff and defendants, accounted together and struck a balance, for which, the defendants gave their bond to pay out of the first moneys they should receive from the estate within eighteen months.

Held bad, as not shewn to be given in satisfaction of the notes or of cross-demands and cannot therefore be pleaded for more than a payment *pro tanto* for the amount of it.

(E. T., 24 Vic.)

Declaration against executors on three promissory notes made by testator, one for £21 5s., payable twenty-four months after date, (1st January, 1855,) the second for £55, with interest, payable twelve months after same date. The third for £40 16s., with interest, payable twelve months after date, 11th February, 1859.

Plea, that after the testator died and the notes fell due, defendants, as executors, and plaintiff accounted together, of and concerning the said notes and divers sums of money then due, and to become due, from defendants as such executors to plaintiff, and of and concerning divers sums of money received by plaintiff on account of the said notes. And upon such accounting the defendants were found to be indebted to the plaintiff in £100. And thereupon it was agreed that defendants should give to plaintiff their bond for payment of the said sum, out of the first moneys that should come to their hands within eighteen months after the making of the said bond, and thereupon defendants did become bound by their writing obligatory sealed with their seals, and now in plaintiffs custody, to pay plaintiff the said money that should come to their hands within eighteen months as aforesaid.

Averment, that the eighteen months have not expired, and that the bond is in full force.

Demurrer.—That the plea does not aver that it was ever agreed that the plaintiff should take the bond in satisfaction of the causes of action declared on, and that neither accord nor satisfaction is alleged in the said plea.

R. A. Harrison supported the demurrer. The plea does not shew cross-accounts—it does not shew any satisfaction of the notes, or any other bar, and if the bond was intended as a satisfaction, it does not shew that plaintiff accepted it as such. The plaintiff is placed in no better condition than before. The plea is bad in form. The bond is not the personal bond of defendants. The accounting is all on one side, and is therefore no bar. There is no consideration

shewn for the accounting, and the declaration shews a larger sum due than the plea meets. He cited *Smith* v. *Page*, 15 M. & W. 688; *Callander* v. *Howard*, 10 C. B. 290; *Perry* v. *Attwood*, 6 E. & B. 691; *Flockton* v. *Hall*, 14 Q. B. 380, and S. C. in error, 16 Q. B. 1029; *Brown* v. *Jones*, 17 U. C. Q. B. 50.

J. Bell, (Toronto,) contra, cited *Fearn* v. *Cochrane*, 4 C. B. 274; *James* v. *Williams*, 13 M. & W. 828; *Evans* v. *Powis*, 1 Exch. 601.

DRAPER, C. J.—The plea is pleaded in bar, and if it contains a good defence, it must be to the whole action, for if it be a suspension of the right to sue upon these notes, it will, I apprehend, be an extinguishment of the claim altogether (See *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122; *Ford* v. *Beech*, 11 Q. B. 852, and the cases there referred to.)

In substance the plea amounts only to this, that in consideration that the defendants, who are executors of Alexander Muir, and are sued in that character, on three promissory notes given by the testator, gave their bond for payment of a certain sum, alleged to be the balance due after deducting certain payments, out of whatever moneys they should receive from the testator's estate within eighteen months after the bond was given, the plaintiff should give time for the eighteen months. If no moneys are received from the testator's estate during that period the bond will be of no value to the plaintiff, and the defendants will be under no personal liability. It is a merely conditional undertaking of the defendants as individuals, and gives the plaintiff no other or higher remedy against the testator's estate.

It is not set up by this plea that the bond was given and accepted as a *satisfaction* of the original demand. But it is introduced by a statement that the defendants, as executors, and plaintiff accounted together of and concerning the said notes, and of and concerning divers sums of money due, and to become due, from defendants as executors to the plaintiff, and of and concerning divers sums of money received by plaintiff on account of these notes; that a balance was struck and thereupon defendants agreed to give this bond.

It is not very easy to understand on what ground the defence is really meant to be rested—whether that the striking a balance as set forth gave a new cause of action founded on that stating of accounts, and the implied promise of the defendants to pay the ascertained balance, or that the plaintiff took this bond as a security for the original demand payable at a future day, and cannot, until this security is due and unpaid, sue for the original demand.

It does not appear to me sustainable on either ground. There is no averment of an accounting respecting cross-*demands* of the defendants against the plaintiff; for the accounting respecting *payments* made upon the notes, or any of them, would not fall under that category, and could furnish only a defence *pro tanto*, and not operate to extinguish the right of action on the notes, and the authorities referred to apply to negotiable securities, which, being accepted for the original demand, may be deemed *payment* for the time, a conclusion which never can be drawn from the giving and accepting such a bond as the plea states. I think the plaintiff is entitled to judgment on this demurrer.

IN CHANCERY.

(*Reported by* RICHARD SNELLING, *Esq*, *Student-at-Law.*)

HERRICK V. THE GRAND TRUNK RAILWAY COMPANY.

Grand Trunk Railway Company—Rights of preference bondholders.

Held, 1. That under Provincial Statutes 12 Vic., cap. 29, 18 Vic. cap. 174, and 19 & 20 Vic. cap. 111, the preference bondholders of the Grand Trunk Railway Company are in the position of preferred creditors, having a lien on the road and all the works and property of the railway.

2. That the rights of the preference bondholders, thus created, are not impaired by any subsequent enactments, and, if anything, confirmed by stat, 22 Vic. c. 52.

3. That the bondholders can institute a suit to restrain the directors from applying the earnings of the road in any other way than in the order appointed by the acts.

4. That the bondholders, having a lien, are not obliged to submit to payment of past debts which the directors neglected to pay.

(Monday, 17th June, 1861.)

The bill in this cause was filed by George Herrick (on behalf of himself and all other shareholders in the Grand Trunk Railway Company of Canada, excepting the defendants hereinafter named, who are such shareholders), against the Grand Trunk Railway Company of Canada:—The Hon. John Ross, Thomas E. Blackwell, Sir Etienne Taché, Thomas E. Campbell, The Hon. James Ferrier, The Hon. George Crawford, James Beaty, Thomas Gibbs Ridout, William Cayley, and The Hon. John Hillyard Cameron.

The plaintiff, as a shareholder in the Grand Trunk Railway Company of Canada, claimed to be entitled to all the powers and privileges of a shareholder, having twelve shares in the undertaking. The prayer of his bill was as follows:

1st. That it may be declared that under the circumstances in the bill mentioned, the weekly and other earnings of the said road should be applied, after the payment of the ordinary and current expenses of managing, maintaining and working the said road, in and towards the purchase and acquisition of such rolling stock, plant, stores, and other appliances, as may be requisite for the more efficient working of the said railway, and in and towards the payment and discharge of the floating debt of the said company, in preference to and before any payment in respect of the preferential bonds, or the interest thereon, or any part of the funded debt of the company.

2nd. That the defendants, the directors of the company, may be restrained from any other application or appropriation of the earnings.

3rd. That (if necessary) for the purposes aforesaid, all proper directions may be given, and accounts taken.

4th. That the plaintiff may have such further and other relief in the premises as the nature and circumstances of the case may require, and to the court shall seem meet.

Galt, for plaintiff, submitted that 12 Vic. cap. 29, was largely referred to in all the subsequent acts relating to the Grand Trunk, and argued that it was most important to be considered in reference to the plaintiff's case, urging upon the court that particular attention should be given to its provisions. Referring to the first section, he argued that the payment of the interest guaranteed by the Province should be the first charge upon the tolls and profits of the company; and particular stress was laid upon the circumstance, that by the provisions of this act, the fund out of which the interest on sums guaranteed was to be paid, was out of the "tolls and profits" of the company, and to secure this a lien was given on the "property" in the following terms of this section:

"That the Province shall have the first hypothec, mortgage and lien, upon the road tolls and property of the company, for any sum paid or guaranteed by the Province."

He also referred to 14 & 15 Vic. cap. 73, secs. 19, 20, 22, 24, commenting at length on their provisions.

He then referred to secs. 2 & 3 of 18 Vic. cap. 74.

He next contended that as the charge, hypothec, and lien in favor of the Crown, by 18 Vic., shall have the same preference and privilege, and shall be subject to the same incidents as to redemption and otherwise as the charge, hypothec and lien in favor of the crown for claims arising out of the Provincial guarantee, and that such payments were to be paid out of the profits. As to what are "profits," he referred to *Corry* v. *The Londonderry and Enniskillen Railway Company*, 7 Jur. N. S. 508. In this case it was held that debts incurred by a railway company for rails, stations, and the like, and which, if there had been funds, would have been paid at the time they were incurred, form a first charge upon the profits of the company; and that guaranteed preference shareholders are entitled to be paid arrears of dividends, without interest in priority to those shareholders over whom they have a preference.

ESTEN, V. C.—Do you contend that this case intends to refer to all debts incurred in the past, and to be incurred in the future, for working the road, and for the purchase and payment of rolling stock, &c.?

Galt.—Yes, most unquestionably, that is our contention.

ESTEN, V. C.—A bond to *complete* the undertaking—would it be a *debt* referred to in this judgment?

Galt:—No, I suppose not. I refer to section 3 of the act of 1856, 19 & 20 Vic. cap. 111, and particularly to 20 Vic. cap. 11, sec. 4.

Mr. Galt continued. You will observe that the Province foregoes all interest on its claim against the company until the "earnings and profits" of the company shall be sufficient to do certain things; and, first, *all* expenses of managing, working and maintaining the works and plant of the company are to be paid.

ESTEN, V. C.—All expenses must be previously deducted before the Government postponed its lien. It seems to imply that unless the Government made this concession, they were entitled to receive interest, but they forego the interest. The Government, as I understand it, Mr. Galt, concede nothing.

Mr. Galt referred to 22 Vic. cap. 53, secs. 4 & 5, and continued: I refer you with confidence to these sections. The company may issue any amount of bonds it pleases. I contend that the Province has not transferred any right to the preference bondholders; and all the Province has done in the matter of preference bonds is just this: The Province has said, "When there is anything to pay us, you, preference bondholders, shall have it." But when reference is made to that act to which I have referred, as to the order of appropriation of the earnings—when regard is had to the deductions made by the Legislature—I say it was intended by the Legislature, by those deductions for expenses of managing, working and maintaining, to provide for the creditors of the company. And if this were not so, all I can say is, that the Legislature have appropriated the earnings of the company for all time to come, and have left no fund whatever for the payment of creditors. I refer to *Russell* v. *The East Anglian Railway Company*, 6 Railway Cases, 541.

SPRAGGE, V. C.—Do you understand that floating debt means every unsecured debt?

Galt.—Yes; I presume it is so.

ESTEN, V. C.—As I understand your argument, there are three classes of debt which you contend should be paid *before* the interest is paid on the preference bonds. 1st. The debts for constructing the line, which were incurred before the act authorizing the issue of the preference bonds had passed. 2nd. The expenses of managing, working and maintaining, in arrear, and also incurred before the said act had passed. 3rd. Similar debts incurred, and to be incurred since the said act had passed.

Galt.—That is our contention.

SPRAGGE, V. C.—What are the costs of construction, when the rails are down, or when the road commences running?

Galt.—I cannot say what may be said to be the costs of construction; nor does it much matter, as the debts for construction are almost all paid. I suppose if a bridge break down, the company would be bound to repair it, and the costs for doing so would be a proper charge to be paid as expenses of managing, working and maintaining.

ESTEN, V. C.—I really don't know what the Legislature may have meant to say—I do know what it has said.

Adam Crooks next addressed the court on the part of the plaintiff, and called attention particularly to the frame of the suit. He referred to 23 Beavan, 212, & Drewry's Equity Pleader, 57, and contended that the bill was properly framed, and that the plaintiff, *quâ* a shareholder, had a right to the relief sought by the bill. He referred to *Corry* v. *The Londonderry and Enniskillen Railway Company*, and directed attention to the consideration that the Grand Trunk preference bondholders' rights were in the nature of a lien on the "profits" of the railway, and argued that there was no difference between preference bondholders and preference shareholders; that a railway mortgage was in the nature of a Welsh mortgage; that while the dry right to have a receiver remained to the bondholder or mortgagee, yet he could neither sell nor foreclose. *Mr. Crooks* also remarked on the circumstance that no sinking fund was provided for the payment of the principal of these preference bonds.

ESTEN, V. C.—I suppose it was intended that the company should start free and clear of debt, and that, the interest being regularly paid, little trouble would ensue. It is remarkable, however, and somewhat important, that a sinking fund was not provided for.

SPRAGGE, V. C.—The bonds are payable on a day certain.

Crooks.—Yes, in twenty years. I refer to *Crawford* v. *North Eastern*, 4 K. & J., 23 Jur. 1093.

Alex. McDonald appeared for the directors and the company. The company, he considered, were *quasi* trustees of the earnings of the road, and they desired to dispense those earnings strictly in accordance with the acts of Parliament. He said that trustees were entitled to come to this court for advice and relief when threatened by actions. The company being trustees for the distribution of the earnings of the road, the question is, where are they to begin? There is no difficulty when a starting point has been obtained, but the difficulty is to arrive at a correct starting point, and hence the desirability of a decision of this court upon the subject. The directors of the company have a plan which they are prepared to act upon. Mr. McDonald argued that this bill was sustainable, and it would have been equally so if filed by the company or the directors, as it has been by a shareholder. As to the preference bondholder who is a party, Mr. McDonald contended that the decree to be pronounced in this suit would certainly bind him. If the decree should be that the defendant Cameron is to be paid, then he (Mr. Cameron) would no doubt be strenuous in his contention to support such a decree; but if, on the other hand, the decree should be that the debts of the company must be first paid, then, without doubt, Mr. Cameron will be bound.

ESTEN, V. C.—Mr. Cameron is a holder of preference bonds resident in this country. Can he represent those in England? Cannot a bondholder resident here have views and wishes in which those resident in England may not agree?

McDonald.—I think not. If the principle of representation is applicable, the other parties resident in England must be bound by any decree made against Mr. Cameron.

ESTEN, V. C.—This court will not make a decree which can be upset next week.

McDonald.—The company and its directors desire that the decision to be pronounced in this suit shall be final. Mr. McDonald then referred to the act of 1857, 20 Vic. cap. 11, and reading sec. 4, contending that the true construction of that section was, that all the earnings of the company should go to pay debts in the first instance.

ESTEN, V. C.—As I have before observed, Mr. McDonald, the Legislature supposed, and, we may take it, intended, that the road started clear of all debt; and if this had been a fact, the construction of this act, 20 Vic. cap. 11, sec. 4, would be easy enough; and there being no sinking fund provided, it seems to me as if the preference bonds were in fact perpetual annuities.

McDonald.—But again, I do not know that I need trouble you with further reference to those acts which have been so frequently mentioned in the course of this argument. I think we get over all difficulty by refering to an act which was passed last session, and I beg you to refer to the same.

Strong.—If that act is referred to, I must consider whether I can retain my brief. My learned friend must not take me by surprise. I have not seen the act; it is not yet printed; and it was understood that that subject should not be referred to.

The COURT.—The acts of last session are printed, and are in court. We had better see the act, Mr. McDonald, and hear what you have to say upon it.

McDonald read from an act passed last session, cap. 17, entitled "An Act to explain and amend the Railway Act." The 8th section he relied upon, is as follows:

"The interest of the purchase money or rent of any real property acquired or leased by any railway company, and necessary to the efficient working of such railway; and the price or purchase money of any real property or thing, without which the railway could not be efficiently worked, shall be considered to be part of the expenses of working such railway, and shall be paid as such out of the earnings of the railway."

ESTEN, V. C.—Is that a declaratory act, and does it apply?

McDonald.—I think I shall be able to shew that it does apply; and I refer to *Wilson* v. *Whatley*, 1 T. & H. 436; a decision of Mr. V. C. Page Wood, which I think carries the application to the present case completely.

The COURT.—What definition do you give to the word "thing."

McDonald.—The case I have cited gives the definition; and I contend, upon the authority of that case, that a "locomotive" is a "thing," within the meaning of the act.

Galt objected to any reference being made to this statute. He considered that it did not apply, and he did not wish that it should be made any part of his case.

McDonald concluded his argument by a general reference to the position of the company and directors in this litigation, and reviewed the points, which, as submitted, established the views he had taken of the case.

S. H. Strong.—I appear for the Hon. John Hillyard Cameron, who is made a party defendant in the interest of the preference bondholders. I need not recapitulate the various statutes which have been so frequently, in the course of this argument, brought before the attention of the court. Mr. Galt has exhausted all that I need say on the question of extracts from the statutes. To my mind, the question is one of construction—the construction of the 5th section of the act 22 Vic. cap. 53. I take the practical question for consideration to be, whether the directors have a right to pay any debts other than mere current expenses—working expenses. These, I submit, must be met and paid. And what are working expenses? They are easily described. I understand working expenses to comprise wages to employees, wood and oil, necessary to work the line, repairs of rolling stock, and the maintenance of the permanent way. And how can it be otherwise? The acts clearly provide how the company are to pay their debts, and indicate the fund to be employed for that purpose. The company, by their acts, have power to raise capital by *contribution* and by *loan*; and, reading the acts by the light of an ordinary commercial understanding, the interpretation is clear. Take the case of a partnership, which I submit is a proper illustration. Suppose that the profits thereof are mortgaged—profits to be hereafter made—can the mortgagors, the partners, use the capital of the partnership for purposes foreign to their trade? Certainly not; the capital cannot be so used. And now refer to 20 Vic. cap. 11, sec. 4, and the force of my illustration is apparent. The *share* capital was limited, but there was no restriction to the *loan* capital; and the section last referred to goes to show clearly how the income of the railway was to be applied, after deducting working expenses. Mr. Strong contended that *Russell* v. *East Anglian Railway* was inapplicable. He also reviewed *Corry* v. *The Londonderry and Enniskillen Railway Company*, and pointed out that that case was as to the distribution of profits as *between shareholders*, while this case was as *between creditors*. And here again he referred, by way of illustration, to the case of a partnership, arguing that as a division of profits between shareholders (*i. e.*, partners), the case of *Corry* v. *Londonderry* was sustainable, but urging the great and grave distinction between that and this case. He also urged that the act of 1858 (22 Vic. cap. 52) superseded the act of 1857 (20 Vic. cap. 11); that in the act of 1858 there were not any conditions; that the order of application of earnings, after payment of working expenses, was clear, and that the first payment thereafter was to be made by payment of interest to the preference bondholders; that this act gave them a title even as against judgment creditors; and that the lien of the Province absolutely vested in them. He referred to the frame of this suit; and as to defendants by representation, referred to Calvert on Parties, 41.

Edward Blake followed on the part of Mr. Cameron, in the interest of the preference bondholders. The lien of the crown, or that of the preference bondholders, or both, extending to everything owned by the company, the execution creditors would be restrained from levying, at the instance of these parties, and therefore the damage alleged by the bill would not arise in fact. The lien of the bondholders was practically a first lien, not on the profits, but on the road and effects of the company; and the bondholders were entitled independently of the act of 1858, to a receiver of the profits, on default of payment of interest or principal. The clear intention of the Legislature was, that the company should construct and equip the road by means of the borrowing powers conferred under the various acts, and there was no intention that the company should go into debt to contractors or others for construction, except by means of these borrowing powers.

The result of the plaintiff's contention would be to give the company power to postpone all holders of securities by the simple expedient of going into debt, and the bondholders would be better off if they had nothing to look to save the company's promise to pay. The words of the act of 1858 were clear, and it was manifest that under them the bondholders were entitled to all the earnings except what were applicable to the expenses of management and maintenance. This was really a suit between the execution creditors and the bondholders, and the former were necessary parties to the litigation, as were also the other classes of creditors. If the act of last session applied, it was clearly fatal to this bill; as it was prospective and did not assist the present execution creditors, while it indicated that the pre-existing law was in favor of the bondholders. *Corry's* case is not an authority, the plaintiff being a shareholder, and the question being as to the application between shareholders of the profits. The proper course for the company was to exercise its borrowing powers, and thus to pay the construction debts. It was no excuse to say that these powers could not be exercised. The answer to that was, that the liabilities should not have been incurred until the means to pay had been provided by the exercise of these powers, which were the only means to which the creditors could look for relief.

Adam Crooks now interposed, and begged to refer to *Linley on Partnership*, pp. 419, 777, 778.

Galt rose to reply, but inasmuch as both Strong and Blake had not referred to the Railway Clauses Consolidation Amendment Act, the Court stated that they should like to hear their views upon the 8th clause, cited by Mr. McDonald.

Strong said, that he considered the last act a general act—that the act was prospective, and did not apply to personal property—and as to the interpretation to be given to the word "thing," the words of the act were, "real property or thing," and the adjective must apply to "thing" as well as "property," and the act would read "real property or real thing."

Blake was of the same opinion.

Galt said he did not rely at all upon the statute referred to by Mr. McDonald, and passed last session.

ESTEN, V. C.—I do not think that statute will bear the interpretation Mr. McDonald seeks to give it.

SPRAGGE, V. C.—That act is a general act; it does not refer to the Grand Trunk Railway.

Galt continued.—My learned friends Mr. Strong and Mr. Blake may think it was quite an easy thing for the company to borrow money, and that it was only necessary to announce the fact that money was required, and it could at once be procured, but he (Mr. Galt) could assure them that they were much mistaken; it was one thing to have the power to borrow, and another to get the money. If the arguments of Mr. Strong and Mr. Blake prevailed and were conceded, four millions sterling of ordinary bonds would be cut out, and he was sure the Legislature never intended that.

Their Lordships retired for fifteen minutes, and returning into court, Esten, V. C., gave judgment as follows:—

ESTEN, V. C.—After the best consideration we have been able, in so short a time, to give to this case, we have come to the conclusion that the plaintiff's bill must be dismissed. It appears to us that the situation of the preference bondholders is clear—their position and their rights have been well defined by the acts. I refer to 12 Vic., ch. 29, which gave the Crown the lien for interest—18 Vic., ch. 174, which extended that lien to principal as well as interest—19 & 20 Vic., ch. 111, which authorized the issue of the preference bonds. Now, this last act authorized this company to issue preferential bonds to the extent of two millions of pounds sterling: the holders of such bonds to have priority of claim therefor *over* the present first lien of the Province. As bondholders merely they have no lien, but by this enactment their lien (for they get the lien which the Government already possessed) attaches to the whole property of the company *present* and *future*, for principal as well as interest.

The rights of the preference bondholders thus created are not impaired by any subsequent enactments, and in my view the act 22 Vic., ch. 52, rather confirms those rights.

Now the object of this suit is to restrict the directors from paying the interest now due and unpaid on the preference bonds. Apart from the acts of Parliament, this Court has no power to interfere. This Court must decide the questions raised upon the pleadings, according to the several acts of Parliament which bear upon the subject; and if we refer to those acts, as we have done, we find it clearly expressed, that the preference bondholders are in the position of preferred creditors, having a lien upon the road and all the works and property of the railway. Then again, on looking at those parts of the acts which have been cited as describing the order of distribution of the earnings of the road, we do not find that in those acts the rights of the bondholders are in anywise impaired. There is no doubt in my mind but that the

bondholders can institute a suit to restrain the directors from applying the earnings of the road in any other way than in the order appointed by the acts. This case is to be distinguished from *Corry* v. *Londonderry and Enniskillen Railway Company.*

We cannot say how the past debts, due and unpaid, are to be met; but it is quite clear to me that any person having a lien is not obliged to submit to payments of past debts which the directors have neglected to pay; and I consider that the preference bondholders of the Grand Trunk Railway Company are in that position.

From the best consideration we have been able to give to the case, we have concluded that the bill must be dismissed, and with costs.

SPRAGGE, V. C.—I regret that I have not been able to give this case more consideration before rendering judgment. There are two branches in the case. (His lordship then read the prayer of the bill.) I am of opinion that it would be a breach of trust to apply the earnings in any way unauthorized by the acts. I am in doubt as to the expenses of maintaining and working, and whether the preference bondholders were entitled to anything more than the "profits." I think that the statutes 12, 19, 20 & 22 Vic., should be read in *pari materia.* I, however, desire to reserve my opinion on these points, as I have not sufficiently considered the effect of the numerous statutes which had been referred to, and I wish to look more fully into the case of *Corry* v. *Londonderry, &c.* At any rate my leaning is in favor of the decision come to by my learned brother Esten, and I shall agree, *pro forma*, that the bill be dismissed.

Per cur.—Bill dismissed with costs.

Reported by THOMAS HODGINS, ESQ., *Barrister-at-Law.*

HARRIS V. MEYERS.

Injunction—Redemption—Agreement not under seal.

When an agreement not under seal was entered into by a mortgagee who obtained from mortgagor a deed of certain property, whereby the mortgagor was allowed to retain possession of a portion of the property, and the mortgagee the other portion until he was paid, and such agreement having been destroyed by the mortgagee and an action of ejectment brought on the deed, the Court restrained the mortgagee from enforcing his legal right.

This was a bill for redemption. On 29th January, 1848, plaintiff gave a mortgage to defendant on 200 acres, including a saw mill, as a continuing security. Some time in August following an arrangement was made between the parties, by which defendant was to get a deed of the whole property and to go into possession of the mill and mill yard (about 4 acres), and to pay himself out of the profits of the mill, and plaintiff to retain possession of the balance. The deed was executed on the 4th September, 1848, and at the same time defendant undertook to re-convey on payment of plaintiff's indebtedness to him. Some time afterwards the defendant endeavoured to sell out his right, and obtained possession of the plaintiff's papers. He continued in possession, and in 1858 assumed possession of 80 acres additional. In 1861 defendant brought an action of ejectment; and plaintiff claimed possession under an agreement under seal, which he said was in the hands of the defendant. At the trial defendant was examined and swore that the agreement was not under seal, and had been destroyed, whereupon the learned judge directed a verdict to be entered for Meyers. This bill was thereupon filed, and a motion was now made for an injunction to restrain the defendant taking possession until the account of the rents and profits of the mill and preperty was taken.

Hodgins for the injunction, relied upon the fact of some agreement having been entered into for possession at the time of the deed in September, 1848; that it had never been cancelled, and that plaintiff had been ever since in possession.

Bell, for defendant, contended that the agreement was not under seal, that it had been given up voluntarily, and that plaintiff had deceived the defendant in not disclosing a mortgage on the property.

ESTEN, V. C. After learning that the question of the cancellation of the agreement entered into as to the right of plaintiff to hold possession of the balance of 200 acres had not been submitted to the jury, granted the injunction.

DIVISION COURT CASES.

In the First Division Court of the County of Elgin, before his Honor Judge Hughes.

TINDALL V. HAYWARD.

Money Letter by a friend—Loss—Liability.

Held—1. That it is not illegal to deliver a money letter to a private friend on his way, journey or travel, provided such letter be delivered by such friend to the party to whom it is addressed.

2. That such friend, as a gratuitous bailee, would be bound to take as much care of the letter as he would have of his own.

3. That if lost where he does take such care, he is not responsible.

The plaintiffs carried on a mercantile business at Port Burwell, and another at Aylmer. The defendant was a livery stable keeper, and in the habit of occasionally carrying parcels and money letters from the Port Burwell branch of plaintiffs' business to the chief place at Aylmer, and in one instance charged for carrying a money letter. In this the plaintiffs' clerk delivered to the defendant a letter, containing fifty dollars in bank notes, which the defendant agreed to carry. It was directed to the plaintiffs at Aylmer, and marked on the envelope "money." The defendant was, at the time the letter was delivered to him, at an hotel in Port Burwell, but just then about to leave on his journey. He handed the letter to the bar-keeper of the hotel in Port Burwell, to take care of, in presence of the plaintiffs' clerk, who did not object to it. This was the last the plaintiffs or their clerk ever saw of the letter or the money, as the defendant never delivered it, but urged that it was never given back to him by the bar-keeper, but lost or stolen. The plaintiffs, therefore, sued the defendant in the Division Court, alleging that the defendant "promised to deliver to the plaintiffs, at their place of business at Aylmer, a letter, containing fifty dollars, which was intrusted to him for that purpose, which undertaking the defendant had not performed."

For the defendant it was objected, that the contract alleged, if made, was illegal, as no private person has a right to carry letters for hire or otherwise, because it was contrary to the 17th section of the Provincial Post Office Act, and punishable; and because it was against public policy.

The judge said he thought the objection fatal to the plaintiffs' claim, but reserved the point for further consideration. Afterwards the following judgment was delivered:

HUGHES, CO. J.—In this case I find I was wrong in supposing that the Provincial Post Office Act prohibits the carrying and delivery of letters by private hand, under circumstances such as were detailed on the trial; for although the Postmaster-General has the sole and exclusive privilege of "conveying, receiving, collecting, sending and delivering letters" within this Province, letters sent by "a private friend in his way, journey or travel, provided such letters be delivered by such friend to the party to whom they are addressed," and letters "sent by a messenger on purpose, concerning the private affairs of the sender or receiver," are specially exempted from that exclusive privilege. It does not appear that the defendant was to be paid anything for carrying this letter, nor was it probable that he was a messenger "sent on purpose" to carry so small a sum as fifty dollars a distance of several miles, when a postal communication existed daily between the two places. I must therefore regard the letter as dispatched by the plaintiffs' clerk, and sent by the hand of the defendant as a private friend on his way and journey, to be delivered by him to the plaintiffs at Aylmer, to whom it was addressed, which was perfectly legal, and would oblige the defendant, as the bailee, to take as much care of the letter as he would of his own, and no more. I think he did that; for it was not to be supposed that the innkeeper would place a man behind his counter who was not fit to take care of a money letter which a guest might commit to his custody. The evidence is, that the defendant was about to put it in his own pocket, but bethought himself, and handed it to the bar keeper for safer custody, until he should leave, which was to have taken place in a few minutes. I think he exercised ordinary prudence and care by so handing it to the bar-keeper, in the presence of the plaintiffs' clerk, who had delivered it to him, and who was present, tacitly assenting to it. I therefore order judgment to be entered for the defendant.

There were, however, circumstances which, if urged upon a

jury as they were detailed upon the present trial, might induce them to believe that a strong inference might be drawn, that the defendant himself took the money out of the till in the bar-room. I cannot say they have had that effect upon me, but a jury may think differently. If the plaintiffs, therefore, choose to apply for a new trial, and desire the opinion of a jury upon the facts, I shall feel disposed to grant one, unless good ground be shown against it on the part of the defendant.

(In the First Division Court for the County of Lambton, tried at Sarnia, before ROBINSON, Co. J.)

MCELHERON V. MENZIES.

Assessment taxes—Action against collector of taxes—Terms thereof.

Held. 1. That no action on the case will lie against a collector of taxes for distraining the goods of a stranger without necessity, upon the allegation of there being goods enough of the defendant in the warrant out of which the money could have been made.

The plaintiff sued the defendant for the value of a stack of hay seized by him as collector of taxes for the Township of Sarnia. The following were the particulars of claim :—

William J. McElheron, of the Town of Sarnia, in the County of Lambton, states that William Menzies, of the Township of Sarnia, in the County of Lambton, did on or about the thirty-first day of December, A.D. 1860, at the Township of Sarnia, wrongfully, maliciously, and without reasonable and probable cause, and pretending to be a collector of taxes for said Township, seized one stack of hay, the property of the said William J. McElheron, situate on the east half of the east half of lot thirteen in the seventh concession of Sarnia, in said County of Lambton, as and for an alleged distress for taxes alleged by the said William Menzies to be due from one James Sheridan in respect of the east half of the east half of said lot thirteen; whereas in truth and in fact, if any taxes were due with respect to said land there were then and there on said premises at the time of said seizure, and until and after the sale hereinafter mentioned, personal property belonging to the said James Sheridan capable of being distrained and sold for taxes more than sufficient to pay all taxes and costs alleged to be due as aforesaid, of all which the said William Menzies then and there had due notice, but that the said William Menzies did, notwithstanding such notice, maliciously and without reasonable or probable cause, seize the said stack of hay then being in my possession on said lot, and did afterwards sell and dispose of the same, and caused the same to be taken and carried away, whereby I, the said William J. McElheron, was deprived thereof and sustained damages, and I, the said William J McElheron, claim forty dollars damages of the said William Menzies.

At the trial the following was the evidence:

For the plaintiff—1st witness deposed, that he as bailiff of said Court sold the stack of hay in dispute to one Tilton Howard, under an execution issued against one James Sheridan, on the east half of the east half of lot thirteen, in the 6th concession of Sarnia, some time in the beginning of December.

2nd witness. I bought the stack of hay from the bailiff and sold the same to the plaintiff. Before the bailiff's sale I met the defendant on the street (meaning in the Town of Sarnia), and he said, I am told the bailiff has seized that stack of hay of Sheridan's, I am glad of it, as I can make the taxes out of a stack of oats on Sheridan's premises. After this conversation the sale by the bailiff took place.

3rd witness. I met the defendant on the London road and asked him had he all the taxes collected yet. He answered, very nearly. I am after seizing Sheridan's hay (meaning the hay in dispute). I told him that that hay was sold for taxes and was now owned by McElheron, the plaintiff.

4th witness. I attended the bailiff's sale. I also attended the collector's sale. I bought the stack of hay for $7, there were five good loads of hay in it. Before the sale the plaintiff told the defendant that the hay was his and not to sell it, but to seize the stack of oats and that he would pay the taxes therefor. Defendant replied that he would sell the hay. Plaintiff said, since you are determined to sell it here are the taxes and do not sell it. Plaintiff called me to witness him offering to pay the taxes. I had no connection with the plaintiff in the purchase of the hay, I bought for myself. Plaintiff gave me the money to pay the defendant, but I gave the same amount back to him on the same day.

For the Defendant—1st witness. I attended the sale with the defendant Plaintiff attended there and forbade the sale. He asked defendant to seize the stack of oats and that he would pay the taxes therefor. Did not hear plaintiff tendering the taxes for the hay. He could have done it. Considered that Barron (meaning witness No. 4) bought the hay for plaintiff.

2nd witness. Corroborated the evidence of the 1st witness for the defence, and also stated that he did not believe the plaintiff offered to pay the taxes.

3rd witness. I live near the lot on which the hay was. Sheridan does not live on it but has a house thereon. He boards out whilst he is tilling the land and also during harvest. He works round the neighborhood with the farmers.

The defendant called—I was collector of taxes for the Township of Sarnia for last year. I seized the stack of hay for taxes due by Sheridan, the owner of the lot. The plaintiff never offered to pay me the taxes if I would not sell the hay, but asked me to seize the oats and that he would pay the taxes therefor. I never had the conversation spoken of by witness No. 2. I would have taken the taxes if they were offered. Plaintiff forbade the sale.

The plaintiff called—I bought the hay in question from Howard (witness No. 2) and paid him for it. I attended the sale of the same by the collector. I asked him to seize the oats and I would pay the taxes for it. He refused to do so. I then offered to pay the taxes for the hay if he would not sell it. He refused to accept it. I then called *Barron* (witness No. 4) to witness that I offered to pay the taxes for the hay if he would not sell it. He refused a second time. I then did forbid the sale, and said I would sue Menzies for the damages I sustained. I had some $50 in my pocket at the time. I never got the hay after the sale.

The defendant's agent submitted that the defendant was justified in seizing the hay and selling, and relied on secs 93 to 107 of cap. 55 of the Consolidated Statutes, and on cap. 126 of the Con. Stat. The case went to the jury on the above evidence, and they were directed to find whether the plaintiff offered to pay the taxes for the hay before the sale. The judge reserved the right of dealing with the law. The jury found that the plaintiff before the sale by Menzies the collector, offered to pay the taxes therefor, and gave a verdict for the plaintiff of $18.

The defendant moved for a new trial on the ground of surprise as to the tender, and filed affidavits to that effect, and also that the verdict was contrary to law and evidence. The plaintiff replied by affidavit substantially the same as his evidence, and also said that the defendant was not entitled to a new trial on the ground that the point was left to the jury, and referred to *Pistrucci* v. *Turner*, 2 U. C. *L. J.*, folio 18, and to *Chitty's Practice*, 9th ed. vol. 11, pp. 1433 and 1434.

ROBINSON, Co. J., gave judgment as follows:—

I am not certain whether the plaintiff means to claim in this action to recover damages for a trespass, or whether he intends to bring an action on the case for an unnecessary taking of his goods when there was plenty of property on the premises of Sheridan that the defendant might have seized.

If this is to be considered an action on the case, I am of opinion the plaintiff cannot recover. (See *Fraser* v. *Pope et al.*, 18 U. C. Q B. 327.) Robinson, C J. says, "I find no precedent or authority for an action for distraining the goods of a stranger without necessity, upon the allegation of there being goods enough of the defendant in the warrant out of which the money could be made."

In the claim of the plaintiff in this cause, he, however, states that the property sold was in his possession. If that be the case, the defendant is a trespasser, and should be sued as such; but as from the manner in which the trial was conducted the plaintiff seemed to treat the action as one on the case and not in trespass, I would have felt it my duty to enter judgment for the defendant if he had not without waiting for any judgment thought proper to apply for a new trial.

If this is an action for trespass, the all-important point of possession was not left to the jury, and the case has not in fact been tried.

I have therefore, come to the conclusion to grant a new trial.

The plaintiff, I think, would do well to amend his claim that it may be known distinctly what is the subject matter of trial.

ASSESSMENT CASE.

In the Third Division Court of the County of Elgin.

Franchon v. The Corporation of St. Thomas.

Assessment—Dwelling-house of Clergyman.

Held—1. That assessors are not bound to inquire into trusts upon which lands are held, but to view each man's premises and find out whether or not he is assessable, or whether or not he comes under any of the exemptions allowed by law.
2. That the assessor, upon seeing a dwelling-house occupied as such by a minister of religion for his private residence, the assessor is bound to assess the occupant for it, no matter upon what trust the freehold in the land upon which the house stands is held.

The appellant was the pastor of the Roman Catholic congregation at St. Thomas. His predecessor had built a house for a priest's residence, upon property conveyed in trust for a site of a church and burial ground. The appellant was assessed as the occupant of a dwelling-house at its taxable value. He appealed, first to the Court of Revision, which refused to disturb the assessment, and subsequently to the County Judge.

Scatcherd, for the appellant, contended that the property upon which the house occupied by the appellant was erected, being held by trustees for the use of a religious body for a place of worship, church yard or burial ground, is not assessable; that this house was built in a church yard and burial ground; that the land cannot be sold away from the trust, supposing the appellant does not pay the taxes, or if it should be returned as absentee land. He also contended that the names entered upon the roll were wrong, because he showed that the property belonged to "The Roman Catholic Corporation of the Diocese of London." No objection was made that the quantity of land occupied does not amount to a quarter of an acre, nor that the assessed value was excessive.

Ellis, for the Corporation, contended that the assessor is not to inquire about trust property; he has to assess all land and property liable to taxation, which is not made the subject of exemption. If parties choose to assume the right to use the trust property, they must take the consequences. Neither the place of worship, the church yard, nor the burial ground, had here been assessed, but the private dwelling of the priest, at its ratable value. It was true, the freehold in this property belonged to the trustees, although used for private purposes; but private dwelling houses belonging to religious corporations are not exempted from taxation, the same as property belonging to a county, city, town or township. This house is therefore assessable, and the appeal should be dismissed with costs. The wrong done to the trust here gives the right to taxes.

Hughes, Co. J.—I am of opinion that I cannot set aside this assessment, because I conceive the assessors are not bound to inquire into trusts upon which lands are held, but to view each man's premises, and find out whether or not he is assessable, or whether or not he comes under any of the exemptions allowed by law. Upon seeing a dwelling-house occupied as such for his private residence by a minister of religion, the assessor is bound to assess the occupant for it, no matter upon what trust the freehold in the land upon which the house stands is held.

The fact of the assessment law providing no remedy authorizing the charging of the property with this assessment in case the appellant should leave it before the collector takes his round, does not, as I conceive, affect the question before me. All I have to consider is, whether the occupant is rightly or wrongly assessed, and not the remedy for recovering the taxes when assessed; and as I do not find there is any objection made, that the land used in connection with this house does not amount in quantity to a quarter of an acre, nor any as to the value, I cannot, I think, properly set aside the assessment upon the points urged for the appellant.

As to the objection to the names inserted on the roll, it is a ground for amendment only, and not for setting the whole assessment aside.

I therefore order that the assessment roll be amended by inserting the name of "The Rev. Mr. Franchon," as the party assessed, and by substituting the name of "The Roman Catholic Corporation of the Diocese of London" as the owners, instead of those persons already designated as the occupants and owners respectively, and that the appellant do pay the costs.

GENERAL CORRESPONDENCE.

Act of last Session, abolishing Registration of Judgments.

To the Editors of the Law Journal.

Dear Sirs—Various and contradictory are the constructions which it seems have been given to this act by those of the profession who have been bold enough to venture an opinion at all upon it: and complaints are made of its ambiguity. I will not say that there is absolutely no ground for these, but will venture the opinion, that when carefully analyzed, the act admits of but one construction.

In your very pleasing commentary upon this act, you are shown to be among those who make the complaint of ambiguity. You do so when speaking of the two last sections, by terming them "incoherent," and saying—"The construction of which will, we fancy, puzzle the courts as they now puzzle us."

In submitting my view of this act, I shall reply to your suggestions. In the end I shall give the construction consolidated, which, I think, will be found after all, to be very brief and very simple.

It is perhaps best to recite before proceeding, the two sections you complain of.

10. "Nothing in this act contained shall be taken, read, or "construed, to affect any suit or action on or before the 18th day "of May, 1861, pending in any court in Upper Canada in which "any judgment creditor is a party."

11. "This act shall take effect on the 1st day of September "next, and in cases of judgments heretofore registered, all writs "of execution against land issued before the said first day of "September, shall have priority according to the respective times "of the registration of the judgments on which they have issued "or shall issue respectively."

You ask—If the first clause of the 11th section means that the act is not to take effect before the 1st September, what is the meaning of the 10th section.* "That nothing in the act contained shall be taken, &c., to affect any suit, &c., on or before the 18th May, 1861, pending, &c."

The act is an universal destroyer of the power of judgment, &c., to create or operate as liens, &c., with this 10th section as a proviso—as a saving clause. The act takes universal effect providing it does not affect any such suits as is described in this section. The act is affirmative, declaring what shall be done, and the time expressed, the 1st September is the time when it shall be done, and this clause is an exception to the rule of what shall be done—it is a negative clause, declaring what shall not be done, and the time expressed in it is merely descriptive of what is the exception to the rule, or what it is that shall not be done, and is not a time expressed as a date, either for the commencement or ending of any proceeding or operation.

You say—"Surely if the act is not to take effect till the 1st September, it cannot very well affect suits pending on or before the 18th May." Your own answer to this is, that by reading the clause, which says when the act is to take effect, alone, you would say it can not; but by reading this clause and the 10th section together, you would say it can. The 10th

* These sections are now numbered 11 and 12 in the statutes.

section declares that such suits shall not be affected at all; and the time when this act takes effect, whether it be before or after the 1st September, can in no wise affect this point. When we read the proposition, together with your own reply to it, there is some appearance, to us, of your meaning to say that if the act does not take efiect till 1st September, it would, in judging from the nature of things, and without reading the 10th section itself, appear impossible for it to affect such suits, and that therefore such a provision as this 10th section makes it useless; but, that when reading this 10th section with the rest, you understand the act to mean, at least by implication, that without this provision of the 10th section, such suits would, or might have been affected by the act. My answer to this would be, whether we read the clause alone, or together with the 10th section, it is I think, clear, that not only does the act mean simply, that unless this provision had been made the act would have affected such suits, but also, that it in reality would have affected them: for example—many chancery suits to which judgment creditors are parties, will reach beyond the 1st September before judgment can be obtained, and in such cases, had not this provision—this exception of the 10th section been made, the interest of the judgment creditor party would have been destroyed, because this registered judgment would have ceased to operate as a lien upon the lands, and leave no grounds for his claim, as they will do in other cases. No judgment, &c. shall create or operate, &c., is the language of the statute. But my business is the construction of this act as it is, and not such points as these.

So much for the 10th section; its relationship to this first clause of the 11th section; and, with the main object and feature of this act—the abolition of registration.

The second clause of the 11th or last section, and its relations, will next occupy my attention.

You put the question—"What is the meaning of the second clause, which declares, that in case of judgments heretofore (before 18th May) registered, all writs of execution against lands issued before the said 1st day of September, shall have priority according to the respective times of the registration of the judgments on which they have issued or shall issue, respectively?"

The act down to the 10th section, has but one idea for its subject matter, or one object in view, and this object is, the abolition of the operation of registered judgments—it is declaring what shall be, and before adding its necessary associate *when* it shall be, it stops in the 10th section to make an exception to its operation simply, and then in the first clause of the 11th section the time *when* is declared. Here would appear to end, all that the act had originally contemplated, but bethinking itself, as it were, it adds something more. And here in this second clause of the 11th section is added *one* other idea to the act; but without coming in collision with or in any way influencing any of the other parts of the act, either by construction or implication; they have their several distinct offices to perform, as we have defined, and this has also a distinct sphere. The subject matter and the one idea of this clause, for it has but one, is the priority of certain writs, but while it has a distinct subject matter of its own, and declares on its own account a something to be done—having but this one idea—it has no associate idea of time *when* this something is to take effect, of its own; the terms here expressed are merely descriptive of the *kinds* of writs which shall have priority, therefore this clause having but this one distinct object of its own, the priority of writs, cannot affect the other object of the act, the prohibition of the operation of registered judgments; and having no time of its own for the operation of its object, it cannot affect the time expressed for the operation of the other object, that is, the first clause of the 11th section, as you and others appear to think: but on the other hand, this first clause entirely rules the second as to time,—without the time of this first clause there would be no time expressed for the operation of this second clause. This first clause of the 11th section is the governing genius, so to speak, of the act: whatever is to be done is subjected to the time here defined for its operation, and there is no proviso or exception made to it, either expressed or implied—it has absolute power.

This second clause then, as influenced by the first, means, that certain kinds of writs, namely, such as have and shall have issued before the 1st September, and on judgments registered before the passing of this act, shall after the said 1st September have priority according to the priority of the registration of the judgments on which they have issued or shall issue respectively. Here, although all registrations of judgments must cease to operate as liens upon lands on the 1st September, a reference to the registration will be necessary to test the priority of the writ. This clause will have the effect of leaving this kind of power, or rather, of giving this power, for it will be a new one, to registrations made "heretofore," that is before the passing of this act, if the other conditions shall have been complied with—that is if the writ shall have been issued before the 1st September. Still, this is not an object of the clause but is an effect, or is both an effect and a means, or as said before, is merely descriptive, and can have no other effect, by implication or otherwise, on any part of the act, and none at all upon the first clause of the 11th section.

The act has two objects in view, the prevention of registered judgments, &c. creating or operating as liens upon lands, &c., and the priority of certain writs; to the first it makes a proviso, and it sets the 1st September as the time when these objects are to be effected. These are the points, and all the points of the act.

Whatever may be thought of the utility of the other parts of the act, this proviso is certainly a consistent and wise provision, for without it great injustice might result to many. Parties having filed bills in chancery upon registered judgments, as liens upon lands, before knowing anything of this act, or before it was heard of, and who have not yet obtained decrees on the 1st September, though having been subjected to nearly all the expenses of a long suit, would have been at once ousted, and all their proceedings rendered of no avail, because (and as before shown under other heads) the registered judgments upon which their claims had been justly rested,

would then have no longer operated as liens on the lands, and so the foundation of their suits destroyed.

I submit then, that the construction of this act is,—*First*, that after the last of August, 1861, the registrations of judgments, rules, orders, or decrees, for the payment of money, of any court of Upper Canada, shall no longer create liens, or charges upon lands, or any interest therein; and that those which have been and which shall have been registered, will then cease to operate as liens, &c., *excepting* those upon which bills had been filed, and the suits had been pending on or before the 18th May, 1861—these will continue to operate as if this act had not been passed.

Secondly—That after the said last of August, writs against lands which have issued and which shall have issued before the 1st September, 1861, and which shall be founded on judgments which have been registered before the passing of this act, shall have priority according to the priority of the registrations of the judgments on which they have or shall have issued respectively.

This is the rendering, as I conceive it, of the last three sections of the act—last three as they are now divided in the published statute.

The rest of the act of course requires no comment to elucidate its meaning.

JUNIUS, JUNIOR.

Toronto, August 3, 1861.

[In the article to which our correspondent refers, we did not pretend critically to analyze the act. Our object was to make an announcement of its existence, and in general terms to state what we thought of it. It is quite possible that the construction of the act in some of the points to which we directed attention is free from doubt in the mind of our able and pains-taking correspondent, but it is, to say the least of it, a little singular that many felt doubts where our correspondent sees none.—EDS. L. J.]

Rights of accused on a charge of felony before a Magistrate.

TO THE EDITORS OF THE LAW JOURNAL.

DEAR SIRS,—There is a point of our criminal law on which there seems to be some difference among the magistracy, both in opinion and practice.

It is, whether at a preliminary examination before magistrates, on a charge of felony, the accused has a legal right to enter fully into his defence, and produce and examine his witnesses, either to disprove the charge in *toto*, or deprive it of a felonious character.

I see the Police magistrate in Toronto—the Hogan case for example,—allows the accused this privilege; our J. P.'s refuse it.

Now, is it either a right or a privilege, optional with the Justices, to grant or refuse? And if not a right, ought not and will not its refusal very frequently impose great hardship and inconvenience?

Where the proceeding is summary, the right is indisputable; if otherwise in cases of felony, as in the case cited, by what authority does the Police magistrate allow it to those brought before him?

Can it be justly called *an examination* where only one side, and not necessarily all of that, is heard?

Please give your opinion, and oblige

Yours truly, INQUIRER.

[1. The depositions on the part of a prosecution for felony having been all taken, the magistrate should consider whether they contain such a strong *prima facie* case of guilt against the prisoner as to warrant his sending the case to a jury.

2. If the magistrate considers the evidence sufficiently strong against the prisoner to call upon him for his defence, he should ask him what he has to say in answer to the charge made against him, and if he is willing to make any statement it is the duty of the magistrate after giving the usual caution, to receive it.

3. If the prisoner, after having been duly cautioned, either on his own motion or in reply to fair and open questions put to him from the bench, should think proper to make any statement, it is the duty of the magistrate to allow him to do so.

4. If the prisoner be desirous of calling witnesses for his defence at this stage of the proceedings, (which it is imprudent for him to do unless he has strong grounds for belief that he can satisfy the magistrate of his innocence, and thus procure his discharge, or at all events an admission to bail,) he is at liberty to call as many witnesses as he pleases, and they must be sworn and examined, and their examinations taken down in writing in the same manner as those for the prosecution. (See Stone's Petty Sessions, 6 Edn. 271, -2, -4, -6.)—EDS. L. J.]

REVIEWS.

A SYSTEM OF CONVEYANCING; COMPRISING THE PRINCIPLES, FORMS AND LAWS, WHICH REGULATE THE TRANSFER OF PROPERTY IN CANADA. Edited by J. Webster Hancock, LL.B., Barrister-at-Law, Berlin, C. W. Published by L. Stebbens, 1861.

This is by far the best work on conveyancing ever issued in Canada. We have had several works of the kind, but none manifesting so much ability and industry as this volume.

It is not a mere book of forms. It comprises, as indicated on the title page, not only forms, but "the principles" and "laws" of conveyancing in this province.

Truly does the Editor, in his preface, remark that "the voluminous and costly works of the great English conveyancers contain little that is needed in ordinary practice on this continent." The conveyancing forms of England are in general quite unsuited to the circumstances of this colony. Simplicity, not complexity, is the rule of conveyancing in Canada. Real estate here, compared with real estate in Great Britain, is of little value, and changes hands much more frequently here than there. Titles here are simple; and owing to our admirable system of universal registration, the state of a title is usually easy of access.

The danger however with us is that the very simplicity of our conveyancing forms may lead to looseness of style and incoherency of statement. Nothing is better as a preventive than a reliable book of forms adapted to our want. The book before us appears to be exactly that which is needed.

The Editor has divided his work into thirteen chapters—each devoted to a particular class of conveyances—prefaced by explanatory remarks as to the law regulating that class of conveyances, and the principles regulating that law. The first chapter is on agreements for purchase and sale. The second, on arbitration. The third, on sales by auction. The fourth, on securities. The fifth, on conveyancing securities. The sixth, on securities. The seventh, on leases and agreements for leases. The eighth, on landlord and tenant. The ninth, on marriage articles. The tenth, on partnership deeds. The eleventh, on wills. The twelfth, on declarations of uses and trusts; and the thirteenth, on powers of attorney. Then follows a supplementary chapter, on bills of exchange, drafts, orders, &c.

We do not pretend to have examined the contents of the volume with much minuteness, but have seen quite enough to convince us that the Editor is a man who has shirked neither labor nor responsibility. Indeed, were we to find any fault with the book, it would be that it is too elaborate.

The arrangement seems to be very good. It is a pity, however, that in referring to Statutes of Canada or of Upper Canada we find "Revised Statutes, 1859, cap. —," instead of "Consol. Stat. U. C." or "Consol. Stat. Can." The latter are the abbreviations now in general use to denote our statutes. Probably while the Editor was engaged in his work, these abbreviations were not so well known.

But while seeing so much to admire, it is scarcely fair to find fault. The work contains no less than 630 octavo pages, and is printed on very superior paper. It reflects credit both on publisher and editor. We congratulate both on what has been accomplished. The work is well conceived—well written—and well printed. We cordially recommend it to our readers.

THE LAW MAGAZINE AND LAW REVIEW. London: Butterworth, 7 Fleet street.

It is with pleasure that we acknowledge the receipt of the August number of this publication. We are always glad to receive it. The number now before us contains a very full and elaborate paper on the professional and parliamentary career of the late Lord Campbell. It also contains other papers of less length, but of much interest, such as the Yelveton Marriage Case — The Province of Jurisprudence determined — Journal of a Gloucestershire Justice — A trial for Child Poisoning in Germany—Charitable Trusts—The Assizes—Old Wills, &c.

LOWER CANADA REPORTS. Quebec: published by Augustin Coté.

Numbers seven and eight of volume eleven are received. None of the cases reported much interest an Upper Canadian lawyer. The assimilation of laws between Upper and Lower Canada, so often promised, if ever effected, will make an interchange of reports much more acceptable. As it is, we often find cases decided in Lower Canada of deep interest to us in Upper Canada. The criminal laws of both sections of the province are the same. The laws as to civil rights are as wide apart as the poles.

THE SCOTTISH LAW JOURNAL. Glasgow.

The number for July is received. In it we find an article on the Small Debt Court, from which we learn that in Scotland there is a growing desire for the extension of the jurisdiction of the Small Courts. It is to be hoped, should the desire be realized, that the Judges will decide according to law and not to "equity and good conscience," which sometimes means in ignorance of or contrary to rules of law.

THE LONDON QUARTERLY for July,

Is also received from same firm. The contents are not quite so numerous as that of the *North British*, but will be found quite enough for an ordinary reader of reviews, who has to earn his daily bread by other than literary pursuits. They are as follows: Thomas de Quincy—Montalambert on Western Monarchism — The English Translators of Virgil — Maine's Ancient Law — Scottish Character — Russia on the Amoor — Cavour — Democracy on its trial. The latter are papers of much interest to us at the present time.

THE NORTH BRITISH REVIEW for August. New York: Leonard Scott & Co.

Is received. The contents are the British Universities and Academical Polity—Montalambert and Parliamentary Institutions in France—British Columbia and Vancouver's Island — Stanley's Eastern Church—Edwin of Deira — Recent Discoveries in Scottish Geology—Freedom of Religious Opinion — Marriage and Divorce — Du Chaulli's Explorations and Adventures—Buckle on the Civilization of Scotland.

BLACKWOOD for August is also received.

Though unpretending as usual, it offers to the reader much to please and delight. The contents are: Joseph Wolff—On Manners—Vaughan's Revolutions in English History—Norman Sinclair (conclusion) — The Royal Academy and the Water Colour Societies—Mad Dogs—Another Minister's Autobiography—Three Days in the Highlands.

THE ECLECTIC. New York: M. H. Bidwell.

The proprietor of this magazine is always "up to time." Indeed he is generally "a-head of time." Such we believe to be the case when during the month of August we receive the September number of his magazine. The number just received is prefaced by a beautiful engraving representing a likeness of Thorwaldsen, one of the most remarkable men of Denmark. The contents are numerous, comprising the best selections from cotemporary magazines, and embracing some of the articles to which we have already referred in our notices of the leading English periodicals. A person not having time to read all the current periodicals cannot do better than content himself with the admirable selections which month by month appear in this magazine.

GODEY'S LADY'S BOOK. Philadelphia: Louis A. Godey.

Godey also is generally "a-head of time," notwithstanding the commotion caused by the civil war in the United States. One thing certain is that the artists of Godey are not either in the Southern or Northern army. The magazine is artistically as well executed as ever it was in the most palmy days of the Republic. The "Widow's Mite" in the number before us is a touching and beautiful plate. The fashion plates, as usual, are all that can be desired.

APPOINTMENTS TO OFFICE, &c.

PRISON INSPECTORS.

JAMES MOIR FERRES and TERENCE J O'NEIL, Esquires, to be Inspectors of Prisons in the room and stead of Donald Æneas McDonell and John Langton, Esquires.—(Gazetted August 17, 1861.)

NOTARIES PUBLIC.

WILLIAM McKEE, of Toronto, Esquire, to be a Notary Public for Upper Canada.—(Gazetted August 10, 1861.)

NATHANIEL BALDWIN FALKINER, of Belleville, Esquire, Barrister, to be a Notary Public for Upper Canada.—(Gazetted August 1, 1861.)

ROBERT MULLIGAN, of Port Hope, Esquire, to be a Notary Public for Upper Canada.—(Gazetted August 17, 1861.)

TO CORRESPONDENTS.

"CHARLES DURAND"—Under "Division Courts."

"JUNIUS, JUNIOR"—"AN INQUIRER"—Under "General Correspondence."

DIARY FOR OCTOBER.

1. Tuesday..... Chancery Examin. Term, London and Belleville, commenced. Last day for notice Hamilton and Brockville. Clerk of Municipality to deliver Assessment Rolls to Collectors.
5. Saturday ..... Last day for notice of Trial for Toronto.
6. SUNDAY ..... *19th Sunday after Trinity.*
7. Monday ..... County Court and Surrogate Court Terms begin.
8. Thursday ..... Chancery Examin. Term, Brantford and Kingston commences. Last day for notice for Barrie and Ottawa.
12. Saturday ..... County Court and Surrogate Court Terms end.
13. SUNDAY ..... *20th Sunday after Trinity.*
14. Monday ..... Toronto Fall Assizes.
15. Tuesday ..... Chancery Examin. Term, Hamilton and Brockville commence.
20. SUNDAY ..... *21st Sunday after Trinity.*
22. Tuesday ..... Chancery Examin. Term, Barrie and Ottawa, commences. Last day for notice for Goderich and Cornwall.
27. SUNDAY ..... *22nd Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

OCTOBER, 1861.

THE ENGLISH COURT OF QUEEN'S BENCH ON ITS TRIAL.

Our readers no doubt, one and all, remember the fact that the English Court of Queen's Bench in January last ordered a writ of *habeas corpus* to issue to Canada in the well known case of Anderson, the slave.

The announcement that the writ had issued was at first discredited, but when corroborated by the published reports of the case the feeling of doubt gave way to combined feelings of astonishment and indignation.

The jurisdiction of the English Court was questioned both here and in England, and all agreed that whether or not the jurisdiction existed, the exercise of it was impolitic.

In our March issue we devoted some attention to the discussion of the important questions raised, and afterwards had the satisfaction of finding the positions we took endorsed by the leading legal periodicals of the mother country. We contended that the jurisdiction did not really exist, and pointed out that the exercise of it was the more extraordinary even if the right to exercise it had been undoubted, because the English Court was not under any obligation to issue the writ upon the materials before it. We submitted, that under any circumstances the course which the Court should have adopted would have been to have issued only a rule to show cause why the writ should not issue, instead of in the first instance and upon the *ex parte* application of a zealot ordering the writ to issue.

It is now no small satisfaction for us to find that the very judges who did the act of which we then complained are now converts to the views which we have always entertained and then expressed.

An application was in June last made to the English Court of Queen's Bench for a Rule to shew cause why a writ of *certiorari* should not issue to bring up the record of conviction of John Craven Mansergh, in custody in India, under sentence of a court martial. The Court doubted its jurisdiction to do so, and was pressed with the decision in Anderson's case. The application was refused—each of the four judges pronouncing an opinion against it. CROMPTON, J., said, "This is a discretionary writ, and the time which elapsed since the proceedings of the court martial took place is, I think, one reason for not granting it. But dismissing that, consider what is the nature of this application. It is for a writ of *certiorari* to bring up the proceedings of a court martial held *in India*. True, it is said, that the record is here in England, but to my mind that makes no difference, because we must see for what purpose it is asked that the record should be brought before us. It is in fact an order that the proceedings may be quashed; so that we are asked in effect to control the proceedings of a court in India, and this application must be treated in the same way as one directly for a *certiorari* to bring before us the proceedings of a court in India. The question therefore is, whether we have any such power vested in us. No precedent whatever is suggested for it. It is said that the application is analagous to that in Anderson's case; but it appears to me to bear no analogy to it, nothing whatever was decided in that case. It was *only* a rule to show cause that was granted, and it was in no way decided that the writ of *habeas corpus* eventually *ought to issue*. There is therefore *no case* which shows that we have the power, nor do I think we ought to examine on a writ of *certiorari* the record of a court in India." So BLACKBURN, J., "The ulterior object of this application is to quash the proceedings of the court martial, and of course we should not grant the writ of *certiorari* to bring up the record unless there was something to be done with it when we got it before us. I am not by any means sure that the court martial had not complete jurisdiction in the case. But even if it had not, has this court any power to quash the proceedings of a court in India? *I think no more than to quash the proceedings of a Court in France.* No doubt our authority to inquire into the proceedings of courts of inferior jurisdiction extends to England and some of the adjacent islands, *but I doubt if it extends any further.* The case which approaches the nearest to this is the one alluded to (*exparte* Anderson), in which we granted a rule *nisi* for a writ of *habeas corpus* to bring up the body

of a prisoner in Canada. But that is no authority for granting this application. That was a case of urgency, and the rule was granted in order to initiate the proceedings *and if necessary to have the matter discussed.* I also agree with my brother Crompton that the length of time which has elapsed is also a point to be considered, and I think that the rule ought not to issue." (*Ex parte* Mansergh, 7 Jur. N. S., 825.)

These opinions of learned judges of the Queen's Bench are satisfactory, so far as they show that Anderson's case decided nothing, and is not to be followed as a precedent, but a grave question of fact is raised when it is stated that the court did not authorize the issue of the writ in that case,

The fact that the writ did issue is beyond all dispute. I was received in Toronto by the Sheriff of York and Peel, was exhibited by him to us, was looked upon as a piece of harmless parchment, nobody ever thought of paying any attention whatever to its hollow command, was looked upon as a good joke, and the subject of much amusement, is now in the Sheriff's possession, and if preservedby him, will probably descend to posterity as a monument of judicial folly.

But perhaps we are to understand the English judges as pleading in confession and avoidance—that although the writ did issue the issue of it was in no way authorized by them. Let us take issue on the plea. Now for the proof. On turning to *ex parte* Anderson, (7 Jur. N. S., 122,) we find chronicled the fact, that Mr. Edwin James moved for the writ, the fact that he made a long and illogical argument in support of his application, the fact that after hearing the "argument" the judges retired (according to some reports for full twenty minutes), the fact that these same judges returned to court, the fact that Cockburn, C. J., opened his mouth and spake as follows: "We have *carefully* considered this matter, and the result of our *anxious deliberation* is, that we think the writ *ought to issue,*" &c., the fact that Crompton, J., Hill J., and Blackburn, J., concurred, (which, by the by, is implied in the expression "*We* have carefully, &c., and the result of *our* anxious deliberations," &c.,) and the fact that the writ when issued was directed to the Sheriff of the County of York, &c. To the same effect is the report of the case in the *Law Times* and other contemporaneous records. Out of the mouths of many witnesses we have proof of these facts, and by the proof of them we are certainly and clearly entitled to a verdict against the English Court of Queen's Bench.

It is painful to find judges for whom we have hithesto entertained so much respect making such an exhibition of themselves. It was bad enough for them in the first place to have done a thing so absurd as to have authorised the issue of the writ in Anderson's case, but it is ten times worse for them in the face of such testimony to deny the fact or prevaricate about it. Why did Cockburn, C. J., who pronounced the judgment of the Court in the Anderson case, sit silently by and allow his learned brothers, Crompton and Blackburn, JJ., to use such language as they are reported to have done without at least telling them to keep silence? He had himself cunning enough to make no allusion to the Anderson case, and it is a pity, so far as the sanctity of the bench is concerned, that his learned brothers were not equally cunning. It would have been quite enough for Crompton, J., and Blackburn, J., to have said, "We are ashamed of what we did in the Anderson case and promise to do so no more." It is human nature to err, and it is manly to acknowledge an error; for an error gracefully acknowledged is a victory won. Is it possible that these learned judges had not sufficient moral courage to acknowledge their error? We cannot believe it, and yet in the absence of some such supposition we find great difficulty in accounting for their most extraordinary conduct.

If Crompton, J., and Blackburn, J., were of the same opinion at the time the Anderson case was decided as they were when deciding *ex parte* Mansergh, how came it that they concurred in the former decision? Why did they not speak out and say, "we refuse the writ, you may if you choose take a rule *nisi*, but we cannot promise to make it absolute?" If Cockburn, C. J., continued to be of the opinion in *ex parte* Mansergh that he was when deciding *ex parte* Anderson, how is it that he sat silently by and allowed his learned brothers to demolish his former expressed opinion atom by atom? Why did he not say, "You are wrong—according to the Anderson case, we have the requisite power but on this occasion we do not see fit to exercise it?" The more we endeavor to probe the motives and actions of these judges the more mystified we become. We cannot we confess account for their apparent tergiversation on any known and honorable principle of human conduct. We are loath to entertain the idea that they have done wrong but cannot get rid of it. We must however say, that conduct so extraordinary without explanation is not calculated to increase the respect in which English judges have hitherto been held in this Colony.

CHANCERY VESTING ORDERS.

By the 63rd section of the *Act respecting the Court of Chancery*, Consolidated Statute U. C., cap. 12, power is given to the Court of Chancery to make vesting orders or decrees in certain cases. The section is as follows:—

"In every case in which the Court has authority to order the execution of a deed, conveyance, transfer, or assignment of any property, real or personal, the court may make an order or a

decree vesting such real or personal estate in such person or persons, and in such manner, and for such estates as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order or decree shall have the same effect both at law and in equity as if the legal or other estate or interest in the property had been actually conveyed by deed or otherwise for the same estate or interest to the person in whom the same is so ordered to be vested, or in the case of a *chose in action*, as if such *chose in action* had been actually assigned to such last mentioned person."

The power of the Court of Chancery to compel the execution of deeds is only ancilliary to its general jurisdiction in cases of specific performance, fraud, accident, mistake, trusts, &c., and therefore, wherever that power is called into exercise, a vesting order under this section will complete that which the judgment of the court directs to be done, and thereby save the expense of a Chancery conveyance, and the trouble, inconvenience, and annoyance of Chancery Writs of Attachment. But the practical use hitherto made of this section has been to vest in purchasers property bought by them at sales under decrees of the court; and as this vesting power of Chancery is in some measure new it may be well to consider the form and effect of such orders.

We must here state, that we interpret the Act as giving no greater validity or more effective conveying power to a vesting order than that possessed by an ordinary deed; and we therefore think that all artificial or necessary words of a legal conveyance are as requisite in a vesting order as in a deed, so far as the peculiar form of the order will allow. The statute says that the property shall by the vesting order be vested in such person or persons, *in such manner*, and for *such estate*, as would be done by any deed if executed, and that such order *shall have the same effect* as if the property had been actually conveyed by deed or otherwise. And as the vesting order is the only evidence of the intention of the Court as to the manner of conveying and the estate to be conveyed, it is clear that everything should appear in it which is necessary to render the conveyance complete.

The person in whom the real or personal property may be directed to be vested may be either a party to a suit who has been declared to be entitled to a conveyance of such property, or a purchaser at a sale by the court. Over the former the authority of the court is undoubted, and it has been decided that where a person becomes a purchaser at such a sale, he thereby subjects himself to the jurisdiction of the court and may be treated in the same way as if he were a party to the suit. But in no case can either party be compelled to accept title under a vesting order instead of a conveyance, it being their right to insist upon covenants from the grantors. (*Slater* v. *Fisken*, 4 U. C. L. J. 261.)

By the words "*vesting in such manner as would be done by any such deed*," we presume the legislature intended to declare that the vesting order should, as nearly as possible, follow the form of an ordinary conveyance. Thus the consideration should be mentioned, (*Ward* v. *Lambert*, Cro. Eliz., 394,) or the property should be conveyed *to the use* of the party or *purchaser*, &c., as well as *unto him*; also the words "granted, conveyed, and vested in," or such like, and the habendum "to have and to hold," &c., should be contained in the order as the ordinary and proper technical words of conveyance.

So also the *quantity of estate* intended to be passed—whether a fee, a life estate, or a term of years—must be shown. The marking out of the estate, says Williams, in his work on Real Property, is as necessary now as formerly, and it is called *limiting* the estate. In addition to the livery of seisin it was necessary that the estate which the feoffee was to take should be marked out, whether for his own life or that of another person, or in tail, or in fee simple, or otherwise. Thus the land may be given to the feoffee to hold to himself simply, and the estate so limited is an estate for life, and the feoffee is generally called a lessee for his life. If the land be given to the feoffee and the heirs of his body, he has an estate tail, and is called a donee in tail. And in order to confer an estate tail it is necessary (except in a will, where greater indulgence is allowed,) that words of procreation, such as "heirs of his body," should be made use of. If the land be given to the feoffee and his heirs he has an estate in fee simple, the largest estate which the law allows. In every conveyance (except a will) of an estate of inheritance, whether in fee simple or fee tail, the word "heirs" is necessary to be used as a word of limitation to mark out the estate. Thus if a grant be made to a man and his seed, or his offspring, or the issue of his body, all these would be insufficient to convey an estate tail, only an estate for life. So if a man purchase lands to have and to hold to him for ever, or to him and his assigns for ever, he will have but an estate for life and not in fee simple. Before alienation was permitted the heirs of the tenant were the only persons besides himself who could enjoy the estate, and if they were not mentioned the tenant could not hold longer than for his own life. At the present day the free transfer of estates in fee simple is universally allowed, but this liberty is now given by the law and not by the particular words, by which an estate may happen to be created. So that though conveyances of estates in fee simple are usually made to hold to the purchaser, his heirs and assigns for ever, yet the word "heirs" alone gives the fee simple of which the law enables him to dispose, and the remaining words, and his assigns for ever, have at the present day no conveyancing virtue at all, but

are merely declaratory of that power of alienation which the purchaser would possess without them (pp. 119–121).

These remarks will, we trust, enable those who have obtained vesting orders under this statute to ascertain whether the full estate intended to be vested has been actually conveyed by the order,—especially fee simple estates purchased at sales had under decrees of the Court of Chancery.

CHANCERY NOTICE.

During the circuits for the examination of witness, the Court will not sit on Tuesday, except in case of the postponement of any of the circuits. Notices, however, will be given for Tuesday, as usual, and court will be held on the Saturday of each week, for which days the notices for Tuesday will continue good, or for the first day on which court will be held. In Chambers, business will be taken on any day that the Judge may be in town, and notices of motion are to be given in the usual manner, and will continue good for any day that Chambers may be held, in the event of their being no sitting on the day named in the notice.

Dated, 16th September, 1861.

COMMON LAW JUDGMENTS.

QUEEN'S BENCH.

CASES ARGUED DURING EASTER TERM LAST.

Present:—McLEAN, J.; BURNS, J.

Judgments delivered, Thursday, Sept. 12, 1861.

Gilkison v. *Alexander.*—Rule absolute to set aside proceedings with costs. One week further time to plead.

Bank of Upper Canada v. *Killaly.*—Rule discharged.

McGinnes v. *The Corporation of Yorkville.*—Rule *nisi* for new trial refused, and judgment for defendants on demurrer to 2nd, 3rd and 4th pleas, and for plaintiff on demurrer to 5th plea.

Regina v. *Askin.*—Rules discharged.

Carrall v. *The Bank of Montreal.*—Rule discharged.

Corbett v. *Kirkpatrick.*—Judgment for plaintiff on demurrer with leave to amend in two weeks.

Stanley v. *The London Gas Company.*—Appeal allowed without costs.

McDonald v. *G. W. R. Co.*—Rule discharged and judgment for defendants on all the demurrers except demurrer to 8th plea, and for plaintiff as to that demurrer.

Todd v. *Perry.*—Judgment for plaintiff.

VanEvery v. *The Buffalo and Lake Huron Railway Co.*—Rule discharged.

Ferrie v. *Wright.*—Rule discharged.

Bartles v. *Benson.*—Rule absolute for new trial, costs to abide the event.

Craig v. *Odell.*—Rule absolute on payment of costs.

Anglin v. *Henderson.*—Judgment for plaintiff on demurrer.

September 23, 1861.

The Queen v. *Preston et al.*—Rule absolute to quash indictment.

Bank Upper Canada v. *Corbett.*—Rule discharged with costs.

Town of Sarnia v. *Great Western Railway Company.*—Rule discharged.

Town of Goderich v. *Buffalo and Lake Huron Railway Company.*—Special case. Judgment for plaintiffs. *Held*, that land covered with water is not liable to taxation under the Assessment Act.

Corporation of Essex v. *Strong.*—Rule discharged with costs.

Watts v. *Howell.*—No judgment, stands for re-argument.

Martin v. *White.*—Rule absolute for new trial on payment of costs.

TRINITY TERM.

Present:—ROBINSON, C. J.; BURNS, J.

Monday, September 23, 1861.

McCabe v. *Shore.*—Rule discharged.

Addison v. *Burrill.*—Rule absolute for new trial, costs to abide the event.

Pherrill v. *Turner.*—Rule discharged.

Lake v. *Wright.*—Rule discharged.

McDonell v. *McDonell.*—Rule absolute for new trial upon payment of costs by plaintiff; plaintiff to be at liberty to amend his pleading.

In the matter of Charles Widder v. *The Buffalo and Lake Huron Company.*—Rule absolute for mandamus *nisi*.

Robinson v. *Stock.*—Rule discharged.

In re Simons v. *The Corporation of the Town of Chatham.*—Rule absolute to quash by-law with costs.

Todd v. *Walsh.*—Rule absolute for a new trial upon payment of costs.

Shack v. *Smith.*—Rule discharged.

Baldwin v. *Foster.*—Rule absolute for new trial without costs.

Talcutt v. *Sychlestein.*—Rule discharged without costs.

Reeves v. *The Corporation of the City of Toronto.*—Rule discharged.

Hurd v. *Palmer.*—Rule discharged.

McMurtrie v. *Swanston.*—Rule discharged.

In the matter of the heirs of Francis Ann Boulton.—*Held*, that title and interest of parties proved as stated in partition Act. Order accordingly.

Dixon v. *Hamilton.*—Rule discharged.

Chamberlin v. *Smith.*—Rule discharged.

Vidal v. *Donald.*—Rule discharged.

Nourse v. *Foster.*—Rule discharged.

In re Wright and Cornish.—Rule for transfer articles from one attorney to another.

Nicholson v. *Burkholder.*—Rule absolute for new trial, costs to abide the event, upon condition that it be admitted on the trial that the late James McGill died seized. If not drawn up in three weeks rule to be discharged.

In re Durand.—Rule discharged with costs.

Humberson v. *Henderson.*—Rule refused. *Held*, 1. That if there be a plea on the record putting title in question, a County Court is ousted of jurisdiction. 2. That a plaintiff in a Superior Court with a plea of that kind on the record is entitled to full costs.

In re McDougall and Township of Lobo.—Rule refused. *Held*, that Township Councils are enabled but not required to pass by-laws for the relief of the poor. The relief is discretionary not imperative.

Present:—Sir J. B. ROBINSON, Bart., C. J.; McLEAN, J.; BURNS, J.

Saturday, September 28, 1861.

Clark v. *Donaldson.*—Rule absolute for new trial without costs.

Vance v. *King et al.*—Verdict for plaintiff on 1st issue to stand; for defendants on 2nd and 3rd issues and judgment for defendants upon the demurrer.

Smith et al. v. *Bill et al.*—Rule absolute for new trial without costs.

Addison v. *Jennings*.—Appeal from county court allowed. New trial ordered. Costs to abide the event.

Sparling et al. v *Robertson*.—Appeal allowed. New trial ordered without costs.

Murdoff v. *Wier*.—Judgment for defendant on demurrer.

McDonald v. *Bell*.—Judgment.

Denison v. *Nation*.—Judgment for plaintiff on demurrer, with leave to apply to amend within a fortnight.

Moore et al. v. *Gurney et al.*—Judgment for plaintiff on demurrer, with leave to apply to amend in ten days.

Moore et al. v. *McMahon*.—Judgment for plaintiff on demurrer.

Ryan et ux. v. *Miller*.—Rule absolute for new trial granted without costs.

Crawford v. *Corporation of Cobourg*.—Judgment for plaintiff on all the demurrers.

Com. Bank v. *Bank of Upper Canada*.—Judgment for defendants.

Teehan v. *Learny*.—Postea to plaintiff.

Fortune v. *Garnett*.—Postea to plaintiff.

Harris v. *Malloch*.—Postea to plaintiff.

Bank of Upper Canada v. *Glass*.—Judgment for defendant.

Sykes v. *Cobourg and Port Hope Railway Company*.—Judgment for defendant.

Glass v. *Wigmore*.—Judgment for plaintiff.

Reg. v. *Desseauer*.—Rule discharged.

Reg. v. *Davidson*.—Judgment for the crown.

McCoy v. *Smith*.—Judgment for defendant.

Small v. *City of Toronto*.—Rule absolute for new trial. Costs to abide the event. Leave to amend.

Reg v. *Walker*.—Conviction affirmed.

COMMON PLEAS.

CASES ARGUED DURING EASTER TERM LAST.

Present:—DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

Saturday, August 31, 1861.

Sharr v. *Baldwin et al.*—Judgment for defendants on demurrer.

Ryland v. *King et al.*—Rule absolute to enter a verdict for defendants, Smith and Richards, with leave to plaintiff to take out a rule *nisi* for judgment *non obstante veredicto*.

Doan v. *Warren et al.*—New trial on payment of costs.

Mein et al v. *Short et al.*—Judgment—Defendants to have costs of the issues, and the costs of the cause as relating to the issues found for them. Plaintiffs to have general costs of the cause, (except as to the issues found against them,) and the costs of the issue on the plea of set off against the defendants *de bonis propriis*.

TRINITY TERM.

Present:—DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

Monday, September 23, 1861.

Macaulay v. *Moodie*.—Judgment of Court of Queen's Bench affirmed. Postea to defendant.

Hart v. *Benson*.—Rule absolute to dismiss appeal with costs.

Ogilvie et al. v. *McLeod*.—Rule *nisi* discharged.

Moore v. *Gray et al.*—Rule absolute for new trial on payment of costs.

Macdonald v. *Macdonald*.—Rule discharged.

Bishop of Toronto v. *Cantwell*.—Rule absolute for new trial without costs. *Held*, that a term's notice is as much necessary in an action of ejectment as in other actions.

Turner v. *Mills*.—Rule absolute to enter verdict for defendants.

Smith v. *Modeland*.—Appeal allowed without costs.

Fitzgerald v. *Kendall*.—Rule discharged.

Parker v. *McDonald*.—Rule discharged with costs.

Howard v. *Haight*.—Appeal allowed without costs, new trial ordered.

Jury v. *Fry*.—Postea to plaintiff.

Holder v. *Langley*.—Rule discharged.

Patterson v. *Langley*.—Rule absolute for new trial, costs to abide the event.

Higgins v. *The City of Toronto*.—Rule absolute for new trial without costs.

Kirchhoffer v. *Ross et al.*—Rule absolute to arrest judgment unless plaintiff within one month amend by suggesting omitted facts.

Metropolitan Gas Company v. *Rossin*.—New trial, costs to abide the event.

Martin v. *Cowan*.—Appeal dismissed with costs.

Dempsey v. *Carson*.—Appeal allowed without costs.

Haight v. *McInnis*.—Appeal allowed without costs.

Baldwin v. *Elliot*.—Rule absolute for new trial without costs.

Perritt v. *Arnold*.—Rule discharged.

McNab v. *Howland & Fitch*.—Rule absolute for new trial, costs to abide the event.

Present:—DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

Saturday, September 28, 1861.

Smith v. *Mutchmore*.—Rule absolute for new trial without costs.

Cleland v. *Robinson et al.*—Rule absolute to set nonsuit aside, and for a new trial except as to defendant Robinson.

Dunne v. *O'Reilly*.—Rule absolute, without costs.

Moore et al. v. *Chambers*.—Judgment for plaintiff on demurrer to equitable plea for defendant on plea of *nunquam indebitat*, with leave to plaintiff to amend on payment of costs.

Moore et al. v. *Hudson*.—Judgment for plaintiff on demurrer to plea.

Moore et al. v. *Murphy*.—Judgment for plaintiff on demurrer; equitable plea held bad.

Moore v. *McDonald*.—Plaintiff entitled to judgment on demurrer. Held, plea bad.

Clendenan v. *Great Western Railway Company*.—Judgment for plaintiff on demurrer.

Gouanlock v. *Smith*.—Appeal dismissed without costs.

Moore v. *Muma*.—Appeal dismissed with costs.

The Queen v. *The Provisional Council of Bruce*.—Rule discharged with costs.

In the matter of George Michie and the City of Toronto.—Rule absolute to quash clause 4 of by-law, without costs, and discharged as to residue.

Proudfoot v. *Harley*.—Rule discharged.

In re McMaster and the Corporation of the Village of Newmarket. Rule absolute with costs.

Harvey v. *Mutual Fire Insurance Company of Prescott*.—Rule absolute. Postea to defendants.

Brown v. *Osborne*.—Judgment for plaintiff on the demurrer, with leave to the defendant to amend within ten days on payment of costs.

LAW SOCIETY OF UPPER CANADA.

MICHAELMAS TERM, 1860.

ARTICLED CLERKS' EXAMINATION.

SMITH'S MERCANTILE LAW.

1. What is a restrictive endorsement, and an endorsement *sans recours* respectively of a bill or note?

2. Can a lien be retained for a debt, the remedy by action for which is barred by the Statute of Limitations? Give your reasons.

3. When does a right to stop in transitu arise, and when is it determined; and will the *bonâ fide* endorsement of bill of lading, in any way, and if so, how affect it?

4. Will such a *delivery* of goods as would be sufficient to support an action for goods sold and delivered, be sufficient to ratify a contract of sale within the Statute of Frauds? State the difference.

BLACKSTONE'S COMMENTARIES, VOL. 1.

1. How may a corporation be created, and how dissolved?

2. Below what age are children presumed not to be *criminally* answerable for their Acts?

3. What is municipal law, and into what four branches is it divided?

STORY'S EQUITY JURISPRUDENCE.

1. Distinguish between a bailment and a trust.

2. When are voluntary settlements of real estate void, and when not.

3. When is surprise or mistake a ground of equitable jurisdiction.

4. When is relief in equity with respect to sureties more complete than at law?

5. How, and when are receivers appointed, and what are their rights and duties?

WILLIAMS ON REAL PROPERTY.

1. Can a husband convey to his wife? and give reasons for your answer.

2. What effect, if any, has the deed of an infant?

3. What is the effect of the registration of a judgment, and what are the rights and remedies under it?

4. Can a mortgagor make a conveyence by lease and release, and give reasons for your answer?

5. Give the most important statutory provisions of the Statute of Limitations with respect to real estate.

STATUTES AND PLEADING OF COURTS.

1. In what cases will replevin lie in Upper Canada?

2. What is the effect upon a cause of the withdrawal of a juror at the trial?

3. Can an award under a compulsory reference be enforced, and if so, how, before the time for moving to set it aside has elapsed?

4. Within what time must a bond be perfected and executed so as to stay execution, in the case of an appeal from the decision of a County Court judge?

5. When a person, not an infant, nor of unsound mind, has been served with an office copy of the bill, within the jurisdiction, but not personally, in what manner must an *order pro confesso* be applied for against him?

6. Can a decree be obtained before the time for answering has expired? State the practice in such cases.

7. Does the dismissal of a bill for want of prosecution operate as a bar to another suit of the same sort?

8. What is the practice when one of the parties wants a rehearing?

9. What is the practice in proceeding under a reference to the master as to title?

EXAMINATION FOR CALL.

SMITH'S MERCANTILE LAW.

1. Will the delivery of goods to an agent of the vendee appointed to convey them, deprive the vendor of his lien for the price; or of the right to stop in transitu, or either?

2. What are the respective rights of debtor and creditor as to the appropriation of sums paid by the former?

3. What are the *implied* warranties in a marine policy?

BYLES ON BILLS.

1. What are the essential requisites of a bill of exchange?

2. Is the drawer of a bill of exchange, accepted for his accommodation, entitled to notice of dishonour under any, and if so what circumstances?

3. When, and by whom, must a bill of exchange be paid so as to extinguish the instrument?

TAYLOR ON EVIDENCE.

1. What are the respective functions of the judge and jury with regard to a written instrument offered in evidence.

2. What is a latent and what is a patent ambiguity, and which can be explained by parol evidence?

3. Under what circumstances must a confession have been made to render it admissable in evidence against a prisoner? Is there any statute applying to this subject?

4. Upon what principle are declarations accompanying acts admissible as evidence? Is this in reality an exception to the rule rejecting hearsay evidence? Give your reasons.

STORY'S EQUITY JURISPRUDENCE.

1. Explain what is meant by tacking; how far the doctrine is affected by our registry laws, and in what cases it may still be applied?

2. Under what circumstances will a surety be held to be discharged in equity?

3. Explain the doctrine of specific performance, and whether it will be put in force with respect to land in foreign countries?

4. When is a trust deemed a purchase, and when not?

5. What defences are peculiar to equity?

WILLIAMS ON REAL PROPERTY.

1. What is the effect of the destruction of the reversion upon the rent incident to it?

2. What are the requisites of a conveyance for barring an estate tail?

3. What is equitable jointure?

4. What are powers, and explain how estates thereunder take effect?

5. What is a shifting use, and distinguish between it and a remainder.

PRACTICE AND PLEADING

1. What is the difference between a demurrer at law and in equity in point of pleading?

2. Can the silence of the answer as to any statement in the bill be construed into an implied admission of its truth?

3. What is the effect of admissions made in an answer by one defendant as regards his co-defendant?

4. What effect has an unproved allegation of fraud in the bill, on the costs of the suit, when the plaintiff succeeds generally?

5. How is a bill taken *pro confesso* against a married woman?

6. What is a departure in pleading?

7. At what period of a suit may either party with or without leave of the court or a judge serve interrogatories on the opposite party?

8. In what cases can a submission to arbitration be now made a rule of court?

9. In what cases of finding on an immaterial issue will a repleader or judgment *non obstante veredicto*, respectively be granted?

10. What is the effect of a reversal of a judgment, by virtue of which a judgment creditor has garnished a debt, upon the garnishee, who has paid over to such creditor the amount due from him to the judgment debtor, under a regular order?

ADDISON ON CONTRACTS.

1. In what cases will a contract in partial restraint of trade be upheld?

2. Mention some cases in which a representation made by the vendor at the time of sale will, and some in which it will not, amount to a warranty.

3. What will amount to a sufficient acknowledgment in writing by a debtor, to take a case out of the Statute of Limitations?

POSTPONED ARTICLES RELATING TO THE DIVISION COURTS.

Several articles on our list for preparation, have been unavoidably postponed in consequence of the continued absence of one of the Editors in Europe. His return, daily expected, will enable us to fulfil all promises at an early day.

CHANGES IN THE LAW.

CHARGE OF HIS HONOR, K. McKENZIE, ESQ., JUDGE OF THE COUNTY COURT OF FRONTENAC, LENNOX AND ADDINGTON, TO THE GRAND JURY AT THE LAST COURT OF QUARTER SESSIONS FOR THE UNITED COUNTIES.

Mr. Foreman and Gentlemen of the Grand Jury:—I find by the Sheriff's calendar that twelve prisoners are confined in the common gaol of the counties, or out on bail, charged with crime. Their cases will be submitted to your investigation. The offences alleged are of the ordinary character, and call for no special direction from the court. Other parties, not in the calendar, charged with crime, may be out on bail. I believe such parties are out on bail. The respective charges will be brought under your consideration in due form of law by the Crown Attorney, who will, no doubt, afford you every assistance in his power to enable you to get at the truth of such matters as will come before you as a Grand Inquest.

At the time of the last sittings of this court, in the month of June, I did not receive the authorized printed copy of the statutes passed in the last session of the Provincial Parliament, consequently I was unable then to direct the attention of the Grand Inquest to the alterations and changes made thereby in the law. An Act was passed to prevent vexatious indictments for certain misdemeanors. For the future no bill of indictment for perjury, subornation of perjury, conspiracy, obtaining money or other property under false pretences, keeping a gambling house, keeping a disorderly house, and any indecent assault, shall be presented to, or found by, any Grand Jury unless the prosecutor or other person presenting such indictment had been bound by recognizance to prosecute or give evidence against the party accused of such offence, or unless the person accused has been committed to, or detained in, custody, or has been by recognizance to appear to answer to an indictment to be preferred against him for such offence, if charged to have been committed in Upper Canada, be preferred by the direction or with the consent, in writing, of a judge of one of the supreme courts of law, or of Her Majesty's Attorney or Solicitor-General for Upper Canada, or of a Judge of one of the County Courts or Recorder of a city in Upper Canada.

And when a party is charged before a Justice of the Peace with any of the said enumerated offences, and the justice shall see fit to refuse to commit or to bail the person charged, then, in case the prosecutor shall desire to prefer an indictment respecting the said offence, the justice is bound to take the recognisance of such prosecutor to prosecute the charge or complaint, and to transmit such recognisance, information or deposition, if any, to the County Crown Attorney.

By another Act the law relating to the unlawful administering of poison has been amended. Heretofore the law was found insufficient to protect persons from the unlawful administering of poison, except in cases where the intent was to commit murder. Now, by the act in question, it is declared that whosoever shall unlawfully and maliciously administer poison or other destructive or noxious thing, so as to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and, being convicted thereof, shall be punished accordingly; and whosoever shall unlawfully and maliciously administer to, or cause to be administered to or taken by any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly.

By another Act of the last session it is enacted that when any person, being feloniously stricken, poisoned or otherwise hurt at any place within the limits of this Province, shall die of such stroke, poisoning or hurt upon the sea, or at any place out of the limits of this Province, every offence committed in respect of any such case, whether the same will amount to the offence of murder or manslaughter, may be dealt with, inquired, tried and punished in this Province in the same manner in all respects as if such offence had been wholly committed within the limits of the Province.

The Act respecting the Extradition of fugitive felons from the United States has been amended. The power of apprehending such fugitive felons, and of enquiring into the truth of the charge made against them with a view of a requisition, being made by the United States Government to deliver them up under the Ashburton Treaty, is now taken out of the hands of the ordinary magistrates, and very properly placed in the hands of the judges of the Superior and County Courts, Recorders of cities, Police Magistrates, Stipendiary Magistrates, and Inspector and Superintendent of Police empowered to act as a justice in Lower Canada. This amendment of the law was rendered necessary by the legal complications which attended the case of Anderson, a colored person who escaped from slavery in the State of Missouri, and fled into free Canada, and who, unfortunately, killed a white man in making his escape. This celebrated case, as you all know, called forth much learning, and the learned judges differed in opinion in expounding the treaty and the law. The feeling of the Province from the one end to the other—the feeling of Great Britain and Ireland,—the feeling of our countrymen all over the world, was aroused and enlisted on the side of this poor man. At one time it would appear that the whole re-

sources of the British Empire would be called forth to save him from slavery and death. During all the excitement called forth by the case, the sober majesty of the law was respected. The people at home and abroad, had implicit faith in the power of truth, and that in the end it should prevail—it has prevailed. The fugitive is free, his chains have fallen off him, and slavery with all its crimes and horrors, stands rebuked and punished in his person. It was truthfully and eloquently remarked by Mr. Justice McLean, in giving his elaborate judgment in the case: 'The man,' he said, 'was committing no crime in endeavoring to escape from slavery, and to better his own condition. A love of liberty is inherent in the human breast, whatever may be the complexion of the skin; its taste is grateful and ever will be so, till nature herself shall change: and in administering the laws of a British Province, I can never feel bound to recognize as law, any enactment which can convert into chattels a very large number of the human race'—language worthy of the bench in its best of days, and worthy of the upright and manly character of him who gave it utterance.

Another Act of considerable importance was passed in the last Session of Parliament, to provide for the more general adoption of the practice of Vaccination. The small pox for ages had been a direful scourge to the human race. Death and desolation followed its devastating course. All authors who give an account of it tell us the great mortality occasioned by this loathsome disease wherever it has appeared, and the consequent terror which everywhere seized the minds of the people on its appearance among them. It is said that physicians had been acquainted with the small pox for upwards of a thousand years before any idea had been promulgated that its ravages could be arrested, and its virulence mitigated by artificial means. Several eminent physicians studied the disease with care and attention, but it was reserved for our own gifted countryman Jenner, to discover and establish the efficacy of vaccine innoculation. When vaccination was first introduced by Jenner, like other new discoveries, it encountered opposition and ridicule. But Jenner lived to see the triumph of his discovery complete. He lived to see vaccination introduced into the public hospitals, and the army and navy of Great Britain, and himself acknowledged as a public benefactor by the Imperial Parliament, which conferred upon him two grants of £20,000 and £10,000. Vaccination is now universal, and has become a subject for Parliaments to consider and governments to regulate. By our own Act of last session, the law has taken the practice of vaccination under its own vigilant eye, to a certain extent. For the future, no money will be granted or paid to any hospital unless it has a distinct and separate ward set apart for the exclusive use of patients afflicted with the small pox; and the Council of each of the cities of Quebec, Three Rivers, St. Hyacinthe, Montreal, Ottawa, Kingston, Toronto, Hamilton, London, and the town of Sherbrooke, are required to contract with some legally qualified and competent medical practitioner for one year, and so from year to year, for the vaccination, at the expense of the city, of all poor persons, and at their own expense, of all other persons resident in such city. Within three months after the passing of the Act, the Council of each such city shall appoint a convenient place in each ward of such city for the performance, at least once in each month, of such vaccination, and shall take effectual means for giving from time to time, due notice of the days and hours at which the medical practitioner contracted with for such purpose, shall attend to vaccinate persons who may then appear, and also of the time when such medical practitioner will attend to inspect the progress of such vaccination in the persons so vaccinated.

After the first day of January, 1862, parents and persons who have the care of children in the said cities, are bound to take children, within four months after birth, to the medical practitioner in attendance at the appointed place, in the ward in which they may reside, for the purpose of being vaccinated; and to exhibit them to the medical practitioner upon the eighth day following the day of vaccination, in order that he may ascertain by inspection, the result of such operation. A certificate of successful vaccination shall be delivered to the parents of the child by the practitioner who performed the operation. Any parent or person having care or custody of any child, who shall not cause it to be vaccinated within the period prescribed by the Act, shall be liable to a penalty of five dollars, recoverable upon a summary conviction.

It is to be trusted that the authorities of this city will employ a competent practitioner for Kingston, to carry out the requirements of the law, and appoint a proper place in each ward of it, for the purposes of the Act. Although the provisions of the Act are for the present restricted to the nine cities of Canada and the town of Sherbrooke, it is not improbable but they will be extended in due time to all towns, villages, and townships in the Province. In the meantime people living in towns, townships and municipalities, not included in the Act of Parliament, should take their children to a qualified medical practitioner within the time mentioned in the statute, and have them properly vaccinated. They owe this duty to the children, to themselves, and to society at large. If we cannot extirpate this loathsome disease, let us do all in our power to circumscribe its progress, and avail ourselves of every security which science and intelligence have placed within our reach against the virulence of such a dreadful malady.

The Act which was passed last year for the purpose of exempting certain articles from seizure in satisfaction of debts, has been amended by confining its operation to debts contracted after the 19th day of May, 1860.

The Act respecting the investigation into accidents by fire has also been amended. The party requiring the investigation, hereafter must pay the expenses of such investigation, unless the investigation be ordered by a writing under the hand and seal of the Head Officer of the Municipality, and of at least two other members of the Council thereof.

Acts were also passed for the better assignment of Dower: and to repeal the laws relating to the registration of judgments in Upper Canada.

All new Acts, and all amendments of old laws should be promulgated as speedily as possible after they have been passed and sanctioned; and their provisions should be made known as publicly and extensively as practicable. With this view I have directed your attention to some of the most prominent Acts of last Session having force in Upper Canada.

It is an old maxim in English jurisprudence that ignorance of the law doth not excuse any man. For every man is bound at his peril to know the law of the country. Half the litigation in the country, and a great portion of the disputes which our courts and juries have to settle, arise out of an improper acquaintance with the requirements of the law. The unwillingness on the part of a large portion of the community to resort to legal advice and guidance before entering into agreements and undertakings is a fruitful source of litigation and trouble. Paper writings intending to secure rights and execute terms, are often drawn so loosely and imperfectly that the parties differ and quarrel as to the meaning and construction thereof. Resort then is had to the court for an interpretation. Often a few dollars paid in the beginning to professional man, for drawing out papers and giving a proper advice, would save many pounds and much trouble and vexation. It is not private individuals only who err in this respect, but justices of the peace, and municipalities get into difficulties themselves and cause difficulties to others by not apprehending the law, and not adhering to its forms and requirements. At almost every sitting of this court we find the first day, and often the second taken up in hearing appeals

from the summary convictions of justices. Convictions quashed for want of form and requirements. We find also every term of the supreme courts at Toronto largely occupied in contesting the legality of by-laws, and such by-laws are frequently quashed for not being framed according to law. Convictions founded upon municipal by-laws are repeatedly quashed for want of a proper by-law to support them, which occasions justice to be defeated. Enormous expenses, trouble and inconvenience are the consequences. When it is taken into consideration that municipal by-laws and proceedings bind to a certain extent the property and rights of the public, and may affect future rights, great care should be taken in the naming and passing of them. The idea has often suggested itself to me that if the various municipalities in each county would come to an agreement among themselves to employ some legal gentleman at the County Town, the County Attorney, or any other legal man, to advise them in all matters touching by-laws and other legal instruments, great saving would be effected, and much trouble avoided. The matter deserves the consideration of those concerned.

It forms a part of your duty to visit the gaol, to examine the condition of the prisoners, and the state of the building. You should see that the rules and regulations which the Inspectors of Prisons have promulgated at the commencement of the year, are complied with by the officers in charge of the gaol, who will furnish you with a copy of such Rules and Regulations.

SELECTIONS.

THE NEW LAW OFFICERS OF THE CROWN IN ENGLAND.

The new Lord Chancellor, who was recently gazetted to a peerage as Lord Westbury, of Westbury, in the County of Wilts, but who for some time to come will be better known to the public and the profession as Sir Richard Bethell, is a native of the town of Bradford-on-Avon, Wilts, where he was born June 30, 1800. His father was Dr. Bethell, a physician, resident first at Bristol and afterwards in London, the descendant of an ancient Welsh family, originally named "Ap Ithel," of which the late Dr. Christopher Bethell, Lord Bishop of Bangor, was a distant relative. Dr. Bethell, of Bristol, enjoyed the reputation of being a man of great skill in his profession; he was a man of education and considerable mental powers, and, what is more, one who in early life had little or nothing to depend upon but his medical practice. Dr. Bethell devoted himself earnestly to the education of his son Richard, the future Chancellor, who has been known to attribute whatever success he has had in life to his father's attention to his education, and to the care and skill with which that gentleman formed and disciplined his mind from his earliest years.

Sir Richard Bethell was brought up in Bristol, where his early education was conducted at a private school. Just before he attained the age of thirteen he returned home, in consequence of the school being given up, and remained at home for a short time, pursuing his studies under the care of his father. At the age of fourteen his father determined to send him to Oxford, and he lost no time in entering his name on the books for admission in Wadham College. This was in October, 1814. After some demur on the part of the authorities, in consequence of his extreme youth, he was permitted to matriculate, and went into residence as a commoner early in the following year. A scholarship at Wadham College was the subject of a competive examination in the following June; and although there were many candidates, and consequently a severe contest, young Bethell, in spite of his extreme youth, was fortunate enough to obtain it, and to be elected scholar on the day that he completed his fifteenth year—an example of precocity which, if it has ever been equalled by any living personage, has been equalled only by the present Bishop of Exeter. Whilst in residence he enjoyed the proceeds of a college exhibition for proficiency in Greek, and these resources enabled him to complete his education with but little aid from his father. He closed an under-graduate career of great promise by taking his B.A. degree in April 1818—before he was eighteen—gaining a first class in classical, and a second in mathematical honours. In due course of time he succeeded to a fellowship, having maintained himself in the meantime by acting as a resident private tutor. Soon after finishing his year of probation, he came to London, and having previously entered as a student at the Middle Temple, he began to study law in earnest. Having been called to the bar at the Middle Temple in Nov. 1823, he began practise as a Chancery barrister, and soon obtained considerable distinction, and what is better a considerable share of business. Dr. Gilbert, now Bishop of Chichester, then Principal of Brasenose College, and who had been one of his examiners in 1818, appointed Mr. Bethell counsel for his college in a suit instituted against them by a wealthy and influential nobleman in the east of England, in which an adverse decision would have been a serious blow to the society over which he presided. It is said that a very eminent counsel advised a compromise, and that the college was only encouraged to resist the action by the earnest representations of Mr. Bethell, who was then comparatively a young and untried man. The college persevered and gained the day. This success, of course, greatly augmented Mr. Bethell's practise, which continued to increase until early in 1840, when he was then nominated a Queen's Counsel by the then Lord Chancellor, the late Earl of Cottenham.

The elevation of Mr. Wigram and Mr. Knight Bruce to the judicial bench, and the death of Mr. Jacob, made way for Mr. Bethell as the acknowledged leader of the court at that time presided over by the late Sir Lancelot Shadwell, over whose mind, and indeed over whose legal decisions, Mr. Bethell was very justly supposed to have established and to exercise a very powerful influence. He continued to practise with great success in the equity courts under Lords Cottenham, Truro and Cranworth, down to the formation of the Aberdeen or Coalition Cabinet, in the month of Dec. 1852, when he was appointed Solicitor-General (Sir Alexander Cockburn being Attorney-General), and received the honour of knighthood. Meantime, on a casual vacancy which occurred in the early part of 1851, Mr. Bethell was returned to Parliament in the Liberal interest as one of the members for Aylesbury; and at the general election of the following year he regained his seat, in conjunction with Mr. Austin H. Layard, the Eastern traveller and author. He was again elected at the dissolution of 1857; but, owing to a difference which arose as to a compromise with the opposite party, in 1859 he withdrew from Aylesbury, and was a successful candidate for the support of the electors at Wolverhampton, by whom he was chosen without opposition, in the place of their veteran M.P., Mr. Thomas Thorneley, who then retired on account of increasing age and infirmity.

While engaged in the discharge of the duties of the important post of the Solicitor-General, Sir Richard Bethell greatly assisted in carrying through the Lower House the Succession Duty Bill; as also the Oxford University Reform Bill, the Bill for the Abolition of the Ecclesiastical Courts, and several other measures of importance. On the promotion of Sir Alexander Cockburn, in Nov. 1856, as Chief Justice in succession to Sir John Jervis, Sir Richard was appointed Attorney-General, in which capacity he carried, after a formidable struggle, measures for the Abolition of the Ecclesiastical Testamentary Courts, the establishment of the Divorce and Probate Courts, &c. He also brought before Parliament the Fraudulent Trustees Act, and the Charitable Trusts Act, in addition to several other important measures relating to improvements in the Equity and Common Law Courts.

When the new Court of Probate and Divorce was about to be formed, it is understood that Lord Palmerston offered the

judgeship to Sir Richard Bethell, as an acknowledgment of his distinguished services in conducting to a successful issue the important measures of law reform upon which the court was established. Patronage to the extent of some £40,000 is attached to the office; but Sir Richard declined the post, considering that the circumstance of his having had in his charge the carriage of the Bills in the Lower House might lay him open to the imputation that his exertions in connection with them had not been of that disinterested character which Parliament and the public had a right to expect at his hands.

The learned gentleman resigned the Attorney-Generalship in February 1858, the change of Administration consequent on the failure of Lord Palmerston's famous Conspiracy Bill; and returned to his former office in June 1859, although generally named at the time for the Chancellorship. The latter, however, was conferred on Lord Campbell, to whose seat on the woolsack Sir Richard Bethell has now succeeded after just two years' delay.

Amongst the important law cases conducted by Sir Richard Bethell may be mentioned the Bridgewater will case (in which Lord Brownlow and the Cust family were so deeply concerned) and the Montrose and the Shrewsbury peerage cases. In the former property was involved to the enormous extent of two millions sterling, and the case was ultimately adjudged by the House of Lords. In the last named case Sir R. Bethell appeared, in virtue of his office as Attorney-General, as assessor on behalf of the Crown; and afterwards, when out of office, during Lord Derby's second brief administration, as counsel for the infant son of the Duke of Norfolk, who was made a party to the suit.

In the House of Commons Sir Richard Bethell was an eloquent speaker and a ready debater. To use the words of a contemporary: "Unlike many honorable members, and unlike many of his brethren at the bar, he introduces the largest amount of matter in the fewest possible words; while he rarely, if ever, repeats an idea. As an illustration of his powers of oratory, it may be mentioned that shorthand-writers, in reporting many speakers, are able to lay down their pens from time to time during the delivery of speeches, without losing anything of importance. Repetitions and unnecessary phrases are so frequent and so readily detected by professional stenographers, that they can desist from their labours minutes and minutes together, and yet afterwards present an unquestionably full and accurate report. With the (late) Attorney-General, however, the case is widely different. His ideas are so aptly expressed, and his arguments so concise that a momentary inattention would indubitably result in the omission of some sentence necessary to the whole, and consequently fatal to the report." The measures recently adopted by the Inns of Court for the education of the students are largely due to the exertions of Sir Richard Bethell, or, as we ought to call him now, Lord Westbury. He has also been, from the commencement, Chairman of the Council of Legal Education.

On the 19th Nov. 1826, Sir Richard Bethell married Ellinor Mary, daughter of Robert Abraham, Esq., by whom he has a family of three sons and four daughters. Two of his sons have been called to the Bar by the Honorable Society of the Middle Temple.

Sir WILLIAM ATHERTON, the new Attorney-General, according to a sketch in the forthcoming edition of "Men of the Time," is the son of a Wesleyan clergyman, the Rev. William Atherton, and was born in 1806, in Glasgow, where his mother's family lived. He was called to the Bar at the Inner Temple in 1839, having practised as a "special pleader below the bar" for several years. He chose the Northern as his circuit, and soon rose into a successful practice. In 1852 he was elected M.P. for Durham in the Liberal interest, and was re-chosen in 1857 and 1859. In 1855 he was appointed Judge-Advocate of the Fleet, and standing counsel to the Admiralty, which post he held until his elevation to the Solicitor-Generalship in 1859, on which occasion he received his usual honour of knighthood. Sir William (who is himself we believe a staunch and active member of the Wesleyan body) is married to a daughter of Thomas J. Hall, Esq., chief magistrate at Bow-street. As a lawyer Sir Wm. Atherton is sound and safe, but not of brilliant abilities and in the opinion of the Profession he will make a very excellent judge when he reaches the bench. He is a sensible painstaking man; moderate and liberal in his views; amiable and quiet in his disposition. He is represented in Parliament to be opposed to the repeal of the Maynooth Grant, and in favour of a large extension of the suffrage, vote by ballot, extensive legal reforms, and the removal of all civil disabilities. His name, however, as yet, is not connected with any very important legal cases or Parliamentary measures.

Mr. ROUNDELL PALMER, Q.C., the new Solicitor-General, is the second son of the late Rev. William Jocelyn Palmer, many years rector of Mixbury, Oxon, by the youngest daughter of the late Rev. William Roundell, of Gledstone, Yorkshire, and brother of the late Mr J. Horsley Palmer, and of Mr George Palmer of Nazing-park, many years M.P. for South Essex, and uncle of the present Colonel Palmer, of Nazing. He is also distantly connected with the family of the late Archbishop of Canterbury, Dr. Howley. He was born at Mixbury Rectory in 1812, and educated at Rugby and Winchester schools. In 1830 he was elected to an open scholarship at Trinity College, Oxford, where he graduated as a first-class in classics in Easter Term 1834, having previously gained the Chancellor's Prize for Latin Verse, in 1831 (subject "Numantia"), and for the Latin Essay in 1835 (subject, "De Jure Clientelæ apud Romanos"), the Newdegate Prize for English verse in 1832 (subject, "Staffa"), and the Ireland Scholarship in the same year. He was subsequently elected to a fellowship at Magdalen College, which he held as a laymen down to the date of his marriage. He also obtained the Eldon Law Scholarship in 1834. (*) In the year 1837 he was called to the bar at Lincoln's Inn, and practised with great success as a Chancery barrister. In April 1849 he was made a Queen's Counsel by the then Lord Chancellor, the late Earl of Cottenham. He sat as M.P. for Plymouth, as a Liberal Conservative, from July 1847 till the general election of 1852, when he was an unsuccessful candidate for re-election, having offended his constituents by voting against the Ecclesiastical Titles Bill. His opponent, however, Mr. J. C. Mare, was unseated on petition, and Mr. Palmer was chosen into the vacant seat in the following June. He did not, however, seek re-election at the dissolutions in 1857 or 1859. He has lately been returned, as our readers are aware, for the quiet borough of Richmond, Yorkshire, which is in the patronage of the Earl of Fitzwilliam and the Earl of Zetland, and where election contests are things almost wholly unknown. Mr. Roundell Palmer, having been appointed Solicitor-General, will of course receive the customary honour of knighthood at the next levee. He has taken an active interest in most of the charities and religious institutions of the Church of England, and is an amiable and excellent man and an accomplished scholar. His English verses on Winchester College have gained a place in the literature of the age, and he was a large contributor of Latin verses to the Anthologia Oxoniensis, edited by the Rev. William Linwood in 1847. In 1849 Mr. Roundell Palmer married the Lady Laura Waldegrave, second daughter of the eighth Earl Waldegrave, by

(*) As our readers may not be aware of the nature of this scholarship, we subjoin the following extract from the *Oxford University Calendar*: "This scholarship was founded from moneys subscribed for the purpose of providing some testimonial to commemorate the political services of the Earl of Eldon, and was more especially established in order to record Lord Eldon's connection with the profession of the law, and with the University of which he was so distinguished an ornament, and at the same time to confer a real benefit upon meritorious individuals, who may have to struggle with difficulties in the early part of their professional career. The annual value of the scholarship is 200*l.* for three years. Candidates must be Protestants of the Church of England, and members of the University of Oxford, who having passed their examination for the degree of Bachelor of Arts, shall have been rated in the first class in one branch at least of examination, or shall have gained one of the Chancellor's Prizes, and who shall intend to study the profession of the law.

whom he has issue. Of Mr. Palmer's brothers one, the Rev. Wm. Palmer, late fellow of Magdalen College, Oxford, is well known for the active interest which he has taken in the question of a union between the Anglican and Greek churches, and for his publications on the subject. Another brother has succeeded to his fathers living at Mixbury; and the youngest brother is the Rev. Edwin Palmer, fellow of Balliol College, Oxford, who gained the Ireland Scolarship in 1843, and the Chancellor's Prize for Latin verse in 1844.—*Law Times.*

THE NEW BANKRUPTCY AND INSOLVENCY ACT.

On and after the 11th of October next, the Bankruptcy Act (1861) will take effect. All the complaints of Mr. Commissioner Fane, and all his letters to Lord Palmerston to the contrary notwithstanding. This measure of reform in the Court of Bankruptcy has been a long delayed one, and the struggle to obtain it has been a somewhat arduous one. Indeed, had it not been for some conciliatory feeling, and some compromises on the part of both Lords and Commons, the late session would have passed over without having accomplished reforms which all felt to be most urgently required. The proposal to appoint a Chief Judge of the New Court of Bankruptcy was well nigh fatal to the Bill. The bankruptcy judge was not merely as useless as the fifth wheel of a coach, but there was every prospect of his being a disagreeable obstacle to the progress of the Bill through Parliament. Fortunately, however, moderation prevailed; the good sense and arguments of the Lords, which were unanswered, were acknowledged, and we have now the Bankruptcy Bill, without the expensive luxury of the judge with little or nothing to do. If it be true, as was stated by the law lords, and it was not contradicted, that the present legal establishment is fully able to discharge all the duties which are likely to be brought before it in connexion with bankruptcy and insolvency, then it is a cause for congratulation that the country has been spared an unnecessary expense of £5000 a-year for a superintending functionary. Should it be found that the services of an additional judge are required, they may be easily provided another year; while if the appointment had been made, and it had happened that there was not sufficient work for the new judge, the country would still have had to bear the expense so long as the fortunate judge with nothing to do should continue to lead a life of dignified ease.

The principle which has been recognised in the new Bankruptcy Act, is that of placing the creditor in a situation as near to that in which he would be entitled to stand according to the terms of the original contract, as the altered circumstances of his debtor will allow; and to relieve the insolvent from all inconvenience and suffering which are not actually necessary for the purpose of enforcing payment to the extent of his real ability; and as far as possible to discourage the imprudence and repress the fraud in which insolvency and bankruptcy so often originate. These objects have, more or less, been kept in view in all preceding Acts with respect to bankruptcy or insolvency. They have, however, most egregiously failed, and the little reforms which have been attempted, have been made rather for the purpose of removing some particular subject of complaint, which was thought at the time improperly to weaken the security of the creditor, or to press with an uncalled-for severity upon the debtor. At one time it was the creditor who was favoured by legislation; at another time the debtor was the object of the anxious solicitation of the law-makers. A desire to protect the rights of the creditor, and an anxiety to lessen the sufferings of the debtor, have alternately predominated in such a manner as to bring the law into a state of uncertainty and confusion. It was high time that some steps were taken for placing this part of our legal system upon a sound and efficient footing. The numerous cases in which immunity has been extended to crime, and in which severity has been exercised against misfortune under the operation, if not with the sanction, of existing laws, have tended to lower and destroy the tone of commercial integrity and mercantile honour which we would wish to have seen preserved in this country.

The most important principle recognised in the Act is that of the abolition of the distinction between traders and non-traders. This distinction, which has existed for so long a period, and which has divided debtors, unable or unwilling to meet their engagements, into bankrupts or insolvents, just as the one happened to be engaged in trade, and the other was a non-trader or professional man, has at last ceased to exist. It is a distinction which appears to have had its origin in feudal times, and when a marked line was drawn between persons engaged in commerce, and the military and territorial portion of the community. In the present state of society it was a distinction which it was very difficult to maintain in an age of railways, mining companies, and steam-ships, and other trading companies. It has become exceedingly difficult to define what constitutes a trader or non-trader. A shareholder in a railway company is practically a carrier; a holder of shares in a steam-shipping company is a shipowner; and it is not easy to understand why a hundred persons joined together in a trading enterprise should be treated as insolvents because they please to enrol themselves in a joint-stock company, while any number of persons less than six trading in copartnership would be liable to be treated as bankrupts in the event of non-payment of their debts. The Act, therefore, very properly provides that all debtors, whether traders or not, shall be subject to its provisions; but it provides that the Act shall only be applied to persons who are not traders in respect of some one of several specified acts of bankruptcy. These acts of bankruptcy are—persons going or remaining abroad, or making fraudulent conveyances, with intent to defeat or delay their creditors; lying in prison or escaping out of prison; the trader filing a declaration that he is unable to meet his engagements; suffering execution to be levied, or his goods to be sold under such execution. The commission of any one or more of these acts will bring the non trader within the provisions of the Act, and his creditor may thereupon issue out a judgment-debtor summons against him. This summons is to be served upon the debtor personally, unless when he is not resident in England; and in such cases the court may order service in such manner and form as it shall deem fit. If the court has reason to believe that the debtor is keeping out of the way to avoid service, then a notice in the *Gazette* and one or more newspapers that the debtor "is wanted," for the purpose of being served, shall be deemed sufficient to justify further proceedings. After such notice or service has been made, the debtor, whether trader or non-trader, must appear before the court on a day to be named, and produce all books, papers, and documents relating to property applicable to or alleged to be applicable to the satisfaction of the debt. Upon failing to pay after the service of the judgment summons, or refusing to obey the order of the court, the debtor may be committed as under the existing law. A debtor may petition for adjudication of bankruptcy against himself. In the case of creditors petitioning for adjudication against their debtor, the debt must amount, if to one creditor, to £50; to two creditors, to £70; and to three or more, to £100 and upwards. In the case of a non-trader, the debt due to the petitioning creditor must, however, have been contracted after the passing of the present Act, its provisions not applying to the non-trader in the case of debts made before the Act became law. It is not in this matter retrospective in its action.

After the adjudication of bankruptcy, and at the first meeting under a bankruptcy, the creditors may remove the proceedings to any County Court, or if they think fit, determine to wind up the estate under a private arrangement, and also decide whether the bankrupt shall have any and what allow-

ance of support. The official assignee is to collect the debts not exceeding £10, and the court is to order into whose custody the books and papers belonging to the estate shall be deposited. The creditors are to determine whether the estate shall be realized by an official assignee, or assignees chosen by themselves, and in the latter case may allow them the assistance of a paid manager. All moneys received by the assignees are forthwith to be paid into the Bank of England, to the account of the Accountant in Bankruptcy, and in country districts where there shall be no branch of the Bank of England, then into such other bank as the court shall direct. The creditor's assignee must, every three months, submit a statement of his accounts, with vouchers, to the official assignee for examination; and after such accounts have been passed the official assignee is to send a printed copy thereof, or a statement showing the nature and result of the transactions and accounts of the assignee, to every creditor who has proved under the bankruptcy. The proof of debts may be made by sending to the assignee, through the post, a statement of such debt, and of the account, if any, between the creditor and the bankrupt, together with a declaration signed by the creditor that such statement is a full, true and complete statement and account between them. Persons making false statements are to be liable to indictment for misdemeanor, and all the statements of account are to be compared with the books and papers, and be kept by the assignee for the purpose of verification. The classification of the certificate is abolished by the Act. The bankrupt after the passing of his last examination is to be entitled to an order of discharge. Stringent penal clause are provided, and for a variety of offences the court may summarily order imprisonment for any period not exceeding one year, or may refuse or suspend the order of discharge, or attach conditions thereto as to future property. For offences made misdemeanors under the Act, bankrupts may be tried in the Court, with or without a jury, at the option of the bankrupt, and on conviction may be imprisoned for any term not exceeding three years, and be liable to any greater punishment attached to the offence by any existing statute. The court may direct the creditors assignee, official assignee, or any creditor to act as prosecutor, and the costs of such prosecution will be borne in the same manner as the expenses of prosecutions for felonies are now borne; and other costs incurred by such prosecutor not so defrayed are to be paid out of the Account-General's fund. Important facilities are afforded to enable a debtor and his creditors to effect private arrangements under trust or composition deeds. A majority of creditors in number, including three-fourths in value, may, on execution of a deed of arrangement, and registering it in the court, bind a minority, and are to have the use of the court in all cases in which they shall require its assistance to decide questions as to disputed claims, or any differences that may arise between the parties interested in the debtor's estate. The court is not, however, to interfere in any manner except its aid is invoked by some person having a direct interest in the matter. Every deed of composition must be registered. The official assignee is called upon to make a report to the court, on the state of the bankrupt's accounts. One year's parochial rates may be paid in full out of the estate of the bankrupt. When the order of discharge has been granted by the court it will be a sufficient plea in all actions for debts contracted prior to bankruptcy; the order differing in this respect from the discharge at present given by the Insolvent Debtors' Court, where the future property of the insolvent is still held liable for the payment of debts. An appeal to the Court of Appeal in Chancery on the part of creditors, bankrupts, or assignees, may be made within thirty days against the decision of any commission in bankruptcy. At the expiration of four months, or sooner, from the date of the adjudication of bankruptcy, the creditor's assignee is to submit to a meeting of the creditors a statement of the whole estate of the bankrupt, the property recovered and the amount outstanding, and the creditors are to determine whether any and what dividend shall then be paid, and what allowance shall be made for the bankrupt; and meetings of a similar kind, and for a similar purpose, are to be held every four months until the whole estate of the bankrupt shall be realised and paid as dividends. The Courts in Scotland and Ireland are made auxiliary to the court in England for the purpose of examining witnesses; and orders made in England may be enforced in Scotland and Ireland. Acts of misdemeanor include the non-surrender of the bankrupt at the time specified, concealment of books or property, removal of property with intent to defraud his creditors, if within sixty days of the adjudication; the proving a false debt; omission from the schedule of any effects or property; the mutilation or alteration of books with a view to defraud; concealment of any debt; statement of petitioner's losses or expenses; obtaining goods on credit within three months of bankruptcy, with intent to defraud, and disposing otherwise than by *bonâ fide* transactions of goods obtained on credit within three months of the bankruptcy, and remaining unpaid for. Each of these acts will subject the bankrupt to a charge of misdemeanor, for which the court may order prosecution. The salaries to be given under the Act are: for the chief registrar, £1400; the registrars in London, £1200; in the country, £1000; the registrar in attendance on the chief judge, £1200; the taxing master, £1400; the accountant in bankruptcy, £1500; the registrar of meetings, £250. The messengers of the Court of Bankruptcy are to be continued in their office, but any vacancies which occur are not to be filled up until the number has been reduced to two in London, and in the district court to one; the remuneration, however, instead of amounting to the extravagant sums which these officers have hitherto received, exceeding in almost every instance the salary of the commissioners themselves, will not in future exceed £500 in London, and £400 in the country. The official assignees in London will each receive £1200, and £1000 in the country; but in the case of future appointments the salaries are not to exceed £1000 and £800 respectively for London and the country. Provision is made for retiring pensions for commissioners, registrars, and other officers, at the rate of two-thirds the salary after service of twenty-five years. The Court of Bankruptcy, as constituted by the Act, will have all the powers and authorities of the superior courts of law and equity, and all the jurisdiction, powers and authorities now possessed by the Court for the Relief of Insolvent Debtors in England. The Act received the Royal assent on the 6th Aug., and is to be cited for all purposes as "The Bankruptcy Act 1861." The Act contains 232 clauses, and, with the schedules, adds seventy one pages to the collection of statutes.—*Law Times.*

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 230.)

Reg. v. *Evans* (7 Cox, C. C. 293,) is a leading case in reference to the fourth offence—according to our division of sec. 3 of the forgery Act—namely, acting or professing to act under false color or pretence of process; and establishes the important principle that it is not necessary to shew that the document used bore any resemblance to the genuine process of the court.

This case was decided in the Court of Criminal Appeal on a case reserved from the Montgomeryshire Sessions. The prisoner, in order to obtain a debt due to him, sent to

his debtor a letter, partly written partly printed, having at the top of the page the letters V. R. and the Royal arms, and addressed to the debtor. It was as follows:—

"SIR,—I hereby give you notice that unless the amount of your account, 10*s.*, which is due to me, is paid on or before the ——, at ——, proceedings will be taken to obtain the same, in pursuance of the provisions of the Statute 9 & 10 Vic., c. 95, of the new County Courts' Act for the more easy recovery of small debts, &c.

"Yours, &c.,

"Instructed by "FRED. MUGLESTON,

"JOHN EVANS." "*Clerk to the Court.*"

Some days after the letter had been received the wife of the debtor went to the prisoner, who represented to her that he had ordered the court to send the letter, when she paid him the debt, 10*s.* He then demanded 1*s.* 3*d.* more for the County Court expense, which she did not pay. It was contended that the letter contained only a threat if the money was not paid, and that there was nothing on the face of it to give it any appearance of a County Court process, and it was in fact different from the general process of the court.

The conviction, however, was affirmed. "It is contended," said ERLE, J., in giving judgment, "that no case falls within the section unless the false instrument purported on the face of it to be, and bore resemblance to, the genuine process of the court. It is certain, if that were so, that the section would be very nearly inoperative: for the class of persons by whom the very ignorant are generally defrauded, consists of those who, though more artful, are not much less ignorant than themselves, and who would, for the most part, use such imperfect devices as would not deceive any one at all acquainted with genuine process. Taking this view of the statute, it seems to me that there was in this case indisputable evidence of a professing to act under the false color or pretence of process."

And WILLIAMS, J., puts the case of a man falsely pretending that he was bailiff of a court and that he had a writ in his pocket, and asks, "Can it be doubted that the framers of the section meant to reach such a case? The words are quite large enough to include it, and in my judgment the statute applies whenever any one falsely pretends to have process under which he professes to act. In this case, looking at all the facts stated, the prisoner seems to me to have done so, and he was therefore, in my opinion, properly convicted."

Per CROWDER, J., "The Legislature intended to include within the operation of the section not only the cases where there has been genuine process, or some imitation of genuine process, under color of which the party charged has professed to act, but also those where, although no genuine process or imitation of it has been used, a person has been induced to part with his money by reference being made to something either verbal or written, for the purpose of inducing a belief that the money is demanded by virtue of some process of the County Court. It is impossible to doubt that the wife in this case did so believe; and there is as little doubt of the intention of the prisoner, who, according to his own statement, had obtained money from another person by the same means." And Lord CAMPBELL, C. J., observed, "Perhaps if the prisoner had merely sent the letter that would not have been enough; but when he afterwards tells the woman that he had ordered the court to send it, it purporting to be signed by the clerk, and then demands a sum of money for County Court expenses, the whole taken together affords abundant evidence that he intended the woman to believe that he had process of the court authorising his demand, and that he did falsely pretend to her that he had such process, and that under that process he was acting in receiving from her the 10*s.*, and also in claiming the County Court expenses. I cannot, therefore, entertain any doubt that this case falls within the words of the section, and also within the intention of the legislature in passing it."

Reg. v *Richmond* (8 Cox, C. C. 200,) is a more recent case on the same point. The prisoner had obtained a blank form used in the County Court office to fill in particulars for names, nature and amount of claim, &c., as instructions for the issue of County Court summons. This form the prisoner filled up, and signed it, "G. G., Registrar of T. Court," writing on the back, "unless the whole amount claimed by Mr. A. Richmond (the prisoner) be paid on Saturday an execution warrant will be issued against you. Witness my signature, W. G."

This document the prisoner sent by post to a party indebted to him whose wife went with the document to D. G., the registrar of the court, to pay the money. The prisoner was convicted, but the case was reserved for the consideration of the Court of Criminal Appeal, and that court held that the offence proved was clearly a professing to act under a colorable process of the County Court, and the conviction was affirmed.

On the other hand it has been held by Mr. Justice CROMPTON (in *Reg.* v. *Myott*, 6 Cox, C. C. 407,) that the enactment does not apply to a mere verbal assertion of authority. In this case it appeared in evidence that J. K. brought an action in the County Court of W. against J. W. for 27*s.*—that a summons issued, to which J. W. did not appear—that the prisoner Myott called at his house and said he was authorised by the court to receive the debt and costs, and if the amount was not paid on that day or before 10 o'clock the following morning he would bring an execution and take the goods. J. W. thereupon went with the prisoner to a public house and there paid the money.

CROMPTON J., stopped the case for the prosecution, saying that in his opinion the charge was not made out, as he thought the Act of Parliament applied to false instruments and not to mere false representations as to the authority or employment of the prisoner. There was no acting or professing to act under the *process* of the County Court.

The prisoner was accordingly acquitted.*

No prosecutions have taken place in this country under the provision in question, which, as shown, is similar to that in England relating to the County Courts, the offence being a felony in both countries. The intimidation of persons in a humble position of life by means of false process or pretended authority of the regular tribunals, is not merely a gross fraud upon the public, but tends to bring the courts into discredit.

It is expressly enacted that the Division Courts shall not be held to constitute Courts of Record (sec. 5), though they have in some sort one of the qualities of a court of record; the judicial entries of the proceedings are made proof of themselves; for by section 42 "the entries in the clerk's books, or a certified copy thereof, are admissible in all courts and places as evidence of such entries and the proceedings referred to thereby, without further proof."

The Division Courts are not inferior courts according to the common acceptation of the term (Bac. Abr. Courts, 392,) for the jurisdiction is not confined to causes of action arising within the judicial district or restricted to parties resident therein, and the original summons may be sent to other counties for service therein, while the judgments of the courts are enforceable on transcript in any part of Upper Canada, and may in certain cases be made operative against lands. However, strictly speaking, "all courts are inferior courts but those held *coram rege*," and as such the Division Courts are referred to in several enactments.

As to the nature and authority of the Division Courts generally, it is to be observed that in some particulars the law and proceedings of the courts are opposed to the principles of the common law, and they have no power by implication of law, except such as is absolutely necessary to effect the purpose of their creation; and this power, by implication, only arises in the absence of express provision where such exists, it must be followed in the manner and and to the extent prescribed (1 Roll. Abr. 564,—2 ditto, 277, 260, 256; Dr. Bonham's case, 8 Rep. 237, Com. Dig. tit Justices I., 1.) In this connection the provisions of the 69th section of the Act must be mentioned, viz.: "In any case not expressly provided for by this Act or by existing rules, or by rules made under this Act, the county judges may, in their discretion, adopt and apply the general principles of practice in the superior courts of common law, to actions and proceedings in the Division Courts."

The statute is comprehensive in its provisions, and the procedure is very fully traced out by the rules, and so with the general provisions of sec. 69. Any difficulty in administration is at least not probable, but if a question should arise as to how far the power by implication of law may be extended, it must be borne in mind, as before observed, that the Division Courts are partly, not in accordance with the common law, creatures of the statute law called into existence under express provisions conferring the necessary powers for their formation, these courts, as to their right, means and power of doing justice, are confined within certain limits, and all the enactments respecting them must be strictly observed.

* There was another indictment against him for a misdemeanor, in obtaining the money by falsely pretending that he was an officer of the County Court, and a person authorised by the court to apply to J. W. for the payment of the debt, and to settle the action. It appeared, however, doubtful whether the prisoner had not been authorised by J. K.'s son to obtain the money, and the sum having been in fact paid on the faith that the prisoner was authorised by the plaintiff in the action, rather than by reason of any supposed authority from the County Court, the case broke down and the prisoner was discharged.

THE LAW OF EXEMPTION.

The second section of the act of last session, cap. 27, amending the Exemption Act, being materially modified, the law on this subject, sec. 2, is as follows:

"Notwithstanding anything contained in the said eighty-fifth chapter of the Consolidated Statutes for Lower Canada, or in the twenty-fifth chapter of the Acts passed in the twenty-third year of Her Majesty's Reign, intituled, *An Act to exempt certain articles from seizure in satisfaction of debts*, the various goods and chattels which were, prior to the passing of the last mentioned Act, liable to seizure in execution for debt in either Upper or Lower Canada, shall, as respects debts contracted before the nineteenth day of May, one thousand eight hundred and sixty, remain liable to seizure and sale in execution, provided that the writ of execution under which they are seized, shall have endorsed upon it a certificate, signed by the Judge of the Court out of which the writ issues, certifying that it is for the recovery of a debt contracted before the date above named."

This provision came into force on the first day of last July. We took occasion, at the time of the passing of the Exemption Act, to point out the great injustice of the measure, and its injurious effects on the business transactions of the country. The glaring injustice of making the act applicable to cases of debt previously contracted, and contracted on the strength of the possession of property subsequently exempted, has been remedied in the amending act before us, and so far justice has been done to creditors. We draw attention to the enactment with a view of making its provisions generally known, and offering a few practical remarks.

Executions as respects debts contracted previous to the 19th May, 1860, have the same range as formerly, and the exemptions will be as set forth in the 151st section of the Division Court Act, if the Judge grants the necessary certificates.

It will be observed that the enactment only relates to executions founded on judgments in actions of contract: the words "debts contracted," &c., clearly exclude judgments in actions of tort; and section 2, before us, will have no bearing on executions in such cases.

The Judge may certify in proper cases, but is he bound to do so? Will he as a matter of course sign the certificate on being satisfied that it is true in fact? There is nothing in the act making it the express duty of the Judge to sign such certificates, but the implication certainly is that under ordinary circumstances he is called upon to do so. The time when the debt was contracted is made the hinging point to entitle to the privileges of section 3, and not the time when judgment was recovered; and it would seem that a judgment for the defendant upon set-off would be within the provision. Upon what evidence is the Judge to be satisfied as to the period when the debt was contracted? In judgments before the 19th May, 1860, the mere production of the execution showing when the judgment was recovered, and that it was in an action upon contract, would probably be sufficient. But where the judgment is recovered after that date, upon what evidence is the judge to act? In disputed cases he may certainly refer to his notes, and so satisfy himself; but in those cases where judgment goes by default, he has no means of satisfying himself when the debt was contracted by a reference to his notes or to the "judges lists." An affidavit from the execution creditor might be necessary, or the production of the original account to the judge might induce him to grant the certificate. The latter course has been adopted in some counties.

It will be observed that the certificate is to be endorsed upon the execution, and we apprehend that after a seizure under execution the judge would not certify upon that execution. A difficulty will occur in respect to executions upon transcript; for it is the judge of the court out of which the writ issues that must certify, and the judge of the outer county can have no knowledge of the particular cases. This difficulty has been met in one county in this way; the judge of the county from which the transcript issued, certified thereon to the judge of the county into which it was sent, that the judgment was "for a debt," &c., and the latter judge then, we believe, certified on the execution, acting on the strength of the first judge's certificate.

A form of certificate we have seen was very simple, and we think all the statute requires, viz:

"I certify, in accordance with the provisions of the second section of the Act 24 Vic., cap. 27, that this writ of execution is for the recovery of a debt contracted before the 19th May, 1860."

A.—— B.——, *Judge Co.*

Will some of our correspondents inform us what is the practice in their counties under this new law?

U. C. REPORTS.

COURT OF ERROR AND APPEAL.

(Reported by THOMAS HODGINS, Esq., M. A., Barrister-at-Law.)

SMITH v. NORTON.

Dower—Seisin of husband—Measure of damages and yearly allowance.

A. conveyed land to B. in 1833, and on the same day took back a mortgage for the whole purchase money. B. paid nothing for either principal or interest, and in 1840 re-conveyed absolutely to A.—the land being then vacant. B.'s wife did not join in either mortgage or re-conveyance, and 18 years after B.'s death, brought an action against C. who had purchased from A. soon after the re-conveyance, and had erected valuable buildings.

Held, 1st. That the seisin of the husband B. was complete, and that the widow was entitled to dower, (*Potts* v. *Meyers*, 14 U. C. Q. B. 499 affirmed.)

2nd. That the damages to which she was entitled only from the time of demand made, should be calculated upon the average value of the land during that period, irrespective of improvements made by the tenant; and that the allowance to be paid to her should be estimated upon a computation of one-third of the occupation value of the ground only, without the buildings.

Held (Per Esten, V. C. and Hagarty, J.,) That the Court of Appeal sits as a Court of Law or Equity, according as the case comes from the Common Law Courts, or from the Court of Chancery.

(9th September, 1861.)

SPECIAL CASE.

This is an action of Dower, brought by the demandant, as widow of Asa Norton, deceased, to recover her dower in Town Lots, numbers Fifteen and Sixteen on Dundas Street, in the Town of Whitby, in the County of Ontario, containing one half of an acre.

1. It is admitted that a demand of dower was duly served by the above named Demandant who is the widow of the said Asa Norton, on the tenant, George Smith, who is the owner in fee of the said land, on the 21st day of May, 1860.

2. That the said Eliza Norton was the wife of the said Asa Norton on and before the 18th of January, 1833.

3. That Asa Werden was owner in fee of the land, and by Deed dated 18th January, 1833, for £30, conveyed said land in fee to said Asa Norton—that said deed was duly registered in the proper Registry office on the 7th February, 1833.

4. That Asa Norton on the same day reconveyed to Asa Werden by way of mortgage for the whole purchase money.

5. That Asa Norton never paid any part of the purchase money or interest, and by deed dated the 28th day of August, 1840, reconveyed the said land absolutely to Werden in fee.

6. That Demandant did not bar dower in either mortgage or reconveyance.

7. That subsequent to the deed to said Norton, and prior to the reconveyance to Werden, said Norton had fenced the Lots and cultivated potatoes in them.

8. That Norton died on the 6th day of June 1842, at which time the premises were vacant Lots, worth about £125.

9. That after the death of Asa Norton, Werden, by deed, dated the 1st May, 1843, conveyed to tenant George Smith, in fee, who built a house and other buildings on the Lots which he occupied as a Hotel, and which are still so occupied by his Tenant at a yearly rental of £187 10s. or thereabouts.

10. That about one third the said Lots are still uncovered by buildings.

The Demandant contends that she is entitled to have assigned to her one third in value of the premises in their present improved state.

The Tenant contends that the Demandant's husband had no sufficient seizin of the premises to entitle her to Dower.

And that if entitled to dower, she is only entitled to have assigned to her one-third of the premises as they were at the death of her husband, or one-third in value calculated as of the date of her husband's death—or one-third of the present value of the land, irrespective of the buildings.

The Questions for the opinion of the Court are:—

First—Whether the demandant is entitled to Dower in the said land.

Second—If the Court should be of opinion that the Demandant is entitled to Dower, then whether she is to have one-third in present value assigned to her as the Demandant contends, or whether she is to have one-third in value calculated as of the date of her husband's death, or one-third of the present value irrespective of the buildings, as the tenant contends.

The case was argued in the Court of Queen's Bench in Michaelmas Term, 1860, when the rule was made absolute. The judgment of the Court is reported in 20 U. C. Q. B., 218.

The Tenant appeals from the said judgment and states the following grounds of appeal:

1st. That under the facts stated in the special case, the Demandant is not entitled to Dower in the lands in question; inasmuch as her husband had no sufficient seisin thereof to entitle his wife to Dower.

2nd. That if entitled to Dower, the Demandant is only entitled to one-third as of the present value, such value must be computed as of the land alone, irrespective of the value of the buildings thereon, or of the increased value of the land by reason of those buildings

The Demandant contends and alleges that there was and is no error in the judgment of the Court of Queen's Bench.

1st. Because under the facts stated in the special case, the Respondent was and is entitled to Dower in the lands in question: such facts showing an estate in her Husband of which she was dowable.

2nd. Because the Respondent is entitled by law to one-third of the present value of the land including the improvements thereon.

C. S. Patterson, for the appellant.

M. C. Cameron, for the respondent.

ROBINSON, C. J., I consider it would be a great reproach to the law if this demand for dower should be allowed. I continue to be of the opinion I expressed in the case of *Potts* v. *Meyers*, 14 U. C. Q. B. 499, although I submitted to the judgment of the other members of the Court below in this case; and now as the case comes before me as a member of the Court of Appeal, I feel myself at liberty to give an independent judgment. The right to dower depends upon the seisin of the husband, but in this case I do not think the husband was ever seised of the land, the deed and mortgage being one transaction, and there being only an instantaneous seisin. The case of *Thompson* v. *Webster*, L. T. N. S. 750, was where a mortgage and settlement were both executed the same day in fulfilment of one contract, and it was held that they formed but one transaction. In equity the widow would never be held entitled to dower; and in the United States the question has been treated in several cases as perfectly clear, following the common law of England. Chancellor Kent, long at the head of a Common Law Court, has thus laid down the law in his commentaries: A transitory seisin for an instant, does not give the wife dower in her husband's lands; nor if the husband takes a conveyance in fee and immediately thereafter mortgages back to the vendor. On the question of damages I continue to be of the opinion expressed in the court below. I follow the decision of the Queen's Bench in the case of *Robinett* v. *Lewis*, (Dra. Rep. 272); but the question of the measure of damages cannot hereafter occur as the Legislature has settled the question by the Act 24 Vic., chap. 40. In my opinion the appeal should be sustained.

DRAPER, C. J., C. P.—I agree with the latter part of the judgment of the learned Chief Justice as to the measure of damages in cases of dower as given in the report of this case in 20 U. C. Q. B. 218; but I differ from him as to the first part, in regard to the right of the widow to dower, and consider that there was such a seisin in the husband as entitled the demandant to dower. I therefore follow the judgment of the majority of the Court of Queen's Bench in *Potts* v. *Meyers*, and think the appeal should be dismissed.

ESTEN, V. C.—I agree with the learned Chief Justice Draper. The cases which have occurred in England are cases where property has been conveyed to one for the use of another—the effect of which under the statute of uses is to convey the estate to the party for whose use it is conveyed to the person first named, who only acts as a conduit to convey it to the party intended, and in which first party there is only an instantaneous seisin not entitling a widow to dower. But the case is different where the mortgage and deed are one transaction. In that case the person is by the deed fully and perfectly seised of the estate until by his own act (not the act of another) he parts with it by executing the mortgage. Now, in this case we sit as a court of law or equity according as the appeal comes from the Common Law Courts or Chancery. A court of law could not compel specific performance of a contract to make a mortgage, it could only give damages, but in equity the purchaser would be compelled to make a mortgage to secure the purchase money. In the first case the party is fully seised of the land, and the damages would be the amount of the mortgage, and in the latter the purchaser would be a trustee for the vendor to the amount of the purchase money. Now, such being the view I take of the case, I must hold that having obtained a conveyance of the estate, the husband was so seised of the property as that the dower of the wife could attach and has attached, and that consequently this demandant is entitled to have her dower in the lands. The appeal therefore should be dismissed.

BURNS, J.—I see no reason to change the view I took of the right of dower in the case of *Potts* v. *Meyers*. In coming to that decision I considered well all the cases I could find bearing upon the question in the United States. The United States courts only disposed of a portion of the question. As to the measure of damages in the case, I agree with the other members of the Court.

SPRAGGE, V. C.—I agree with the majority of the court that the appeal should be dismissed. In equity, the purchaser is only a trustee for the vendor to convey back the estate by way of mortgage to secure the purchase money, and then dower would not attach. But in this case the seisin was complete in law, and consequently the widow is entitled to dower.

RICHARDS, J., Concurred with the court below.

HAGARTY, J.—I concur with the majority of the court. If there is relief in equity it is a pity that the case did not go to equity, for it may yet go to a Court of Equity and come up before us again, and we may then have to give a judgment the opposite to that we are now giving. I think it a pity we cannot dispose of it at once in both law and equity. But we have only to dispose of the case as a court of law, and in that view I am clearly of opinion the widow is entitled to her dower, and that the appeal should be dismissed.

Per Cur.—Appeal dismissed with costs.

QUEEN'S BENCH.

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*)

BELLHOUSE v. GUNN.

Interpleader—Costs.

Two interpleader actions having been twice tried, resulted in favour of the plaintiff, the claimant of the goods in question, and on application to the judge who granted the orders to dispose of the costs, the matter was referred to full court. *Held*, that the plaintiff was entitled as of right to the costs of the actions: that the costs incurred before the issues, in procuring the order, &c., should also be paid by defendant; but the question raised as to the discretion of the court in such cases being a new one, each party was ordered to pay his own costs of the application.

(E. T. 23 Vic.)

On the application of the sheriffs of Lincoln and Wentworth, two interpleader issues were directed to try whether two certain locomotives belonged to Gunn, the execution debtor, or to Messrs. Burton & Sadlier, claimants of them. These orders had been made by the Chief Justice of this court. The issues were tried at Hamilton, at the fall assizes, in 1859, in one of which the jury not agreeing were discharged, and in the other the jury found a verdict in favour of Messrs. Burton & Sadlier. The court upon application set the verdict aside, and ordered a new trial. Both issues came on again for trial at the spring assizes, 1860, and in both verdicts were rendered in favour of Messrs. Burton & Sadlier. Applications were again made for a new trial, which rules were ultimately discharged. (See *Burton* v. *Bellhouse*, 20 U. C. R. 60.)

The Chief Justice, who made the interpleader orders, was applied to for the purpose of disposing of the costs of the issues and different proceedings under the orders, but entertaining some doubts as to the proper order to make, and whether it was discretionary with the judge to make such order as to him seemed to be right according to the facts of the case as proved at the two trials, he referred the parties to the court.

Accordingly in Hilary Term last *Jackson* obtained a rule *nisi* calling upon the plaintiff, Bellhouse, and each of the sheriffs to

shew cause why Messrs. Burton & Sadlier should not have their costs of the issue, and otherwise attendant thereon, and of the various proceedings.

During this term *MacLennan* shewed cause, citing *Rex* v. *The Lord of the Manor of Oundle*, 1 A. & E. 299; *Rex* v. *Round*, 4 A. & E. 139; *Rex* v. *Commissioners of the Thames and Isis Navigation*, 5 A. & E. 817; *Regina* v. *The Justices of Surrey*, 9 Q. B. 37; Tapping on Mandamus, 416; *Regina* v. *Mayor of Lichfield*, 6 Jur. 624; Consol. Stats. U. C., ch. 30.

Eccles, Q. C., supported the rule, citing *Lewis* v. *Holding*, 2 M. & G. 875; *Melville* v. *Smark*, 3 M. & G. 57; *Bowen* v. *Bramidge*, 2 Dowl. 213; *Janes* v. *Whitbread*, 11 C. B. 419; *Regina* v. *Kelsey*, 20 L. J. Q. B. 283; *Dempsey* v. *Caspar*, 1 U. C. P. R. 134.

McLean, J.—By the 9th section of chapter 30, Consolidated Statutes of Upper Canada, it is declared, (as in 7 Vic., ch. 30, sec. 6,) that the costs of all such proceedings, that is the costs of all proceedings authorised by the preceding sections, shall be in the discretion of the court or judge. Then the question is in what manner that discretion must be exercised in the present case? The whole property claimed has been decided to belong to the plaintiff in the interpleader cases, and therefore there is no occasion for exercise of the same discretion as in the case of *Lewis* v. *Holding*, (2 M. & G. 875,) where the court gave neither party the general costs of the issue, nor the costs of the rule, but gave to each such portion of the costs as applied to the part on which he had succeeded, and allowed the claimant his costs of the application under the Interpleader Act.

In the case of *Melville* v. *Smark*, (3 M. & G. 57,) the court decided that the claimants of goods taken in execution having failed upon an issue directed to try the validity of the claim under the Interpleader Act, the proper course was to require them to pay the costs of the application and of the subsequent proceeding, and Tindal, C. J., in delivering judgment, said, "In cases of interpleader, the Court of Chancery always requires the unsuccessful party to pay the costs. The same course has been adopted in practice in the courts of common law, acting under the late statutes. I see no reason for pursuing a different course when claimants happen to be assignees of a bankrupt." In the case of *Janes* v. *Whitbread*, (11 C. B. 419,) the verdict in an interpleader case being unsatisfactory, a new trial was granted on payment of costs. Maule, J., said "The verdict was unquestionably against the evidence. I see nothing to take the case out of the general rule as to costs, which applies as well to trials of interpleader issues as to any other cases."

The execution creditor, the plaintiff in the suit against Gunn, having caused property to be seized which has been decided by several juries to be the property of Burton & Sadlier, the claimants, and they having been compelled to proceed by the interpleader suits to establish their right to such property, and being successful in that object, are entitled to all costs to which they have been put in obtaining the interpleader orders, and all subsequent costs in the suits instituted under the orders. But Bellhouse having been brought into court on this occasion by a summons issued at the instance of Messrs. Burton & Sadlier, relating to the costs, and the question being a new one as to the discretion of the court or a judge with reference to costs, and how such discretion is properly to be exercised, I think the rule must be made absolute, but without costs on either side, on this application, each party paying their own costs.

Burns, J.—The costs of these cases must now be very considerable, and a matter of some importance, and may, as Tindal, C. J., said in *Lewis* v. *Holding*, (2 M. & G. 875,) be divided into three descriptions—costs incurred before the issues were ordered, and attendant upon the exercise of the sheriff's duty upon the *fi. fa.*, costs of the trial of the issues and consequent thereon, and costs of the subsequent applications.

The question is whether the power of the court or a judge, under the provisions of the Interpleader Act, ch. 30, of the Consolidated Acts of Upper Canada, is or not discretionary over all these costs? With respect to the costs of the interpleader rule there can be no question, but a question has been made as respects the costs of the issues and attendant thereon. Messrs. Burton & Sadlier, as plaintiffs in the issues, claim to be allowed those costs on the general principle of law that the successful party is entitled to be paid his taxable costs as in any ordinary case, and that these being interpleader issues makes no difference; while, on the other hand, Bellhouse contends the court or a judge is invested with power to grant or withhold those costs according as the facts or circumstances of each case may call for.

In the case I have already mentioned, of *Lewis* v. *Holding*, Chief Justice Tindal said he could not consider an interpleader issue as in the nature of an action of trover, in which by the strict rule of law, founded upon the Statute of Gloucester, the plaintiff is entitled as of right to the costs of the cause if he succeeds as to any part of it, and he thought the court had a more extended jurisdiction under the Interpleader Act than under the Statute of Gloucester. He further makes this observation, "It seems to me that we are entrusted with a discretion as to costs, in the exercise of which we ought to be mainly guided by the decision of the jury." It must be observed that the court was there dealing with a case in which the jury had found that part of the property belonged to the plaintiff and part of it to the defendant. The direction the court gave was that the master should tax the bills of both sides and then set off the one against the other. In the case before us there can be no division as to the costs of the issues, the plaintiffs in the interpleader issues having succeeded must get the costs or not at all.

In *Janes* v. *Whitbread*, (11 C. B. 406,) in disposing of the costs upon granting the new trial in that case the court said, "We feel some difficulty as to the costs," and Jervis, C. J., speaking of the discretionary authority of the court, said that he apprehended that power applied to the costs of the interpleader rule only. Mr. Justice Maule, who had tried the case, stated that the verdict was unquestionably against the evidence, but he saw nothing to take the case out of the general rule as to costs, which applies as well to interpleader issues as to any other cases; and the court ordered the new trial only on payment of costs.

In *Bowen* v. *Bramidge*, (2 Dowl. 213,) the court of exchequer laid down the rule in an interpleader issue that the party who succeeds is entitled to the costs of the action, and the party who fails must pay them.

In the present case Messrs. Burton & Sadlier succeeded, and there is nothing to deprive them of the rule thus stated in *Bowen* v. *Bramidge*, unless the court has the power of discretion over the costs of the action as well as the other costs. I have not been able to find any authority supporting such a proposition. I do not think the case of *Lewis* v. *Holding* upholds any such view. The verdict was a divided one. Each party was right to a certain extent, and the court only did what would have been done had there been two issues instead of one; for in the former each successful party would have recovered costs against the other, and the one judgment for costs might in such case have been set off against the other, but the whole matter being disposed of by the one issue, the court applied the principle which would have been allowed in the other case. Therefore, instead of that case being an authority for saying that a discretion is given over the costs of the issues irrespective of the finding of the jury, I think it supports the general proposition that costs of the issue are awarded to the successful party.

The Interpleader Act was made in relief of sheriffs, and the consequence is when a claimant is brought before the court he is deprived of his action against the sheriff, and he is made to join issue with the execution creditor with respect to his claim upon the property. Now, although he may, notwithstanding the interpleader, perhaps bring his action against the execution creditor in some cases, where the creditor is active in setting the sheriff in motion, yet he is deprived of any remedy against the sheriff. I can hardly imagine the legislature intended that the claimant should be subject to be deprived of his costs of the action which he is compelled to engage in for the relief of the sheriff. It is enough to deprive him of any remedy against the sheriff, without also giving the court a discretion to deprive him of costs of an action he must go on with, and if he does not must pay costs. To hold otherwise would, I think, be holding that the Interpleader Act by implication has repealed the Statute of Gloucester in such cases as the present.

I am therefore of opinion that the costs of the issues and trial, with the costs consequent thereupon, of right should be paid by Bellhouse to Messrs. Burton & Sadlier: that the cost incurred before the issues ordered—that is of the interpleader summons and consequent upon the sheriff discharging his duty with respect to the property—should be paid by Bellhouse; and the costs incurred by the parties since in procuring the summons and order in chambers as to the costs, and the costs of this application, should be divided between the parties—that is, each side paying his and their own costs.

THE QUEEN V. THE MUNICIPAL CORPORATION OF THE COUNTY OF HALDIMAND.

Mandamus to repair bridge—Indictment—Practice.

A mandamus *nisi* having issued commanding a municipal corporation to repair and rebuild a bridge, it appeared on the return that the liability was disputed on several grounds, it being contended that the bridge did not belong to defendants: that it was not constructed on the site provided by the charter of the original company which built it, and was in an unfit and dangerous place; and that it should be repaired by another municipality.

Held, that under these circumstances a mandamus would not lie, and that the applicants must proceed by indictment; and *semble*, that the latter is the proper remedy in all cases, except where a charter has been obtained to construct the road, and the work has never been done. (Q. B. E. T. 24 Vic.)

Eccles, Q C., during last term obtained a *mandamus nisi*, of which the following is a copy.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Municipal Corporation of the County of Haldimand, greeting.

Whereas we have been given to understand in our court before us, that by a certain act of parliament passed on the twentieth day of April, in the year of our Lord one thousand eight hundred and thirty-six, certain persons were incorporated under the style and title of "The Cayuga Bridge Company," and authorised and empowered to build and construct a bridge over and across the Grand River at Cayuga, in the said county of Haldimand, for the use and benefit of the public generally:

That pursuant to the terms and provisions of the said act of parliament the said bridge was built and constructed at the place and for the purpose aforesaid, and was used and enjoyed by the public generally:

That on or about the fifth day of August, in the year of our Lord one thousand eight hundred and forty-two, William Kingsmill, Esquire, sheriff of the then district of Niagara, (within which the said bridge was situate,) under and by virtue of certain writs of execution to him directed, sold the said bridge to one William Fitch, and by a certain deed poll conveyed the same to him, and thereby the title to the said bridge became vested in him, the said William Fitch:

That by a certain indenture made between the said William Fitch, of the one part, and the said municipal corporation of the county of Haldimand, of the other part, and dated on the seventeenth day of October, in the year of our Lord one thousand eight hundred and fifty-one, the said William Fitch duly conveyed unto the said municipal corporation all his right, property, title, interest and demand of, in and to the said bridge, and thereby the same became vested in the said corporation:

That the said municipal corporation have from the time of the said conveyance to them as aforesaid until the happening of the accident hereinafter mentioned, repaired and maintained the said bridge, and used and suffered the public generally to use and enjoy the same as a common and public highway:

That some time in or about the month of March now last past, the said bridge became and was greatly damaged and injured, and parts thereof were carried away by the freshets of said river, and thereby became useless and impassable, and by reason thereof the public generally have been deprived of the use and benefit thereof, and of the means of crossing said river at the place aforesaid, as they had been accustomed to do:

That application has been made to the said municipal corporation to cause the said bridge to be repaired and in part rebuilt, but they have neglected and refused to do so, and have declared their intention of abandoning the same, and of allowing it to remain in its present dilapidated state, to the great inconvenience, damage and injury of the public in general, and of the inhabitants of the village of Cayuga in particular, as we have been informed from the complaint of Joseph Harssell, Esquire, reeve of the said village of Cayuga, and a ratepayer within the said county of Haldimand.

Whereupon he hath humbly besought us that a fit and speedy remedy may be applied in this respect, and we being willing that a due and speedy justice should be done in this behalf as it is reasonable, *We therefore command you* the said municipal corporation of the county of Haldimand, firmly enjoining you, that immediately after the receipt of this our writ you do properly repair and in part rebuild the said bridge, and keep the same repaired and maintained, so that the public generally may use and enjoy the same as a common and public highway for crossing the said river at the said place, or that you do shew us cause to the contrary thereof, lest on your default the same complaint should be repeated to us, and how you shall have executed this writ make appear to us at Toronto, on Friday, the thirty-first day of May instant, at twelve o'clock, noon, then returning to us this our said writ.

Witness the Honorable Sir John Beverley Robinson, Baronet, Chief Justice of our said court, at Toronto, this twentieth day of May, in the year of our Lord one thousand eight hundred and sixty-one, and in the twenty-fourth year of our reign.

By the court,

(Signed) CHAS. C. SMALL.

Issued from the office of the Clerk of the Crown, Toronto,

(Signed) CHAS. C. SMALL.

Affidavits were filed verifying the statements contained in the writ.

The return, supported by affidavits, set out that the bridge was built originally not on the line of the Canboro' and Simcoe road mentioned in the statute 6 Wm. IV. ch. 10, but deviated therefrom about 300 feet northerly: that the sale under execution in 1842, was upon a *fi. fa.* against goods and chattels, and not against lands: that the bridge was wholly within the limits of the village of Cayuga: and lastly, that the site selected originally, and upon which the bridge was built, was not suitable, but the original one mentioned in the charter, that is, the continuation of the Canboro' and Simcoe road, would be preferable.

Adam Wilson, Q. C., shewed cause. 1. The sheriff could not sell the interest of the company in this bridge. They could not do it themselves, it would have been a dissolution of the company, and the sheriff therefore could not do it for them. All that he could possibly sell would be the tolls, for which the assistance of the Court of Chancery would probably be required, but he could not dispose of the bridge. The public have an interest in it as part of the highway, and it cannot be sold. (Burns, J., referred to *Scott* v. *The Trustees of Union School Section No.* 1, *in Burgess, and No.* 2, *in Bathurst* (19 U. C. Q. B. 28), where it was held that land conveyed to the trustees for the purposes of a school house could not be sold under an execution.) Grant on Corporations, 306. In *Arnold* v. *Ridge* (13 C. B. 760), it is said, quoting from Dyer, 7 *b*, "A man can never have a thing extended on an execution, unless he may grant and assign it." In *Legg* v. *Evans* (6 M. & W. 36), and *The Governors of St. Thomas's Hospital* v. *The Charing Cross R. W. Co.* (7 Jur. N.S. 256), this seems to be taken for granted. *Furness* v. *The Caterham R. W. Co.* (4 Jur. N.S. 1218, S. C. 27 Beav. 358), *Fenwick* v. *Laycock* (2 Q. B. 108), *Regina* v. *South Wales R. W. Co.* (14 Q. B. 902). These cases shew that the original bridge company could not have sold their bridge, and if so at common law the sheriff could not.

If the act, Consol. Stats. U.C., ch. 49, secs. 68, 69, 70, authorises a sale by the sheriff, then he must make a valid sale, and here it should have been under a writ against lands, not goods, for the bridge is not chattels, but realty, being part of the highway.

There is another objection fatal to this application. The 6 W. IV. ch. 10, requires that this bridge shall be built on the main Canboro' and Simcoe road, and the affidavits shew that it never was built there, but on an entirely different road. They had no authority to construct the bridge where they did, and the court therefore cannot compel us to put a bridge where there is no right to place it. In *The Mayor of Norwich* v. *The Norfolk R. W. Co.*

(4 E. & B. 397), it is held expressly that erecting a bridge out of the authorised line was an act *ultra vires*, and all contracts relating to it were void. If it is 300 feet out of the way, as here, it is the same in effect as 300 miles.

Again, it is within the Municipality of the Village of Cayuga, and the county has no jurisdiction there. Consol. Stats. U. C., ch. 54, secs. 336, 339. Sec. 342, sub-sec. 7, shews that they may obtain aid from the county to build the bridge, but that is a very different thing from making the county build it themselves.

Another reason urged to the discretion of the court is, that if the bridge really were on the line of road, the place is shewn to be unsafe and improper for the purpose.

As to whether a mandamus is the proper remedy in such a case, there are authorities on both sides of the question. *Regina* v. *The Bristol Dock Co.* (2 Q. B. 64), *The King* v. *The Severn and Wye R. W. Co.* (2 B. & Al. 646). As to the obligation on a company to complete their work when partly performed, see *York and North Midland R. W. Co.* v. *The Queen* (1 E. & B. 860).

We contend therefore that the writ should not go—1. Because the county has no jurisdiction. 2. Because the road has never passed properly from the original company, which therefore still exists. 3. Because the original site is not that on which the bridge has been constructed, and we cannot be compelled to put it in the wrong place. 4. Because it is shewn to be an improper and dangerous site for the purpose.

Eccles, Q. C., (*J. R. Martin* with him) contra. As to the sale having been made under a *fi. fa.* against goods, that appears only by recital in the sheriff's deed. It is not proved otherwise or sworn to here, and the recital, which may be wrong, cannot bind us. Moreover, if the sale was so made, there is nothing to shew that this bridge was not in fact goods; it may have been, and if so the presumption is that it was, for otherwise the sheriff should not have sold it under the writ. But under the statute referred to, Consol. Stats. U. C., ch. 49, sec. 70, it is clear that the sale being made under legal process is valid.

As to both these objections, however, it does not lie in the mouth of the county now to say that they have no title. They have assumed the bridge, they have repaired it, they have leased it, and have taken the tolls; and they cannot now say that they never owned it, and were wrong in doing all these acts.

Then it is alleged that the act (6 W. IV., ch. 10) requires the bridge to be on the Canboro and Simcoe road. The statute recites that it would be very convenient to have it on that road; it is not said that it must be there. The deviation of 300 feet is not material, and at all events there the bridge was when the county assumed it, and they assumed it in that locality. If there were no act to authorize the bridge at all, still they assumed it as a county bridge, and having done so they must continue to repair and maintain it, and cannot escape their liability,

As to the argument that the village only has jurisdiction and the county none, there was no incorporated village there when they assumed the road. It became then the property of the county, and having done so it never vested in the county. The corporation of Cayuga have never assumed it by by-law or otherwise. Consol. Stats. U. C. ch. 54, secs. 315, 316, 329. Under sec. 337, the county were authorised to assume the bridge, which they did. The village never got it, and never could, for the county would not give it up so long as they could collect tolls from it. Under secs. 339 and 340 the county might build a new bridge and then give it up by by-law, but now at all events until that is done they must repair.

As to the remedy by mandamus in this case, in the *Justices of Huron* v. *the Huron District Council*, 5 U. C. Q. B. 574, the writ was refused to compel the council to build a court-house, but the judgment shews that in a case like this it would have been granted. In the *Municipality of Augusta and the Municipal Council of Leeds and Grenville*, 12 U. C. Q. B. 522, the writ was ordered to compel the council to make a road, which is a case clearly in point.

But without any statute there is no reason why the common law of England should not prevail here, and if it does there is abundance of authority to show that the counties are, with very few exceptions, bound to repair bridges. *Rex* v. *The Inhabitants of the West Riding of Yorkshire*, 5 Burr. 2594; S. C. 2 W. Bl. 685; *Regina* v. *West Riding of Yorkshire*, 2 East 343; *Ib.* 356, note; *Rex* v. *The Inhabitants of Kent*, 2 M. & S. 513, shews this. *Rex* v. *The Inhabitants of Northampton*, 2 M. &. S. 262; *Rex* v. *The Inhabitants of Devon*, R. & M. 144, shews that any bridge over a stream running between banks is a public bridge, *James* v. *Green*, 6 T. R. 231; *Rex* v. *Inhabitants of Kingsmoor*, 2 B. & C. 194. It is a common law liability, and applies notwithstanding the trustees of the bridge are authorised to raise tolls. The county are bound to repair, because it is for the public benefit, unless it is clearly shewn that the obligation is cast upon some one else, as, for instance, a company authorized to build a bridge and compelled to repair and maintain it; but as there is nothing in the act of incorporation obliging the Cayuga Bridge Company to repair, even if the title remained in the county, as is contended, they would still be bound to repair.

Burns, J.—The cases are not altogether satisfactory upon the point of jurisdiction to grant the writ of mandamus to repair a road, but I think the weight of authority and precedents are against it, for the proceedings seems to be rather by way of indictment. The distinction seems to be that where certain parties have undertaken the construction of a road, and have obtained a charter for the purpose, which is assumed to be a contract between such parties and the public that the road or work will be constructed, and the work has not been done, then the court will interfere by mandamus as the proper remedy, upon proper cause made and no sufficient excuse shewn. This court acted upon that principle in the case of the *Municipality of the Township of Augusta* v. *The Municipal Council of the United Counties of Leeds and Grenville*, (12 U. C. R. 522.) That principle was established in England by the cases of *Regina* v. *The Birmingham and Gloucester R. W. Co.*, (2 Q. B. 47, 1 G. & D. 337,) and other cases. But where the application is for the repair of a road already constructed it may be doubted whether the proper remedy is not by indictment. In the case of *The Queen* v. *The Trustees of the Oxford and Witney Turnpike Roads*, (12 A. & E. 427,) Lord Denman said, "I know no instance of a mandamus to repair a road." The case of *Rex* v. *The Commissioners of Llandilo Roads*, (2 T. R. 232,) which is cited as an authority upon this point, does not contradict his lordship's assertion, for the rule for it was discharged, but the case has been cited by most writers as in support of the application for mandamus. Whether his lordship, in giving the judgment of the court, when he said, "If we entertained applications for writs of mandamus in such cases, we might have to try questions of guilty or not guilty on the state of the roads, and all questions affecting the liability," meant this to be of universal application, I cannot say, or whether he intended it to apply only in the particular case, where it was a dispute between two bodies upon whom the duty lay of repairing part of a street in the city of Oxford. Since that decision I have found no instance of a mandamus being asked for to repair a road, but, on the contrary, the proceeding has been by way of indictment generally, though on one occasion the Court of Queen's Bench granted an information for the non-repair of a road, because two persons, inhabitants of the parish liable to repair the road, happened to be upon the grand jury at the assizes, and through their influence the bill of indictment had been thrown out. See *The Queen* v. *The Inhabitants of St. Leonards*, (10 Q. B. 287.) The case of *The Queen* v. *The Inhabitants of Bedfordshire*, (4 E. & B. 535,) was an indictment for not repairing a bridge.

The first question in dispute between the two corporations is upon which of them rests the liability to repair the bridge. The village of Cayuga contends that the title to the bridge is vested in the county now by the purchase of it, but the county contends it has no legal title to the bridge, and the village answers that again by alleging that, though possibly that may be true, yet the county has hitherto since the purchase exercised ownership over it, and has also from time to time repaired it and exacted tolls for the use of it. Then again, the county contends that under the section of the Municipal Act, ch. 54 of the Con. Acts U. C., the bridge being wholly within the village of Cayuga, the duty is cast upon the village to repair it, for under those provisions the bridge belongs to the village, and that the jurisdiction which the county has hitherto exercised over it is a usurped one. Besides all this, the county contends the bridge never was constructed in the place intended when the charter was granted to the Cayuga Bridge

Company; and besides that it is contended the site is not a proper one to have been selected originally, and the county would, if the onus be cast upon them to repair, desire to remove the site to another part of the river. The village opposes that, because if removed it would not be in accordance with the streets of the town approaching the bridge.

These conflicting interests seem to be the very matters contemplated by Lord Denman, and render it proper that the rights of the parties should be settled by indictment, or some other mode than by mandamus.

The village of Cayuga in adopting this remedy did so avowedly upon the ground of being more speedy in its application than that of indictment, and as they have chosen to try an experiment I think the applicants must pay the costs.

The mandamus *nisi* should therefore be quashed with costs.

McLEAN, J, concurred.

Mandamus *nisi* quashed.

BRADLEY AND ROWE V. TERRY.

Ejectment—Several plaintiffs—Proof of title.

In ejectment there are several plaintiffs claiming each an individual interest, it is not necessary that they should prove a joint title, or any privity between them, but they may maintain a joint action upon separate titles.

(Q. B., T. T., 24 Vic.)

This was an action of ejectment for lot 20, in the 7th concession of Alnwick. The plaintiffs claimed by several titles, each an undivided one-half. The defendant claimed under a deed from Robert Drope, the patentee, and upon the evidence, which it is immaterial to report, the jury found for the plaintiffs, upon the ground that that conveyance was fraudulent. At the trial it was objected that the plaintiffs could not maintain a joint action, as they claimed under several titles; and that, if entitled to recover, each must bring an action for his undivided half.

Leave was reserved to move for a non-suit upon this ground, and *Eccles, Q. C.*, obtained a rule *nisi* accordingly, or for a new trial upon the evidence, and upon affidavits.

C. S. Patterson, shewed cause, citing *Coltman* v. *Brown*, 16 U. C. R. 133.

McLEAN, J.—Mr. Eccles contended that the plaintiffs could not maintain a joint action on separate titles, though they hold each an undivided interest in the land. No doubt either of the plaintiffs could bring an action for his individual undivided portion, but that could only have the effect of removing the defendant from an undivided half, and letting the one suing come in with the defendant into possession; but the one object being to remove the defendant from the premises, if the plaintiffs shew together an interest which covers the whole land, I cannot see why they should not join in an action which will enable them to recover the whole instead of each being obliged to have recourse to a several action, a recovery in which by each would only have the effect of placing them in the position of tenants in common on the premises.

As to the title under which the defendant claims from Drope, there was certainly very strong evidence to shew that it was fraudulent, and given for the purpose of delaying the creditors of Drope. The dealing of the defendant and Drope with the lands after the execution of the deed, and their statements and declarations to some of the witnesses who were examined on the trial, were such as to satisfy the jury that defendant's title was fraudulent when given, and that the sole object of it was to defeat and defraud creditors.

The affidavits of defendant and Drope do not materially change the aspect of the case, and even if they did the defendant cannot be a witness in his own behalf, should a new trial be granted.

I think the jury came to a correct conclusion on the evidence, and that the verdict should not be set aside, especially as the defendant may, if he thinks proper, bring another action, and bring forward any other testimony which he may be able to produce in support of the validity and honesty of his own title. The rule must be discharged.

BURNS, J.—With respect to the point raised at *nisi prius*, and reserved as ground of non-suit, namely, that plaintiffs in ejectment should, as in cases of assumpsit, debt, &c., prove some joint title, or connected with each other in some way, as joint tenants or tenants in common, &c.,—it is the first time I have heard such a point raised. In the old form of ejectment the declaration contained several demises whenever it became necessary to rely upon different chains of title, and it is contended that the effect of the alteration of the form of action of ejectment is to alter the law, and render it necessary that plaintiffs should have a joint interest. However, a little reflection upon the words of the act of parliament must dissipate that idea. The form of writ given in the ejectment act is this, "to the possession whereof A., B., and C., some or one of them, claim to be," &c., and the writ in this action is so framed. The 21st section enacts that "the question at the trial shall be whether the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and whether to the whole or part," &c.

Proof of a sufficient title in any one or more of the claimants will support the action, either for the whole or for part of the property, according to the evidence. *Doe dem. Rowlandson* v. *Wainwright*, (5 A. & E. 520). See Cole on Ejectment. 285, 286.

I have examined the evidence given at the trial, and upon that the question was whether the deed under which the defendant claimed from the grantee of the Crown was or not fraudulent as against creditors, being made, as contended, without consideration. The jury so found, and I think the evidence justified that finding. The affidavits do nothing more on the part of the defendant than state that he thinks if he had a new trial he would be better able to shew by some old scraps of accounts, which he said was his mode of keeping accounts, for he kept no books, that the person who conveyed him the land was indebted to him at the time of the conveyance. That person was examined as a witness at the trial as to the state of the accounts. If the defendant thinks he can make out a good title and sustain his deed, he may bring another ejectment and thus test it, but I think the rule should be discharged.

Rule discharged.

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Barrister-at-Law.*)

COTTER V. MUNICIPALLITY OF DARLINGTON.

School section—By-law—Quashing of—13 & 14 Vic., ch. 48—Laches.

On a motion to quash a by-law passed on the 1st of October, 1859, by defendants doing away with school section No. 7, in the Township of Darlington, and attaching a portion thereof to school section No. 6, and other part to No. 8.

Held, 1st, that it is unnecessary that a by-law should state on its face that the alteration shall not go into effect till the 25th December following the passing thereof—13 & 14 Vic., ch. 48, sec. 18 sub-sec. 4

2nd, that no step having been taken to quash a by-law for a year or more from the passing thereof, the decision in *Hill* v. *Municipality of Tecumseth*, 6 U. C. C. P. 207, adhered to, and the motion was refused on account of delay in making the application.

(C. P. E. T., 24 Vic.)

On the 4th of February, 1861, in Hilary Term, 24 Vic., *McLeod* obtained a rule *nisi* to quash a by-law passed on the 1st October, 1859, by which school section No. 7, in the township of Darlington, was virtually annihilated, one portion of it being attached to, and made part of section No. 6, and the residue of it attached to and made a portion of No. 8. No objection was urged to any thing apparent on the face of the by-law. The objections were, that there was no consent of a majority of the inhabitant householders and freeholders, and want of notice, and that the by-law did not express on the face of it, that it was not to come into operation until after the 25th day of December next after the alteration was made. At the time of granting the rule *nisi*, leave was given to file additional affidavits in support of the rule. Under some misapprehension the rule was drawn up giving the applicants leave to file affidavits in reply to the case made by the municipality.*

McBride in Easter Term, answered the rule, filing affidavits, by which it was shewn that there was a petition to the township council for the alteration asked for, from a majority of the inhabitant householders and freeholders of section No. 7, and that notice

* Whether the court would have done this, after hearing what was advanced in answer to the application, is a question; but it was intimated that the court would not do so beforehand, for it is very easy to suggest the great inconveniences such a course might lead to.

of the intention to pass the by-law was duly mailed, addressed to the trustees of that section. He referred to *Sutherland* v. *Municipality of East Nissouri*, 10 U. C. Q. B. 626; *Hill* v. *Township of Tecumseth* 6 U. C. C. P. 297; Con. Stat. 740, secs. 40, 41, 47; *Shaw et al*, v. *Municipality of Manvers*, 19 U. C. Q. B. 288.

McLeod produced further affidavits, denying the validity of some of the signatures to the petition, asserting that some of the parties whose names were to it, were not entitled to vote at school meetings, and denying therefore that a majority desired the change. There was also a denial on the part of the relator, one of the trustees for section No. 7, and of one of his co-trustees, that they received any notice, and other inhabitant freeholders and householders swore they had no notice, and did not, or most of them did not, know of the change until November, 1860. The relator however, stated that he had heard of a petition for the change, and that he attended the meeting of the township council, at which the by-law was discussed (not stating when this was) and opposed it, but he was not aware until about the 5th of November, 1860, that such by-law had been passed. Three of the affidavits last put in stated the inconvenience to which the deponents were subjected by the change. He referred to *Shaw* v. *Municipality of Manvers*, 19 U. C. Q. B. 288; *Hart* v. *Vespra*, 16 U. C. Q. B. 82.

On the other side it was stated that nothing was done in pursuance of this by-law until after the 25th December, 1859, but since that time the by-law had been acted upon.

Draper, C. J.—The statute in force affecting this action at the date of passing this by-law was 13 & 14 Vic., ch. 48 The 4th sub-section of the 18th section provides, "that any alteration in the boundaries of a school section shall not go into effect before the 25th December next after the time when it shall have been made," but there is no enactment that this shall be expressed on the face of the by-law. The legislature having established the rule, and the by-law saying nothing inconsistent therewith, the latter will take effect according to the rule, and the omission to make such a provision in the by-law, cannot be deemed an objection to it in any form.

Then as to the other two objections, they are precisely of that class which should be promptly urged. Of course, if there be no notice that such proceedings are being taken, there can be no charge of laches or delay. But it is difficult to understand the relator's alleged ignorance of the passing of the by-law, or his alleged want of notice, not of the by-law being passed, but "of the intended step or application," when he admits he heard of the petition, and attended the meeting of the township council, and opposed the by-law, which was then under discussion. He does not pretend that he then objected to the petition on any ground now suggested, or urged a want of proper notice.

Under these circumstances, we think it better to adhere to our decision in *Hill* v. *Municipality of Tecumseth*, 6 U.C. C. P. 297, and to refuse to quash this by-law on account of the delay in making the application. It was not even made in the term following the 5th November, 1860, when the relator admits he knew the by-law was passed, the first day of which term was the 19th of November.

Per cur.—Rule discharged.

Wilson v. Brecker.

Trespass—Arrest—Evidence of—Not legally sufficient—Constructive—Power of attorney—Responsibility for an arrest committed under.

Plaintiff brought a suit in Chancery against T. S. and S. W. which was referred to arbitration, and an award made thereon against plaintiff for £120 to S. W., and £154 to defendant. This award was made a rule of court by an *ex parte* order, and an attachment was issued by S. W. for both sums of money, the defendant having previously assigned all his interest in the award to S. W., and given him a general power of attorney to collect the amount. The only evidence of the arrest and imprisonment was given by the sheriff, who swore that "the attachment was received in his office on the 31st January, 1859, and the plaintiff was arrested on that attachment on the 16th February, 1859, and committed to gaol." It further appeared that the attachment was endorsed by the solicitor of S. W. as his solicitor only.

Held, 1st. That although there was no sufficient proof of an *actual arrest*, nevertheless sufficient evidence was given to warrant a jury in deciding that the plaintiff was constructively (at least) arrested by submitting to the process, and actually confined to gaol thereunder.

2nd, That the power of attorney given by defendant to S. W. being a general power to collect the money due on the award, and to do all acts relating thereto, he S. W. must be presumed to have been acting for the defendant, who was therefore responsible for the arrest. (C. P. E. T. 24 Vic.)

Trespass for assault and false imprisonment.

Plea.—Not guilty.

The case was tried before McLean, J., at Toronto, in February, 1861.

It appeared that the plaintiff brought a suit in Chancery against the defendant, Tobias Switzer, the younger, and Seth Wilson. The suit was referred, and an award was made directing plaintiff to pay a specific sum to defendant, and another sum to Seth Wilson. The award was made a rule of court by an *ex parte* order, after which an attachment was issued against the plaintiff for non-performance of the award. The attachment was afterwards set aside with costs, and the court directed that the plaintiff should be discharged from custody.

To prove that plaintiff was arrested on this writ of attachment, is sworn by the sheriff, that the attachment was received in his office on the 31st January, 1859, "the plaintiff was arrested on that attachment on the 16th February, 1859, and committed to gaol." The sheriff received the writ from Messrs. McDonald and Brother, who endorsed it as solicitors for Seth Wilson. The gaoler proved that the plaintiff was brought to gaol in custody, on the 17th February, 1859, on an attachment in a suit in Chancery of Tobias Switzer and others, and remained in custody on the same process until the 3rd of May following. The writ of attachment was put in, and annexed thereto was a warrant under the sheriff's hand and seal, directed to several persons, the sheriff's bailiffs, commanding them to execute the writ. It had thereon an endorsement as follows:—"Mr. Sheriff: If the within named Moses Wilson pays you the within mentioned sums of £120 and £154, with interest thereon, from 26th January, 1859, together with your own fees, poundages, and incidental expenses, you may discharge him on this suit. Yours, &c., McDonald & Bro., for defendant S. Wilson." This and other endorsements on the writ were proved to be in the handwriting of one of the partners in the firm of McDonald & Bro. The sums mentioned were stated by the certificate of the registrar of the court to be £120 to Seth Wilson, and £154 to the defendant, Samuel Brecker, for non-payment whereof the now plaintiff was directed to be attached. The precipe for the attachment mentioned both these sums, payable as above, and was signed McDonald & Bro., defendants' solicitors. The answer of the now defendant in Chancery was filed by A. Crooks, as his solicitor, but his name did not appear in any subsequent proceedings. There was a power of attorney given by Brecker to Seth Wilson, to ask, demand, recover, &c., of and from the plaintiff, and all other persons whom it might concern, the sum of £150, with interest, appointed to be paid to Brecker, by the award in the Chancery suit, and to appoint an attorney or attorneys, and to do and perform all other acts, matters, and things necessary in and about the premises the same as Brecker could do if personally present. On the defence it appeared that Brecker had assigned to Seth Wilson all his interest in the moneys payable under the award, and had given the power of attorney in furtherance of the assignment, both which documents were in the hands of Messrs. McDonald & Brother. There was put in evidence another order of the Court of Chancery in the same cause, restraining the plaintiff from further prosecuting the action against Seth Wilson and Alexander McDonald, who were sued jointly with defendant Brecker for the alleged trespass.

The learned judge told the jury that if defendant gave sufficient authority to his agent, Seth Wilson, to proceed in making an arrest for the enforcement of the amount due, and his agent made such arrest, the defendant would be liable, if it were illegal. That it appeared the defendant had in truth no interest in the money, and did not interfere otherwise than by giving authority to Seth Wilson to enforce payment.

The defendant's counsel objected that the defendant was not sufficiently connected with the issuing of the attachment. That Seth Wilson must be presumed to have acted solely for his own benefit, the papers being signed only by McDonald & Brother, as solicitors for him. That the power of attorney only authorised

Wilson to do what was necessary to collect the money, but not to make any illegal arrest under the attachment; the fact that the plaintiff was in gaol not establishing an arrest in this particular case.

The jury found for plaintiff—damages, $200.

In Hilary Term last, *M. C. Cameron* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection in telling the jury, under all the circumstances, that defendant was liable by reason of the power of attorney he had given to Seth Wilson, and that such power was sufficient to make defendant liable, although it did not in terms authorise Seth Wilson to cause an arrest of plaintiff, and in directing that there was sufficient evidence that plaintiff was arrested on the attachment.

In Easter Term *Eccles*, Q. C., shewed cause.

Cameron supported his rule on the ground that defendant did not himself employ the solicitors or authorise the arrest, and that Seth Wilson never employed the solicitors on behalf of the defendant, and it was the direct act of the solicitors that caused the arrest. That Wilson had authority or interest to the extent of £120, and that anything beyond that was mere excess, and the plaintiff's claim was limited to damages for this as an excess on the part of Wilson, and that there was no arrest of plaintiff proved. He cited *Roe* v. *Birkenhead &c., Railway Co.*, 7 Exch. p. 36, per Parke, B; *Wilson* v. *Tumman*, 6 M. & G. 236; *Blessley* v. *Sloman*, 3 M. & W. ..0; *Cooper* v. *Harding*, 7 Q. B. 928.

DRAPER, C. J.—The cases of *Berry* v. *Adamson*, 6 B. & C. 528, and of *Arrowsmith* v. *Lemesurier*, 2 N. R. 211, are as strong as any that have been suggested to shew that there was no sufficient evidence of an arrest, but in my opinion this case goes much further; the plaintiff was conveyed to gaol, and was certainly in custody there under this writ, and detained for several weeks; it is true there is no proof of an actual arrest by the officer, but I think there is enough to warrant the jury in finding either that the plaintiff was arrested in fact or constructively by submitting to the process, which would be sufficient to prove an arrest according to the case cited in Bull, N. P. 92. It is to be observed that the plaintiff obtained his discharge from custody under this writ of attachment, by an order of the Court of Chancery, and there is no pretence that he had been arrested or taken under any other writ.

I feel no difficulty in saying that the defendant is sufficiently connected with the issuing of the attachment, to make him responsible. He had a claim against the plaintiff—he assigned it to Seth Wilson, giving him a very full power of attorney to enforce payment, and Seth Wilson placing the assignment and power of attorney in the hands of his own solicitors, authorises the proceedings to collect, as well the sum awarded to himself, as that awarded to and assigned by the plaintiff. I look on this act as an act authorised by the defendant just as much as if he had gone to the solicitors and had given the same directions that Seth Wilson did. In my opinion it makes no difference that the solicitors were employed by Seth Wilson only, for he had the defendant's authority to employ any person whom it might be necessary to employ to collect the debt. Suppose it had been paid, is there any doubt but that the defendant would have derived the very result he contemplated by his assignment to Seth Wilson? I think this conclusion abundantly sustained by the principles contained in *Collet* v. *Foster*, 2 H. & N. 356; *Gauntlett* v. *King*, 3 C. B. N. S. 59; *Warner* v. *Reddiford*, 4 C. B. N. S. 180.

See also *Jarman* v. *Hooper*, 6 M. & G. 827; *Rowles* v. *Senior*, 8 Q B. 677; *Semple* v. *Keen*, 3 H. & N. 753; *Freeman* v. *Rosher*, 13 Q. B. 780.

Per cur.—Rule discharged.

HOWLAND V. JENNINGS

Promissory note—Interest recoverable at the rate drawn after maturity till payment.

Held, that interest is recoverable on a promissory note at the same rate for which it is drawn over six per cent. till payment.

(C. P., E. T., 24 Vic.)

Declaration on a promissory note, dated 17th January, 1860, for £100, made by the defendant and payable to the plaintiff one month after date.

Plea—Non-fecit.

At the trial, at the Toronto Assizes, in April last, the plaintiff proved the note sued upon, which was as follows:—

$400. KLEINBERG, 17th January, 1860.

One month after date, for value received, I promise to pay H. S. Howland, Esq., or bearer, the sum of four hundred dollars, with interest, at twenty per cent per annum.

The only question was whether the plaintiff was entitled to recover interest at the rate mentioned on the promissory note from the date till payment, or only at that rate until the note fell due, and from thence at the ordinary rate of six per cent per annum. A verdict was taken for the plaintiff for the full amount, with leave to defendant to move to reduce it.

In Easter Term *Bull* obtained a rule *nisi* accordingly.

McMichael shewed cause, contending it was a loan of money at a specified rate of interest till paid, and that the defendant ought not to be allowed to take advantage of his own wrong by making default, defending the action on a false plea, and so changing the contract into a loan for upwards of a year, at six per cent for the much larger part of the time. He cited *Morgan* v. *Jones*, 8 Exch. 620.

Bull contra referred to Mayne on Damages 69; *Dickenson* v. *Harrison*, 4 Pri. 282. Sugd. V. & P. vol. 2, p. 816; *Upton* v. *Lord Ferrers*, 5 Ves. 801.

DRAPER, C. J.—The case of *Keene* v. *Keene*, 3 C. B. N. S. 144, is decisive on the question. If the defendant had taken the trouble to look at it, this motion need not have been made. It is referred to in the last edition of Chitty on Bills, p. 439, Note 7.

Rule discharged.

IN CHANCERY.

Reported by RICHARD SNELLING, ESQ., Student-at-law.

METCALF V. KEEFER.

Assignment for benefit of creditors—Title derived under 13 Eliz. and 22 Vic.

A trader having become involved made an assignment of his whole property for the equal benefit of all his creditors. This instrument contained a provision that the creditors should execute before they should become entitled to the benefit of it—that the trustees should be at liberty to retain 2½ per cent. on all monies received by virtue of the assignment as a remuneration for their services—that they might in their discretion employ the assignor (Debtor) in the performance of the trusts at a salary of £300 a year—and that they should complete any building contracts already entered into by assignor—to employ workmen and mechanics—pay salaries and wages—make advances—before they should make any distribution of the estate amongst the creditors.

The plaintiff purchased the property in question in this cause from the Trustees, and the defendant contracted to purchase the same from the plaintiff.

Held, 1. That the assignment was not fraudulent and void as against creditors under 22 Vict., ch. 96.

2. That the provision requiring creditors to execute did not create a preference.
3. That the allowance to the trustees was not a preference within the Act.
4. That the clause authorising the completion of contracts before making a dividend might delay creditors. *Meadson* v. *Peck*, 18 U. C., Q. B. 113.

The facts of this case appear sufficiently in the judgment of the court.

Adam Crooks for plaintiff. *Strong* for defendant.

ESTEN, V. C. (before whom the case was argued.

This is an amicable suit instituted in order to obtain the opinion of the Court upon a doubtful title, the purchaser declining to complete his purchase without the opinion of the court expressed in favor of the title. The question arises upon an assignment made by Mr. White, a builder, of his whole property for the equal benefit of all his creditors. The instrument contained a provision that the creditors should execute before they should become entitled to the benefit of it, that the trustees should be at liberty to retain two and a half per cent. on all monies received by virtue of the assignment as a remuneration for their care and trouble in the execution of the trusts, that they might in their discretion employ Mr. White in the performance of the trusts at a salary of £300 a year, and that they should complete any building contracts already entered into by Mr. White, in order to the winding up of the estate, and they were authorised to employ workmen and mechanics for this purpose, and to make such advances as should be necessary, and to deduct and pay all salaries and wages that might become necessary, and repay all advances that might be made

under this trust, before they should make any distribution of the estate amongst the creditors. The plaintiff purchased from the trustees the property in question in this cause, being part of the trust estate. Mr. Keefer has contracted with the plaintiff for the purchase of the same estate, and the question is, whether he can make a good title to it, which is considered to depend upon the validity of this assignment. The *bona fides* of the assignment is not impugned, but the question is, whether its provisions are not of such a nature that it must be deemed fraudulent and void against creditors under the 13 Eliz. or the 22 Vic. ch. 96, and whether the deed bearing upon its face the marks of its own invalidity any purchaser of the estate must not be deemed to have notice of it.

I will consider the question with regard to the 22 Vic. ch 96. 1st. In my opinion this statute has produced no alteration in the law except to avoid preferential assignments. In all other respects it is a transcript of the 13 Eliz., and if the assignment in question in any case contain no provision for preferring one creditor to another, I apprehend it cannot be deemed void on any ground, on which it could not have been considered void previously to the passing of this statute. It is argued in the present instance that the provision requiring the creditors to execute the deed makes a preference. I cannot agree to this opinion. Supposing the deed to be wholly unobjectionable in all other respects, what can be more reasonable than that the creditors should intimate their assent to it, so that the trustees may proceed with confidence, and know whom to pay? It must be intended that the creditors will always be known; it will be the duty of the trustees to notify the assignment to them, and if it be wholly free from defects in all other respects, and the creditors churlishly refuse to execute or otherwise to intimate their assent to it, they postpone themselves, they are not postponed by the deed. It appears to me that they might with equal reason refuse to receive their money, and argue for a preference. It is then argued that the provision of an allowance of two and a half per cent. to the trustees who are creditors is a preference within the meaning of the Act. I must dissent likewise from this proposition. It is not a preference of their debts, but a recompense for their trouble. They yield a distinct consideration for it. To the creditors it may be a matter of great importance that competent persons should be induced to act as trustees by the prospect of remuneration, then otherwise it might be impossible to procure any persons to assume so onerous an office. Suppose the trustees not to be creditors the notion of a preference would be inadmissible. Can it make any difference that they are creditors if their services as trustees constitute a distinct consideration for the allowance? If indeed it exceed in amount what is reasonable the question may admit of a different consideration, but that cannot be said in the present instance. These remarks dispose of the question so far as it regards the 22 Vic. ch. 96.

As regards the 13 Eliz., the deed is objected to on account of the provision relating to the employment of White at a salary, and the completion of the contracts and settlement of the business. The first objection is, I think, untenable. Many cases have occurred in which a similar provision for the employment of the debtor has been considered unobjectionable. It is in fact a very common circumstance in these assignments. It may be advantageous to the creditors to secure the services of the debtor in the settlement, collection and realization of his own estate, and it cannot be expected that he will render these services for nothing. He must be maintained during the time. The remuneration, it is true, must not be unreasonable in point of amount. In the present case the allowance is fixed at £300 a year, as a maximum this cannot be doubted, for as the trustees were not obliged to employ White at all, they could fix his remuneration at any sum they could mutually agree upon not exceeding £300 a year. They could, however, go as high as this sum, and the question is whether that would be excessive. In the abstract I should think it would not be so, considering the respectable station Mr. White occupied, the value of the estate, and the nature of the services he was expected to perform. It is impossible, however, not to perceive that Mr. White's services were required principally for the completion of the contracts into which he had entered, and therefore the provision for his employment and remuneration must be considered in some degree in connection with the other provisions contained in the deed in relation to these contracts. The point chiefly relied upon as rendering the deed void was the provision for completing the contracts and closing the business, viewed under the aspect of creating a partnership between the trustees and creditors *quoad* third persons, and rendering the creditors liable for the debts which might be contracted in carrying this provision into effect. I do not think this ground of objection tenable. The case was compared to that of *Owen* v. *Boddy*, 5 A. & E. 28, from which, however, I think it differs very materially in these respects. In the case of *Maulson* v. *Peck*, 18, U. C., Q. B. 113, it seems to have been suggested that a partnership *inter se.* might exist in such cases. But of course no such result could occur under ordinary circumstances. The only objection that can be ordinarily made in such cases is that the creditors accepting the benefit of the assignment by subtracting from the funds to which third persons giving credit to the trustees, look for the payment of their debts, become partners as to such persons, that is, entitle them to treat them as partners, not that any partnership actually exists, or that any partnership *inter se* takes place. It is well known that any receipt of a share of the profits of a business, as such, makes the person so receiving a partner *quoad* third persons upon the principles I have mentioned. This might have occurred in *Owen* v. *Boddy*. The business might have been carried on for years. The profits of good years would have been divided annually, and when a bad year came or a loss occurred the fund would be gone to which the creditors looked for the payment of their debts. The creditors therefore who had subtracted from that fund would be liable for such debts, in other words, would have been partners *quoad* third persons; and this is a risk which a creditor cannot in reason be required to incur, and therefore a deed containing such a provision or framed upon such a principle, is considered fraudulent and void against creditors. The case of *Hickman* v. *Cox*, 18 C. B. 618, was a similar case to *Owen* v. *Boddy*, and stronger. In both these cases the trade might have been continued for years, and the creditors were to be paid their debts out of the profits. The cases of *Janes* v. *Whitebread*, 11 C. B. 106, and *Coates* v. *Williams*, 7 Ex. 205, were distinguished from *Owen* v. *Boddy*, on the ground, that the continuance of the business was merely auxiliary to its winding up. It is true some doubt was expressed in *Coates* v. *Williams*, and the court was divided in opinion, but perhaps the doubt had reference to the correctness of construction put upon the clause in question in *Janes* v. *Whitebread*, as to whether the continuance of the business was to be merely auxiliary,—to the winding up or absolute at the option of the trustees. Supposing, however, the principle enunciated in *Owen* v. *Boddy* and *Hickman* v. *Cox*, to be ultimately affirmed, it cannot apply to a case like the present, involving as it does only one transaction or set of transactions. In this case the creditors becoming parties to the deed can never subtract from the fund devoted to the payment of the debts incurred in completing the contracts. By the express provisions of the deed every possible expense incurred in the completion of the contracts is to be paid before the creditors are to receive anything. All salaries, wages, hire, and advances, and doubtless all debts incurred in carrying the contracts into execution, must be paid before any distribution can take place amongst the general body of creditors, who therefore can never diminish or subtract from the fund to which these persons giving credit to the trustees look for the payment of their claims. In the present instance the creditors, if the provisions of the deed were performed, never could become partners with the trustees, and therefore this ground of objection to the deed appears to me entirely to fail. Viewed, however, in another light, the provision in question appears to me so objectionable, that, if it depended upon me, I cannot compel Mr. Keefer to accept the title to this estate. What I mean is, that this provision, as imposing upon the creditors an unreasonable delay in the distribution of the estate, must be deemed, so far as they are concerned, to render the deed void. The objection is not the same as the one I have been considering, although it is in one respect analagous to it, where a partnership, *quoad* third person, will be created. The deed is held void because the creditors cannot reasonably be required to incur such a risk, and therefore if the deed be upheld they are delayed, inasmuch as they can neither

take the property in execution nor accept the benefit of the deed. It may be, however, that although no such result arises, the trusts are of such a nature as to cause some small delay in the distribution of the estate and creditors are thereby directly delayed, and also justified in reason in declining to execute the deed, and thereby if the deed be upheld indirectly hindered. There is no doubt that in all cases of this sort some restriction and delay are imposed upon the creditors, and nevertheless the deeds are upheld as tending to the general good of all. But it would not be difficult to imagine a case in which the distribution of the estate might be postponed for such a length of time, and so unreasonably, that the courts would be compelled to infer an interest to delay or hinder creditors. Such a deed would doubtless be void as against them. Thus we have seen that a provision for the winding up of the estate of the debtor, although it necessarily involves some delay and restriction, is held good, because it tends to the general benefit of all the creditors. The stock in trade of the debtor, sold at once by auction, would be comparatively sacrificed; likewise if new goods were purchased from time to time so as to make, in the language of trade, a proper assortment, good prices would be obtained, and the creditors generally benefited.

The cases of *Maulson* v. *Peck* and *Taylor* v. *Whittemore*, 10 U. C. Q. B. 440, were cases of this description, and probably the cases of *Janes* v. *Whitebread*, and *Curtis* v. *Williams*, were so likewise. I apprehend that the provision involving delay must upon the whole turn to the advantage of the general body of the creditors, otherwise the deed cannot be supported. If it tend rather to the benefit of the debtor than of the creditors, if it may occasion a delay in the distribution of the estate unreasonably great, or more than commensurate with the advantage expected to result from it, I should entertain great doubts of the validity of such a deed.

In the present case I think nothing more is intended than that subsisting contracts should be completed, such parts of the estate as may be necessary for this purpose are to remain involved for the present. I do not attach any weight to this circumstance, because the materials on hand might be employed in this way perhaps more profitably than in any other; although probably the difference would not be very great, and the other articles are not of so much importance but that they might be advantageously used in the same way. The only advantage however to the creditors that I can discover in this provision consists in the slight increase in the value of the materials and in the profits to be derived from the completion of the contracts. The former is hardly worthy of attention, the latter is problematical and uncertain. On the other hand, it is impossible for me to say what delay may not be occasioned by the completion of these contracts. It may involve months or a year or more for ought I know. During all this time the distribution of the estate may be suspended. At all events the trustees will not be compellable to pay a farthing to the creditors. It is true the rest of the estate may and must be realized and converted into money, and the trustees may be disposed to pay the expenses attending the execution of the contracts and to distribute a dividend amongst the creditors at the same time. But it may happen that such large advances may become necessary for the completion of the contracts, and their issue as regards profits or loss may be so doubtful that the trustees may not in justice to themselves be disposed to make any distribution among the creditors. The advantage to the creditors of this provision is not very clear or decided, but to Mr. White it is considerable. If these contracts be not performed he will be liable to actions, and he might very naturally stipulate for protection against them. Mr. Crooks argued that persons recovering judgments in such actions would be creditors under the deed, and that it would be advantageous to the other creditors to exclude them by performing the contracts. I doubt this, I mean I doubt whether they would be creditors under the deed.

Upon the whole I entertain so much doubt upon this point that I think I ought not to force this title upon the purchaser; at the same time this is doubtless a question of fact, and I am quite in the dark as to the real facts of the case. The advantage to the creditors of the completion of the contracts may be so clear and decided according to the actual facts of the case as bring the case within the principle of *Janes* v. *Whitebread* and *Maulson* v. *Peck*. The point too was not raised in argument, and though suggested by myself, I doubt whether the learned counsel for the defendant was much surprised by it. I do not think it was taken in any other case except in that of *Maulson* v. *Peck* or *Taylor* v. *Whittemore*, by Mr. Wilson, Q. C., and then it did not seem to attract the notice of the court. It would be a great satisfaction to me if the case could be carried to the Court of Appeal. My own impression is, that if in point of fact these contracts are so many and of such a nature that probably much time will be consumed in their completion, and the trustees may incur such liabilities that they may not feel justified in distributing the estate until they are finally settled, or if the issue as to profit and loss is doubtful, the deed cannot be upheld.

I should not entertain confidence in the validity of the deed unless the circumstances were such as to make it clearly for the benefit of the creditors that the contracts should be completed. Some discussion arose during the argument as to when any judgments that might be obtained would attach upon the property which is an equity of redemption. It is quite clear that under the 12 Vic., ch. 78, they would not attach until delivery of the writ to the sheriff. As to when judgments generally attach upon lands under the 13 & 14 Vic., ch. 63, it is unnecessary to express an opinion, although I have a very clear one, and shall be prepared to express it when necessary. In the present case any creditor whose debt existed at the date of the deed may obtain judgment and deliver his writ to the sheriff, when, if the deed is void to creditors, he will be entitled to treat the property as White's and proceed to a sale of it, and the sheriff's vendee will be entitled, as between him and Mr. Keefer, should he complete the purchase, to redeem the estate. White's concurrence in the sale to Metcalf does not seem to mend the matter.

CHAMBERS.

Reported by Robert A. Harrison, Esq., *Barrister-at-Law.*

Cotton v. McCulley.

Ejectment—Variance between writ and precipe—Effect thereof.

Held, that the fact that an original writ of ejectment contains a more full or more extended description of the premises sought to be recovered than contained in the precipe, is no ground to set aside either writ, copy or service.

(October 3, 1861.)

On 17th September plaintiff's attorney filed a precipe for the writ of ejectment in this cause, in the following form:—

IN THE QUEEN'S BENCH.

"Required a writ of summons in ejectment for James Cotton against Patrick McCulley, of the Township of Toronto, in the County of Peel, to recover possession of water-lot number one on the east side of the River Credit, in the Village of Port Credit, of the County of Peel, being the corner lot at the intersection in Toronto and Brock Streets in said Village of Port Credit, as shown on a plan of said Village made by Stoughton Dennis, Esq., Deputy Provincial Land Surveyor.

(Signed,) "James Paterson,
"*Plaintiff's Atty.*"

On the same day a writ of summons in ejectment was issued on this precipe; the writ described the *locus in quo* in the same manner as described in the precipe.

On 19th September, on a precipe in the same terms as the above a concurrent writ of ejectment was issued. The copy of the concurrent writ served contained a description the same as that above given, with this addition, "said lot being composed of all that parcel of land and marsh containing by admeasurement twenty acres, situate on the north-east side of the River Credit, and bounded on the west and north-west by the north-western boundary of the town plot, on the north and north-east by Lot and Brook Streets, and on the south-east by Toronto Street."

Harman, for defendant, obtained a summons on plaintiff to show cause why the service of the copy of the concurrent writ of summons and the concurrent writ itself should not be set aside for irregularity, in containing words of description of the premises sought to be recovered not inserted in the precipe on which the original writ of ejectment was issued, or in the precipe on which the concurrent writ was issued.

J. Paterson showed cause. He submitted if there was any irregularity that the papers filed only showed the irregularity to be in the copy filed, and that the summons in asking to set aside the original writ asked too much (*Chalkley* v. *Carter*, 4 Dowl. P. C. 480). But assuming the concurrent writ to be the same as the copy, he contended that the application should have been to set aside the original and not merely the concurrent writ and copy. (*Edwards* v. *Danks*, 4 Dowl. P. C. 357, Arch. Prac., 9 Ed., 1880.) He also contended that in fact there was no irregularity either in the concurrent writ or service, the precipe being no part of the proceedings in the suit but a mere memorandum for the information of the clerk who issues the writ. He pointed out that no discrepancy between the original and concurrent writ, or between the concurrent writ and its copy was shown, and submitted that if the concurrent writ followed the original it was sufficient, and that if the original was irregular the application should have been to set it aside. He submitted that the fact of the description in the writ or copy being more extended than in the precipe was not of itself an irregularity.

Draper, C. J.—The objection taken in this case is, that a concurrent writ of summons contains a more full description of the premises than is contained either in the precipe for the writ or in the precipe for the original writ—as defendant expresses it—that the concurrent writ contains "words of description of the premises sought to be recovered not inserted in the precipe."

It does not appear, nor is it objected, that the copy of the concurrent writ served deviates from the original, *i. e.* the concurrent writ, nor that the concurrent writ itself differs from the original first writ. Nor is it objected or shewn that either of the writs is altered since they were issued, that is, that the words contained in the copy served were not in the original of that copy when it was issued in the first instance.

As it would be at least an irregularity if not a contempt to alter the process of the court without authority, I must assume it has not been done until it is shewn to have been done, and then the question is, whether if the writ before it leaves the officers hands is more extended in its terms than the precipe, it becomes thereby irregular?

I take it no officer, at least since the Common Law Procedure Act, would issue a writ without a precipe. And the English Practice before the modern changes required a precipe for every original writ, *latitat*, and *capias*, as well as for the writ on which the proceedings to levy a fine or suffer a recovery were founded; but I have not discovered an instance in which if a writ was regular on the face of it it could be objected to for variance from the precipe, which, although required, is not a step or proceeding in the action.

On the simple ground taken, viz., that the copy of the writ, which in the absence of proof to the contrary, I take to be a true copy, contains a more full or more extended description of the premises than the precipe shows, I think there is no ground to set aside any thing, either, writ, copy, or service, and I therefore conclude this summons must be discharged.

Summons discharged.

DIVISION COURT CASES.

IN THE FIRST DIVISION COURT OF THE COUNTY OF GREY.

(Before his Honor F. T. Wilkes, County Judge.)

Daragh v. Dunn.

Fisheries Act—Exemption Act.

Held, 1. That all Her Majesty's subjects have a right to take bait or fish in any harbour, river, or public water in Upper Canada (not duly set apart by the Governor in Council for the natural or artificial propagation of fish), so that in so doing they trespass not on Crown lands or beaches, or by their place, time, or mode of fishing contravene any provision of the Fisheries Act, or any regulations made by the Governor General under its provisions, and applicable not merely to individuals but equally to all Her Majesty's subjects.

2. That a boat in lawful use by a person owning the same, though not a fisherman by trade, is exempt from seizure under an execution for debt.

(August 12, 1861.)

The defendant, a bailiff of this Court, was sued for having, during December or January last, seized and sold, under execution, a boat used by the plaintiff in his occupation as a fisherman, contrary to the form of the statute.

At the trial during last June sittings it appeared that plaintiff is by trade a turner, and has for several years resided in Owen Sound, and carried on that trade upon his own premises in that town, over his shop being placed conspicuously a sign with his name and occupation, "Turner," painted thereon; that for several years he has devoted the mornings and evenings in the spring of the year to fishing with nets or lines in Owen Sound Bay or Harbour, and also some weeks in the fall to fishing excursions to places beyond; that on these occasions, and for these purposes, he made use of the boat in question; that he frequently sold fish, the result of these catchings, remaining over after the wants of his own family were supplied; that during the latter part of the fall and the winter just passed the bay was frozen over, as it usually is, so as to prevent him following this occupation, the ice having taken last fall about the end of November, and that the boat was about that time laid up for the season, and was shortly afterwards, some time in December, seized by the defendant under an execution against the goods of plaintiff issued out of this court.

The defendant contended:—

1. That plaintiff was by occupation a turner and not a fisherman, since he gained his living chiefly by turning, and was known only as being a turner by trade.

2. That the boat was not in ordinary use at the time of the seizure, citing the 13th section of the Fisheries Act, Con. Stat. Can. cap. 62, as shewing that fishing boats and apparatus could not be considered in ordinary use except during the fishing season, which is in that section supposed to be from 1st of May to 1st of November, and in the present case the fishing season had terminated a considerable time before the boat was seized.

3. That under the Fisheries Act, and the Government Regulations passed in conformity with its provisions, such use of the boat by the defendant must be considered unlawful, as the waters wherein he fished were closed against him by being leased by Government, and he had not the proper sanction of a fishery officer or the written permission of the lessees as required by By-law No. 7 of the Regulations.

The Judge directed the jury that the object of the Legislature in exempting certain articles from seizure in satisfaction of debts was to relieve debtors who were liable to be deprived by execution against their goods of the means of subsistence or of obtaining a livelihood, and that the debtor's occupation in the meaning of the statute (28 Vic., cap. 25, sec. 4, sub. sec. 6,) is the calling or pursuit followed by him for a living. That if the plaintiff during any portion of his time was in the habit of fishing, not for pleasure but for the sake of the results in the way of assisting in his support, and was accustomed to use the boat in this pursuit, he was protected by the Act in his possession of it for this purpose against any seizure in execution for debt. That the discontinuance of fishing owing to the termination of the fishing season, whether by the severity of the weather or the advance of winter, or by any other cause, did not deprive him of that protection, the boat still being in ordinary use within the meaning of the Act though laid up to await the return of the fishing season. That the analogy attempted to be drawn from the 13th section of the Fisheries Act would not hold, since that provision was made, not so much for the protection of the fisherman as for the protection and encouragement of fishing as a branch of industry, which it was of public importance specially to foster, there being under the 13th section no limit as to the value of the fishing vessels and apparatus protected. With respect to the other point, no evidence of the facts alleged being produced, it was withheld from the consideration of the jury.

On this ruling a verdict was given for the plaintiff for $20.

The defendant applied for a new trial mainly on the last ground above mentioned, and partly on affidavits and leases shewing the matters of fact alleged but not proved at the trial.

Wilkes, Co. J.—If under these leases it be made to appear that the plaintiff could not at the time of the seizure of his boat have lawfully used it as he had been accustomed to do for fishing without the sanction or written permission required in the By-law, and that his use of it for such purpose immediately prior to the

seizure was in an unlawful pursuit, then I think there should be a new trial, there being no pretence on the part of the plaintiff that any such sanction or written permission was ever given.

The first lease is executed by John McQuaig, Superintendent of Fisheries for Upper Canada, in favour of Thomas C. Stephens, dated 9th August, 1859, for three years from 1st February, 1859, at $4 per annum payable half yearly, and is of property described as a certain fishing station situate in Owen Sound Bay, in Upper Canada, and commencing at the shore on the side line of lots 19 and 20 in the Township of Sarawak, thence easterly to Squaw Point in the Township of Sydenham, thence southerly along the coast past the mouth of the Sydenham River to the bottom of Owen Sound Bay, thence westerly along the coast to the place of beginning, embracing the southerly portion of Owen Sound Bay, together with the right of cutting timber for fishing purposes upon the enclosed reserved Crown Lands, together with the sole right of occupation for fishing purposes, and the exclusive privileges of fishery upon the same.

The second lease is executed by Andrew Russell, Assistant Commissioner of Crown Lands, in favor of the Mayor and Corporation of Owen Sound, in the person of the present Mayor, George Snider, thereto present and accepting for the Corporation, dated 4th September, 1860, for two years from 1st February, 1860, at a rent of $4 per annum payable half yearly, and is of a certain fishing station described nearly as in the first lease except that the line runs from Squaw Point along the coast at high water mark, and includes the Sydenham river up to the foot of the first falls or dam, but excludes that portion of water near Boyd's wharf already patented. It is alleged, but not proved, that this lease was granted upon the forfeiture of the lease to Mr. Stephens for non-payment of rent. It was during the pendancy of the lease to the Corporation that the seizure of this boat was made.

By the Fisheries Act, sec. 3, sub. sec. 1, all subjects of Her Majesty, but none other, may, for the purposes of trade and commerce (and a *fortiori* for private use), take bait and fish in any of the harbours, roadsteads, bays, creeks, or rivers of the Province. By section 1, the Governor in Council may grant special fishing leases and licenses on lands belonging to the Crown for any term not exceeding nine years, and may make all and every such regulation or regulations as may be necessary or expedient for the better management and regulation of the fisheries of the Province.

By section 2, "the Governor may, as occasion shall require, appoint two superintendents of fisheries, one for Upper and one for Lower Canada, whose powers and duties shall be defined by this Act and the regulations to be made under it."

By section 34, "the superintendent of fisheries may grant written permission to any person or persons who may be desirous of obtaining spawn for *bona fide* artificial or scientific purposes to fish for that purpose during the close season."

By subsequent sections power is given to the superintendent of fisheries to act as a magistrate on complaints of contravention of the Act, and certain duties are devolved upon him in reference to the bounties to be given in respect to certain fisheries, to consider which would be irrelevant to this enquiry.

By section 46, "the Governor in Council may from time to time make rules and regulations for preventing or regulating the fishing with nets," &c., &c., "in any harbour, river, or public water, within Upper Canada."

Regulations were adopted by the Governor in Council on the 16th May, 1860, of which the material portions are as follows:—

By-law No. 1. "The Crown having for the purposes of the Act 22 Vic., cap. 62, Consolidated Statutes of Canada, practically resumed and re-entered formally into possession of all fishing stations within the Province of Canada, it is pursuant to the said statute further provided, that the following regulations shall hereafter apply to the fisheries of Upper Canada, and any person or persons continuing to occupy or use directly or indirectly any such net fishing, without lease from the Crown, shall become liable to the pains and penalties imposed by the Fisheries Act, saving moreover all other recourse in like cases provided by law."

By-law No. 6. "No fishing shall be allowed in any water which may have been leased or set apart by the Crown for natural or artificial propagation of fish, except by express sanction of a fishing officer or officers."

By-law No. 7. "All other persons are forbidden to take fish for purposes of trade within the limits covered by leases from the Crown, except only by written permission of the lessees."

By-law No. 8. "The receipt, gift, purchase, sale or possession of any fish had in contravention of these regulations, shall be punishable according to law; and the article so had and all materials so unlawfully used therefor, shall become subject to forfeiture and disposed of as the law directs."

It may be observed *in limine*, that the leases put in do not appear on the face of them to have been granted by the Governor in Council, as required by the 1st section of the Act, and there is nothing in the Statute or Regulations made thereunder to enable the Superintendant of Fisheries, or the Assistant Commissioner of Crown Lands, to grant them. The leases are not under the Great Seal or the seal of the Governor, or in any way authenticated as having been granted by authority of the Governor in Council, and ought to be regarded as wanting in those *indicia* which can alone secure for such documents attention and authority as evidence in a court of justice. The lease or license to the Corporation is not under the seal of the Governor, and for that reason cannot convey to the Corporation any right to enter upon the lands described therein.

But independently of these objections to these leases, which appear to me fatal to their validity as evidence for the defence, it appears to me questionable whether by any lease or license, however formally drawn and executed, a right of fishing in any of the public waters of Upper Canada, can be conveyed to any one or more of Her Majesty's subjects to the exclusion of others.

By the common law of England, which is ours also by Con. St. U. C., cap. 9, fishing in navigable rivers or arms of the sea is common and public. *Carter* v. *Murcot*, 4 Burr. 2163, *Richardson* v. *Oxford* (*Mayor of*), 2 H. Black 182, 1 Anst. 231, 4 T. R. 437, except where by grant or prescription a several fishery exists. "Grants of this description can no longer be made by the Crown —being prohibited by King John's Great Charter, and the second and third confirmations of it in the reign of his successor." Stephens' New Commentaries, 22, 23, Am. Ed., 1843. Our inland lakes and rivers are held to be subject, in respect to public rights, to the same rules as are applied to the seas and rivers of England. See the *Queen* v. *Meyers*, 3 U. C. C. P., 305, and cases cited. The King *jure coronæ* may grant the land upon the sea shore between high and low-water mark, and even probably below low-water mark, for the purpose of being reclaimed and converted to useful purposes of occupation, which occupation however must be carried into effect within a reasonable time. *Attorney Gen.* v. *Richards*, 2 Anstr. 614. But such grant is subject to the *jus publicum*, or public right, and if acted upon injuriously to such public right it is void, or it is a grant which does not divest the Crown or invest the grantee. *Attorney General* v. *Burridge*, 10 Price, 350, *Attorney General* v. *Parmeter*, 10 Price, 378; see also *Attorney General* v. *Chambers* v. *Rees*, 9 Eng. L. & E. Rep. 212, in Chancery.

The question is, Is this public common law right of fishery in the navigable waters of Upper Canada made liable by the Fisheries Act, or other statute, to be abridged by act of the Crown, and if so, how far?

The 3rd section of the Fisheries Act, sub-sec. 1, grants no new privilege, but is, as we have seen, only in affirmation of the common law, and was doubtless intended to rebut any misconstruction of the other parts of the Act to the prejudice of the public right recognized by it. The other sub-sections do indeed grant some privileges not before enjoyed except by intrusion on the Crown, but only by giving a limited use of Crown property, and thus enlarging and giving practical effect to the public rights upon such waters.

The first clause of the 1st section of the Act refers to lands of the Crown, and is no enlargement of the power of the Crown. It may well be questioned whether the term lands of the Crown be used at all in reference to lands under navigable waters. The term "Fisheries of the Province," in the following part of this section, is not in any way defined in the Act, or elsewhere, and must, I presume, mean generally the fisheries carried on by individuals in the public waters of the Provice. But both this section and section 46 must receive a construction in harmony with the

common law and the intent of the Act itself, as expressed in its whole contents, and cannot I think be intended to empower the Crown to abridge the *jus publicum* of free fishery in public waters enjoyed by all Her Majesty's subjects in common, but, on the contrary, only to regulate this right and to make its exercise more productive of results to those actively engaged in it—thus increasing the aggregate wealth and resources of the country. Under section 46 net fishing in any public water in Upper Canada might no doubt be prevented altogether by the Governor in Council under circumstances rendering such step advisable for the protection of the public interests, that is, to prevent damage to the fisheries or to increase its extent and value. This would be in analogy to sections 20, 27, 28, 30 and 31, under which fishing for certain kinds of fish is made unlawful or prevented during certain periods of the year, (called in section 34 the close season,) and so under section 46 the Governor in Council may in certain cases extend these provisions of the Act by closing entirely, or for limited periods, any public water in Upper Canada against net fishing. So under section 6, the Governor in Council may cause to be set apart any river or other water for the natural or artificial propagation of salmon, trout, or other fish, thus closing such waters entirely against fishing in any manner. And during the close season fishing can only be allowed under section 34 by written permission of the superintendent, and for the particular object pointed out in that section. But to attempt to exercise the powers granted under the 1st and 46th sections by preventing net fishing as regards some of Her Majesty's subjects and permitting it as regards others, or by regulating such net fishing with a view of such enjoyment of it by some of Her Majesty's subjects to the exclusion of others, is, I think, contrary to the spirit of the Act and beyond its meaning and intent. No power but that of Parliament can grant to any individual or corporation any privilege which may operate as a monopoly of trade or of industrial pursuit of any description, and the power of Parliament has not I think been put forth in the Fisheries Act for any such purpose. It was passed not to deter and discourage fishing by the granting of invidious monopolies to individuals, nor even principally to create a source of revenue for the Province, but to protect the fisheries as a great Provincial interest from injury and deterioration, and to encourage the proper prosecution of the fishings by all who could under the beneficial provisions of the Act find it their interest to engage in this pursuit in Provincial waters. See the heading of sections 1 to 46 inclusive. "Protection of Fisheries," and the provisions of sections 3, 13, 14, 15, 16 and 31, granting special privileges to fishermen who might engage in fishing on these waters, privileges not confined to lessees but applicable to all alike. The whole tenor of the Act is to the like effect. It is true that section 67 contemplates that a revenue may arise under its provisions from the leases or licenses of salmon or other fisheries. But this must have reference to leases and licenses on lands belonging to the Crown mentioned in section 1, including the public lands and beaches mentioned in sections 3 and 4, and cannot of itself suffice to extend the scope of the initial clause of section 1, over the great public navigable bays and other waters of the Province.

The first clause of the first section of the Act then must I think be taken by itself, and is confined to Crown fishings or fishings on Crown Lands, and has no reference to fishing carried on in public waters in boats at a distance from the shore, and where the shore or beach is not made use of for the purpose of landing the nets in drawing them in with fish, or in cutting or preparing the fish for market. The power to lease or license includes the power to impose rules and regulations as conditions upon the lessee or licensers, and in reference to Crown property capable of being thus leased, it was unnecessary to empower the Governor to make rules and regulations for its management. The second clause therefore of the first section and the 46th section do not properly apply to such Crown fisheries, but to the fisheries of the Province open and common to all Her Majesty's subjects. After granting certain privileges upon Crown Lands to the public the Act in the 4th section expressly reserves the right of the Crown to dispose or take possession of any public land or beach occupied under its provisions for fishing purposes. Such public land and beaches therefore could be resumed at any time; and by-law No. 1 of the Fisheries Regulations declares them to have been practically resumed and again formally taken possession of; and the subsequent use of these same public lands and beaches was of course subject to any conditions which might be imposed and mentioned in any lease or license of them thereafter to be granted, not so much by virtue of this Act as of the rights of the Crown as Lord of the sea.

By-law No. 1 then, I consider, declares the resumption of the lands belonging to the Crown, up to and including beaches (if any) in front of such lands, occupied for fishing purposes but not going beyond the beach, or taking in any of the permanently submerged bottom of any public water; and from the time of this resumption the Crown was in possession of all such lands and beaches for all purposes not inconsistent with the *jus publicum*, and including the purposes mentioned in the first clause of the first section of the Act.

By-laws Nos. 2, 3, 4, 5, 8 and 10 have effect only as regulations made under the latter clause of the 1st and the 46th sections.

By-laws Nos. 6 and 7 refer to two distinct classes of waters:—

1. Waters leased by the Crown.
2. Waters set apart by the Crown for the natural or artificial propagation of fish.

To take fish in the first class of waters these By-laws require:—

1. The express sanction of a fishing officer or officers; or,
2. The written permission of the lessees.

In the second class of waters:—

1. The express sanction of a fishing officer or officers.

We have seen that the first class of waters—those leased by the Crown—cannot include the public navigable waters of the Province in which there exists at common law, as well as by virtue of the 3rd section of this Act, a public right to take fish common to all Her Majesty's subjects.

The second class of waters are not made either by the Act or by the Regulations subject to lease, but are closed against all persons except such as have the express sanction of a fishing officer.

I think, therefore, that notwithstanding any leases or grants of the Crown to the contrary (of the existence of which however no sufficient evidence is given), all Her Majesty's subjects have, both at common law and by this statute, a right freely to take bait or fish in any harbour, river or public water in Upper Canada not duly set apart by the Governor General for the natural or artificial propagation of fish, so that in so doing they trespass not on Crown lands or beaches, or by their place, time or mode of fishing, contravene any provision of the Act or any regulations made by the Governor in Council under its provisions; and applicable not merely to individuals or classes, but equally to all Her Majesty's subjects.

I have found it unnecessary to consider the effect the document put in purporting to be a lease to "the Mayor and Corporation of Owen Sound in the person of the present Mayor, George Snider," would have, if in due form, and valid and admissible as a conveyance. I may say here, however, that even were the waters of the harbours subject to lease by the Crown, it does not appear to me that the lease produced would affect injuriously the case of the plaintiff. A Municipal Corporation in Upper Canada cannot, under the municipal law as it at present stands, take a lease of a fishery at an annual rent payable out of the corporation funds, that being beyond or aside from the scope of the powers conferred on such a body by the Legislature. If the lease were at all effectual as such it would be so as a lease to the inhabitants of the town individually, and would operate in favour of the present plaintiff as one of those inhabitants, having a right under it in common with the other corporators.

The plaintiff's boat then was lawfully used by him in fishing in Owen Sound Bay, and as such was exempt from seizure under this execution, and I see therefore no reason for disturbing the verdict.

New trial refused.

GENERAL CORRESPONDENCE.

Law Scholarships.

TO THE EDITORS OF THE LAW JOURNAL.

Dear Sirs,—The intentions which actuate the Law Society of Upper Canada to offer scholarships to deserving students—members of the Society—are no doubt praiseworthy; but the manner in which these prizes are distributed, and the advantages offered to one class of competitors and denied to another, are, to say the least, very objectionable. I hail this step on the part of the learned body who sit and deliberate in solemn convocation in Osgoode Hall, as an era of better things in the study of the legal profession, but I must emphatically condemn in my humble way the narrow course pursued to make those valuable gifts totally useless to a great majority of the students in Canada.

Now let me explain:—About the first of June last, almost immediately after Easter Term, an announcement appeared in the Toronto papers that the Law Society intended offering scholarships to the various members thereof, viz., £30 for the first year's men, £40 for the second, £50 for the third, and £60 for the fourth. So far so good. The examinations were to come off next Michaelmas Term. About three weeks ago came out another advertisement, stating that a Law School was established at Osgoode Hall, the lectures and readings of which commence after all the country students have left Toronto for home. Then also the term in which a candidate tries for the scholarship is not taken to have been attended by him at all.

Now what is all this but the most direct partiality to the *Toronto* students in preference to those from a distance. We all know that the majority of Law Students get no salary, and therefore are unable to spend two or three months in the year in so expensive a place as Toronto, attending readings and lectures and the ordinary terms required by law. The very fact that the Society offers prizes argues a state of comparative indigence among many of our class which these prizes are intended to remedy. But with all the advantages of living at head quarters, the Toronto students enjoy the additional ones of having access to every facility for study that it is in the power of the Society to offer. No impartial man will fail to see the unfairness of making us in the country, under so many disadvantages, compete with them, with every possible facility at their command for successful study. Give us a chance, or at least equal advantages with them, and we are perfectly willing to enter the arena and compete for the prizes. Again, why not divide the scholarship into *two* or *three* sums, and at least give us a *second* or a *third* chance? But no, here there is but *one* large prize for each year for its some 120 students. I am very happy to see so valuable and important a step taken to improve and elevate our profession, but I humbly submit to those in authority that the suggestions contained in this my letter are not unworthy of their distinguished consideration.

I am yours truly, &c.,

Woodstock, Sept. 10, 1861. A LAW STUDENT.

Mode of Addressing Judges.

TO THE EDITORS OF THE LAW JOURNAL.

Gentlemen,—May I take the liberty of asking, for the information of law students generally, and perhaps for a few unsophisticated lawyers, the proper method of addressing the Judges of the Superior Courts, or a Judge of the County Court, when meeting them *out of Chambers*.

Shall we say,—Judge, Judge Burns; (for instance) Justice Burns, Mr. Jurtice Burns, or Mr. Burns? And in the case of a County Judge, shall we say,—Judge, Judge Price (for instance), or Mr. Price.

I ask these questions as many of us country students who attend to the ordinary business of an office in Chambers and at the Division Courts, and afterwards meeting the Judge—frequently perhaps—put our foot in it, by addressing him in an unprofessional manner.

Perhaps you will better understand my meaning by asking you "What the practice is in Toronto?"

Should you favor us with an answer to the above I feel convinced the same will be received with thanks by a large number of students throughout the country, and the undersigned will feel himself under particular obligations to you.

Sarnia, Sept. 23, 1861. A COUNTRY STUDENT.

[The mode of addressing a Judge sitting in the discharge of public duty is well settled in and out of Toronto. The mode of addressing a Judge when not sitting in the discharge of public duty is by no means so settled as to be called "a practice." In fact no rule on the subject prevails in Upper Canada. It is a matter of taste. We think that to address a Judge out of Chambers as "Judge" is bad taste. It is the "practice" in the United States, but none the better on that account. "Judge will you liquor," is so said to be a common expression there, but one which good taste certainly condemns. There is no more sense in addressing a gentleman in a drawing room as "Judge" than addressing the man who retails gin cock-tails as "Colonel." To our taste, "Mr. Burns" and "Mr. Price" are much better than "Judge," "Justice," or "Mr. Justice." When speaking *of* (not speaking *to*) the judge a different rule may with propriety be observed.—EDS. L. J.]

APPOINTMENTS TO OFFICE, &c.

CLERKS OF THE PEACE.

JAMES JOSEPH BURROWES, Esquire, to be Clerk of the Peace for the United Counties of Frontenac, Lennox and Addington, in the room of JOHN WAUDBY, Esquire, deceased.—(Gazetted 7th September, 1861.)

CORONERS.

ROBERT RAMSAY, Esquire, Associate Coroner for the United Counties of York and Peel.

JOHN BOWKER, Esquire, Coroner for the Provisional District of Algoma.—(Gazetted 7th September, 1861.)

NOTARIES PUBLIC.

JAMES WEBSTER, the younger, of the town of Guelph, Esquire, to be a Notary Public in Upper Canada.

FRANK EVANS MARSON, of the town of Guelph, Esquire, to be a Notary Public for Upper Canada.

WALTER R. BROWN, of the City of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 7th September, 1861.)

TO CORRESPONDENTS.

"A LAW STUDENT"—"A COUNTRY STUDENT"—Under "General Correspondence."

DIARY FOR NOVEMBER.

2. Saturday ..... Articles, &c., to be left with Secretary Law Society.
3. SUNDAY ..... *23rd Sunday after Trinity.*
6. Tuesday ..... Chancery Examination Term, Goderich and Cornwall com.
8. Friday ..... Last day for setting down for hearing Chancery.
10. SUNDAY ..... *24th Sunday after Trinity.*
11. Monday ..... Last day for notice of hearing Chancery.
13. Wednesday ..... Last day for service of Writ County Court.
17. SUNDAY ..... *25th Sunday after Trinity.*
18. Monday ..... MICHAELMAS Term beg. Chan. Hearing Term. com. Recorder's Court sits.
22. Friday ..... Paper Day, Q. B.
23. Saturday ..... Paper Day, C. P. Last day to declare County Court.
24. SUNDAY ..... *26th Sunday after Trinity.*
25. Monday ..... Paper Day, Q. B.
26. Tuesday ..... Paper Day, C. P.
27. Wednesday ..... Paper Day, Q. B.
28. Thursday ..... Paper Day, C. P.
30. Saturday ..... Michaelmas Term ends. Chancery Hear. Term ends. Clerks of Municipal Councils to return No. of resident Ratepayers to Receiver General.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

NOVEMBER, 1861.

RIGHT OF BRITISH AUTHORS TO COPYRIGHTS IN CANADA.

The Imperial Legislature by the act 3 & 4 Vic., cap. 35, commonly called the Union Act, empowered Her Majesty the Queen, within the Province of Canada, by and with the advice of the Legislative Council and Assembly of the Province, to make laws for the peace, welfare, and good government of the Province—such laws not being repugnant "to any act of Parliament made or to be made, which does or shall by express enactment or by necessary intendment extend to the Provinces of Upper and Lower Canada, or to the Province of Canada" (sec. 3).

The Queen, by and with the advice of the Legislative Council and Assembly of the Province, on 18th September, 1841, made a law entitled, "An Act for the protection of Copyrights in this Province" (4 & 5 Vic., c. 61).

By section 2 of the act last mentioned, "any person or persons resident in the Province, who shall be the author of any book or books, &c., which may be now made or composed and not printed or published, or shall hereafter be made or composed, or who shall invent, design, etch, engrave, * * * any print or engraving, * * * shall have the sole right and liberty of printing, re-printing, publishing, and vending such book or books, &c., in whole or in part, for the term of twenty-one years from the time of recording the title thereof in the manner after mentioned."

By section 5 of the same act it is enacted, that "no person shall be entitled to the benefit of this act unless he shall, before publication, deposit a printed copy of the book or books, &c., in the office of the Rigistrar of the Province, which officer is hereby directed and required to record the same forthwith, in a book to be kept for that purpose," in a given form of words; and by section 6, that "no person shall be entitled to the benefit of the act, unless he shall give information of copyright being secured, by causing to be insertrd in the several copies of each and every edition published during the term secured, on the title page or page immediately following it if it be a book, the following words, "Entered according to act of the Provincial Legislature in the year ——, by A. B., in the office of the Rigistrar of the Province of Canada."

It is manifest upon a perusal of the act, that it was intended for the sole benefit of authors being residents of the Province; British and Foreign authors, so far as this act was concerned, were left without protection.

On 28th July, 1847, the 10 & 11 Vic., cap. 28, was passed by the Provincial Legislature. It was entitled, "An Act to extend the Provincial Copyright Act to persons *resident* in the United Kingdom *on certain conditions*," and enacted, that "for and notwithstanding any thing in the said Provincial Act contained, the provisions thereof shall be, and the same are hereby extended to any person or persons being British subjects, and residing in Great Britian or Ireland, as if such person or persons were residents in this Province. *Provided always*, that to entitle any such literary production or engraving, as in the said act mentioned, being the work of any such person or persons so residing in Great Britain or Ireland, to the protection of the said act, it *shall* be printed and published in this Province, and *shall*, in addition to the words directed to be inserted by the 6th section of the said Provincial Act, and immediately following threreafter, contain the name and place of abode or business in this Province, of the printer or printers and publisher or publishers of every such literary production or engraving."

So far, protection was given to British authors resident in Great Britian or Ireland; but the protection was only given upon certain specified conditions. Neglect to comply with these, was an answer to any claim of protection. The conditions were reasonable, viz., that no non-resident, even though a British subject, should have copyright in this Province unless he printed *and* published his work in the Province, thereby giving some employment to the people of the Province, and in order to avoid mistake,

stated in a conspicous place the name and place of abode or business in the Province of the printer and publisher.

No difficulty could arise in the practical application of this act, were it not for the fact that five years previously to its passing, the Imperial authorities had passed an act with which it appears to be in conflict. We refer to the English Act 5 & 6 Vic., cap. 45, passed on 1st July, 1842. It enables British authors residing in England there to obtain copyright of their works, and enacts that "if any person shall, in *any part of the British dominions* after the passing of the act, print or cause to be printed either for sale or exportation, any book on which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, * * * such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in that part of the British dominions in which the offence shall be committed;" and by section 23 it further enacts, "that all copies of any book on which there shall be copyright, &c., and which shall have been unlawfully printed, &c., without the consent of the registered proprietor of such copyright, shall be deemed to be the property of the proprietor of such copyright," &c.

This act is not restricted to Great Britian. It is made expressly to extend "to the United Kingdom of Great Britain and Ireland, and to *every part* of the *British dominions*" (section 29). By section 2 it is expressly declared that the words "British dominions," shall be construed "to mean and include all parts of the United Kingdom of Great Britain and Ireland, the Islands of Jersey and Guernsey, all parts of the East and West Indies, and *all the colonies, settlements, and possessions of the Crown*, which now are or may hereafter be acquired."

The Provincial Act 10 & 11 Vic., cap. 28, entitles no work of a British author resident in Great Britain to any protection in Canada, unless upon compliance with the terms and conditions mentioned in the act already noticed. Thus, so far as the Provincial Act is concerned, copyright in England is clearly not copyright in Canada. The act allows Canadians to print and publish the works of non-resident British subjects when not copyrighted in Canada, quite as much as the works of non-resident foreigners. The English Act makes such printing or publishing an offence for which the offender is liable to be punished by action at the suit of the English author, and forfeits the edition printed or published to the English author.

The Imperial, delegated to the colonial authorities powers of legislation, but these powers are not supreme. Power, as we have seen, was given to the Colonial Legislature to make laws for the peace, welfare, and good government of the Province—"such laws not being repugnant to any act of Parliament made or *to be made* (by the Imperial Legislature), which does or shall by express enactment or by necessary intendment extend to the Provinces of Upper and Lower Canada, or to the Province of Canada."

Two questions therefore arise. Does the English Act 5 & 6 Victoria, cap. 45, by express enactment or by necessary intendment extend to the Province of Canada? Is our 10 & 11 Vic., cap. 28, repugnant to the 5 & 6 Vic., cap. 45?

It is abundantly clear that as Canada was at the time of the passing of the 5 & 6 Vic., cap. 45, not merely a part of the British dominions but a British colony, Canada is bound by that act, and inasmuch as that act makes it an offence in the colonies to re-print or re-publish a book copyrighted in Great Britian or Ireland, it would seem the British copyright proprietor is entitled to the protection of that act, although he neglect to comply with the provisions of our 10 & 11 Vic., cap. 28. Some persons may read our 10 & 11 Vic, cap. 28, as being cumulative to the 5 & 6 Vic., cap. 45, instead of being repugnant to it. It is possible that the acts may be so read, but we do not clearly see our way to that conclusion.

REPORTS OF THE COURT OF ERROR AND APPEAL.

Several subscribers have urged upon us the necessity of regularly reporting in the columns of this journal the decisions of the highest court in Upper Canada. The expense of so doing would be great, but rather than continue to allow important decisions of that court to remain unpublished we would be inclined to undertake the burthen of publishing them ourselves. With that object in view we have caused inquiries to be made in the proper quarter, and learnt with much satisfaction that Mr. Alex. Grant, the Reporter of the Court of Chancery, is about to commence a complete and regular series of Error and Appeal cases, including all cases already decided and not as yet published. We hope that his enterprise will receive proper support. All are interested in the decisions of that court which sits in appeal on the decisions of the two Superior Courts of Common Law and the Court of Chancery.

SELECTIONS.

FICTITIOUS LEGAL CASES.

Courts of justice are established for the purpose of solving questions which actually and bonâ fide are brought before them for the purpose of obtaining a decision which will, whatever may be the result, unless reversed by the judgment of a higher tribunal, be binding upon the litigant parties. Courts of

justice are not bound to decide, and will not decide, merely fictitious cases; they will not permit the tricks of the stage to be played on the judicial forum. However ardent might be the desire of two ingenious conveyancers to have a knotty point of real property law decided, no Courts would entertain the question if they were aware that the actors in the proceedings were merely imaginary, the facts fictitious, and that the whole suit was taken, not from real life, but was a mere scene, got up to gratify the impertinence of learned curiosity.

Moreover although the facts of a case brought before the Court be true, the plaintiff must not appear in a fictitious character, for, when discovered, he will not be allowed to obtain that relief to which he might have been entitled had his character been real, and not assumed. To no class of suits, perhaps, do these remarks more forcibly apply than to those relating to public companies. In a proper case one shareholder is allowed to institute a suit on behalf of himself and the other shareholders of a company; but, ex necessitate, that constructive representation of one can only with propriety be allowed when the suit is intended to be bonâ fide for the benefit of those whom the plaintiff represents; otherwise nothing would be easier than for a person having a large stake in one company to obtain a small interest in another, and institute a suit ostensibly to obtain relief as a member of the latter company, when in reality it was intended merely to subserve the interests of its rival, and obtain for it indirectly, under a false character what such rival company could not obtain if it were to appear as plaintiff in its true colours. The mere fact that a person has a share in one company is not, of itself alone, enough to enable him to sustain a suit nominally on behalf of the other shareholders, when he in reality is acting for and on behalf of the interests of another company.

These principles have been clearly laid down and acted upon by the Lord Chancellor in the recent case of *Forrest* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (7 Jur., N. S., part 1, p. 887). There it appeared that the plaintiff, a Mr. Forrest, *suing on behalf of himself and the other shareholders*, instituted a suit against the defendants, the Manchester, Sheffield, and Lincolnshire Railway Company, to obtain an injunction against their employing certain steam-boats (which they were obliged to keep for the purposes of a ferry on the river Humber) in excursion trips down the river. The bill alleged not only that these excursions were ultra vires, but were also greatly prejudicial to a certain steam-packet company called "The Gainsborough United Steam-packet Company, Limited," of which the plaintiff was a large shareholder. The defendants submitted that the suit was not for the benefit of of the other shareholders of the company on whose behalf the plaintiff sued, but was instituted solely to promote and serve the interests of the steam-packet company, and that all the other shareholders of the defendant's company were opposed to the suit

The motives which actuated the plaintiff in filing the bill, which to a certain extent are frankly stated in the bill, appear in rather an amusing and somewhat complex form in his cross-examination. In the first place, he admitted that his interest in the packet company was much greater than his interest in the railway company. He admitted that the excursion traffic had been continued for eight or ten years. One objection he had to the excursion traffic was, that *the boats were running on Sundays which he disapproved of from a moral and religious feeling*. His *principal objection*, however, was to the injury done to the packet company, of which he was a director. *The directors of the packet company had "directed" the institution of the suit, and indemnified him against the costs.* Sir. J. Romilly M. R., dismissed the bill with costs, upon the ground that what had been done was within the scope and powers of the defendants. Upon an appeal to the Lord Chancellor, his Lordship, but on entirely different grounds to those upon which the Master of the Rolls founded his judgment, refused the application with costs. "I have nothing to do," said his Lordship, "with the motives of men suing in this court. If they come here in a bonâ fide character, the reason for their coming here is a matter beyond the province of a court of justice to inquire into. But if a man comes here representing to me that he is a bonâ fide shareholder in a company, and that it is the bonâ fide suit of that company, and it turns out not to be the suit of that company, but in reality to be in its origin, and in its very birth and creation, the suit of another company, then, I repeat, that is an illusory proceeding, and ought not to be attended to by the Court. The well known words, the trite quotation, will occur to the minds of those who hear me—'Fabula non est judicium, in scenâ non in foro res agitur.' If the plaintiff be permitted to assume, merely for the purpose of coming into this court, the garb of a shareholder, but at the same time announces—'This suit is not directed to the purposes of that company; I have nothing in common with the shareholders of that company; it has not emanated from the wish of the shareholders; it does not emanate from me as a shareholder; it is not my act; I am directed to do it by another party and another body of men'—then, in point of fact, the suit is not the expression of his own will, nor is it the legitimate prosecution of his own interests or his own objects, but it is the prosecution of the interests and objects of persons who have no right whatever to invoke the interference of this Court. It is most desirable that suits in this court should really be that which they profess to be, *and whenever they are found to be illusory proceedings of the character I have described*, I hold it the bounden duty of the Court to treat them as a mockery, and an imposition on the Court, and to deal with them accordingly." We entirely agree with the principles laid down by the Lord Chancellor in this important judgment, and we think that much good will result from their being carried out on all occasions to their fullest extent. Their application may not be devoid of difficulties in many instances, because, in cases of large companies, where directors, and perhaps a large and influential body of their supporters, are doing all in their power to divert the capital of the company from its legitimate purposes, and to employ it in speculations which were never intended upon its formation, it is but just that individual shareholders should have perfect freedom of action, and should have power, even though possessing shares in a rival company, to come into a court of equity, and ask for an injunction to restrain the directors from such misemployment of the capital of the company; but if they are really only agents of another company, then the mere possession of shares in the company against which they seek relief should not give them a right to it.

The case before the Lord Chancellor, both upon the pleadings and on the cross-examination, was a very clear one. The plaintiff's interest in the rival company, from his holding a larger stake in it than than in the other, was evident. The suit was directed by the rival company, and the plaintiff was indemnified by them against costs, so that he could indulge in the luxury of litigation without dread of the usual and greatest drawback to its enjoyment. The principles laid down by the Lord Chancellor might, however, be well applied to cases where the facts against the plaintiff do not stand out in such bold relief.

Suppose, for instance, it appears that one company wishes to restrain another company from carrying on a business which it considers to be prejudicial to its own interests, and, not being able to do so directly, does so indirectly, by *instigating* a shareholder to take proceedings for that purpose; ought such a suit, according to the principles laid down by the Lord Chancellor, to be successful? In the case of *Colman* v. *The Eastern Counties Railway Company* (10 Beav. 1) this objection was taken to the plaintiff, but it was not successful; and Lord Langdale, M. R., held that it was no ground of personal exception to a shareholder coming forward as plaintiff in such a case, that "*he had been instigated to institute his suit by another*

company." With regard to that case, the Lord Chancellor, without certainly expressing any approval of it, distinguishes it from the case before him, observing, that if the proposition of Lord Langdale were limited to the extent to which the words in which it is expressed go, there might be no exception to that proposition; but undoubtedly he would not assent to it if carried one jot beyond those limits.

From these observations of the Lord Chancellor we hope to see the principle he has laid down in *Forrest* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* acted upon in the decisions of the Court of Chancery, as far and as extensively as they possibly can be, consistently with the right which individual members of a company have to protect their own interests by bonâ fide proceedings; and that companies, whether they are actuated by religious or commercial motives, or both of them, will be warned that they cannot, by assuming the garb of a shareholder of a rival company, or by employing him as their tool, attain those ends which they could not do in their real character.

The principle might also, we think, be more extensively acted upon by the Legislature than it has been, and that every means should be taken to prevent suits in courts of justice being commenced, except for the interests of those on whose account they are nominally instituted. Administration suits, for instance, in the Court of Chancery, have not always been, and are not always now, instituted either for the benefit of creditors or the estate to be administered. But perhaps the most iniquitous law proceedings ever tolerated by courts of justice, or borne for a long period by a patient people, are those in which companies are wound up. Can no additional security be imposed against such proceedings being wantonly undertaken and recklessly carried out? How often have they been commenced and carried on by the mere nominees of those who profit by them, ostensibly, indeed, for the payment of creditors but in reality for the creation of costs, the apparent movers in the proceedings being the mere puppets of those undertaking the profitable process of winding up the affairs of shareholders unfortunate in the object of their speculation, but doubly unfortunate in falling into the hands of the winding up fraternity.

A correct return of all the cases in which the operation of winding up companies has been performed, giving the names of the operators, the amount distributed, and the cost of distribution, with, perhaps, a few other details, would form a very instructive commentary upon the evils of allowing any person constructively to represent others, except in those cases where, to use the words of the Lord Chancellor, the suit is a bonâ fide one, faithfully, truthfully, and sincerely directed to the benefit and interest of the persons whom the party originating such proceedings claims a right to represent.—*Jurist.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie P.O.

All other Communications are as hitherto to be "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 262.)

The power to hold a court is nothing but a delegation of an authority, and when the time and place for holding it is appointed, in the delegation thereof, the direction must of course be followed, or all acts not in accordance with the provision will be void.

In the old Court of Requests Act the days of sitting were fixed by statute. By the Act regulating the Division Courts, neither the times nor places of holding the courts are appointed. If no provision respecting sittings was contained in the Act the judges, by their authority as judges, would doubtless have the determining when and where courts were to be held, subject to the control of the superior courts of common law. But the Act expressly confers the necessary power, as will be seen.

The general provision as to the times when and the places where the courts are to be held is contained in sec. 6, which enacts as follows:—

A court shall be holden in each division *once in every two months*, or oftener, in the discretion of the senior or acting county judge; and the judge may appoint and from time to time alter the times and places within such divisions when and at which such courts shall be holden. Section 8 also provides, that there shall be a court in every city and county town; and section 7, before noticed, enables the Governor to make special order respecting the holding of certain courts where the amount of business in the division, or its peculiar situation, renders frequent courts unnecessary.

Where no order has been made under section 7 for holding the courts, the appointment of sittings or days when the courts in each judicial district are to be holden belongs to the judge, and are fixed at his discretion, subject to the direction (in sec. 6) that in each division a court shall be holden once in every two months. In like manner the judge has the sole power of appointing the places where the courts are to be held within each division.

The direction in sec. 6 calls for some observation, viz.: "A court shall be holden for each division once in every two months," that is to say, not in every three months, nor in every six months (quarter or half year), but one in every two months, or in every sixth of a year. The year is thus regarded as divided into six parts or periods of two months each; and at some convenient time in each of these periods a court is to be held, but not necessarily at regular intervals or a periodicity of two months fixed. This is the plain and ordinary sense of the words "once in every two months," *i. e.* calender months (Interpretation Act, sec. 13). Indeed it would not be possible to comply strictly with a provision to hold sittings at regular intervals and stated days, for the day might fall on a Sunday or legal holiday, and besides the judge is also sole judge of the local courts of record, the terms and periods of sitting of which are fixed by statute, and no arrangement could be made for so holding the Division Courts that would not conflict therewith. Therefore the necessity for leaving to the judge the power of appointing the sittings for such days in the

two months as will not conflict with his engagements in other courts of superior jurisdiction,—such days as will best square with local considerations and the public interests. In general the practice is so to arrange the sittings as to avoid as much as possible having them at the busy times of the year—seed-time and harvest—in country places.

A court may in certain cases be held on a day different from that appointed, and if the judge or acting judge does not arrive at the appointed hour parties should wait until eight o'clock in the afternoon of the same day, when an adjournment will be made by the clerk.

The 20th section of the Act provides as follows, viz.:—In case the judge or the acting judge, from illness or any casualty, does not arrive in time, or is not able to open the court on the day appointed for that purpose, the clerk or deputy clerk of the court shall, after eight o'clock in the afternoon, by proclamation adjourn the court to an earlier hour on the following day, and so from day to day adjourning over any Sunday or legal holiday until the judge or acting judge arrives to open the court, or until he receives other directions from the judge or acting judge.

The places where the Division Courts are to be held are appointed by the judge, and may by him be altered from time to time, but not, it is apprehended, while summonses are current for the attendance of parties at a particular place, unless indeed it becomes impossible to hold a court there. For in such case even where the place of holding the court is appointed by Act of Parliament the judge would have the power by implication of law to remove it, (3 Bulstr. 268,) and under the Division Court Act having himself the power of appointing, the judge it is apprehended would clearly have authority to alter or remove;—but in either case due notice should be given to the parties who are bound to attend the court, and the place should be within the limits of the particular division.

In acting under this clause the convenience of those having business in the court should be a chief consideration in determining the position and the centre of population, rather than the spot equally distant from the outside limits of a division, seems the most eligible place for holding the sittings.

If there be a town or village in the division it will in general be found the best place; if a city or county town lies therein the statute is imperative, and the court must be held there.

LAW OF EXEMPTION FROM SEIZURE.

The following communications, received from two attentive and well-informed correspondents—both clerks—speak for themselves.

We agree with one of our correspondents that, as respects the Division courts, the Legislature might very well have left the duty of certifying to the clerk who knows all about a suit from first to last. But we suppose that as the enactment is intended to apply to executions from *all* the courts, and as the clerks of the superior courts know next to nothing of the nature of the suits, the intervention of the judge was found desirable.

The judge merely acts upon the evidence of the fact, necessary to bring the case within the statute. This evidence may be his own actual judicial knowledge, from having tried the case, for instance—the original papers produced for his inspection—the certificate of the clerk—or the affidavit of the plaintiff.

In executions upon transcript of judgment, the judge of the Home county may certify upon his knowledge of facts, on the faith of which the judge of the foreign would certify upon the execution. But in these cases, the better mode seems to be an affidavit from the plaintiff or his agent. We continue to think that the certificate should be endorsed upon the execution, before it is placed in the bailiff's hands for execution.

To the Editors of the Law Journal.

GENTLEMEN,—In your October number you have noticed (page 262) "The Law of Exemption," and as you have asked to be informed what is the practice in other counties, under the act of last session, cap. 27, I write to explain the practice in this county. So soon as the act was officially known by the judge, he directed the clerks to endorse a certificate on the back of any execution, which was intended to be used under the provisions of the act, certifying that the debt was contracted before the 19th May, 1860; and upon the production of such an execution before him he would endorse the necessary certificate. In pursuance of this direction, I endorse *on every* execution I issue, on judgment for debt contracted before that date as follows:

"I certify, that the claim in this cause was upon a promissory note made by defendant, dated September 8th, 1858."

A. B. C., *Clerk.*

If anything shall arise by which the judge's certificate will be required, the bailiff can transmit the execution to the judge accompanied with his own or the application of the plaintiff, upon which the judge will act.

Yours truly, A CLERK.

To the Editors of the Law Journal.

GENTLEMEN,—In your last number I observe your very appropriate remarks respecting the Exemption Law as amended. You are perfectly correct in saying that it was a great injustice in making the act applicaple to debts previously contracted. However, the Legislature of last session very wisely did away with the retrospective feature, which has enabled many plaintiffs in my court to collect judgments from debtors who were much more able to pay them than the unfortunate creditor was to lose.

I think it a useless feature in the amendment requiring the judge's certificate to the execution, as the clerk's certificate would have answered every purpose, and would have saved

much delay and trouble to the judge. The mode of getting the judge's certificate upon the executions in this county is, I think, as easy and correct a system as can be adopted, viz.; An execution creditor goes to the clerk and orders out the execution, and wants the judge's certificate endorsed thereon. The clerk turns to the suit, makes out the execution, and, if judgment were obtained since 19th May, 1860, and examines the original claim, which shows when the debt was contracted, takes the necessary postage from plaintiff, and transmits the execution by first mail to the judge, telling the judge that the debt for which the enclosed execution was issued was contracted before the 19th May, 1860. If the judgment was obtained before that time it is so stated in the body of the execution, and no certificate is required from the clerk, except that the judgment is not for tort, &c., which I think certainly the best evidence the judge can have necessary for his order, as the clerk cannot err as to the date of the contraction of the debt. Why not then allow the clerk's certificate upon the execution to answer every purpose, inasmuch as the judge has to be be guided by the clerk's certificate before he endorses the execution? My court is only 20 miles from the judge, with a a daily mail, and it takes till the third day after mailing the execution to the judge to get it back, with the judge's certificate ready for the bailiff; which delay often is to the predjudice of the execution creditor, as many persons have plenty of property one day, and two or three days afterwards have none.

It certainly cannot be argued that to simply allow the clerk's certificate upon the execution, would be placing too much power in their hands; if so, then it is equally wrong for a clerk to issue any process without an order from the judge. If a clerk would make a false statement upon the execution he would do so to the judge, which would not occur without some exposure. For instance: supposing a clerk misinform the judge, and procure his order, I ask, when the bailiff went to levy, if he (the debtor) would not know at once when the debt was contracted? and if he was imposed upon, would very soon go and see the judge to tell him that he had made a mistake in his certificate; and if correct, I fancy it would not be well for such clerk. And just the same would apply if clerks were empowered to make the certificate. If any clerk would certify upon an execution that a debt was contracted before the 19th May, 1860, and the bailiff sell under that execution, and it turns out that the debt was contracted since that date, I apprehend that the clerk and his sureties would be liable for damages, as on any other illegal process.

If any one will show me the use of imposing all this extra trouble upon the judge, then I will say it is a wise enactment.

The mode I have adopted on "transcripts and certificates" to other courts is, I require the plaintiff to make an affidavit that the "debt was, &c.," which I attach to the "transcript and certificate," requesting the clerk to whom I send it to forward said affidavit with his "execution on transcript" to the judge in his county, which I should think would be sufficient evidence for the judge to grant the certificate; which I think a much shorter process than for the clerk to mail it to the home judge for his certificate, who would have to remail it again to the foreign clerk, and for the foreign clerk to mail again to his judge, &c. Furthermore, a judge is not asked by the act to certify only *upon the execution*, and upon a transcript going to another county. I don't see how the judge of the county where the judgment was obtained could be called upon to make any certificate.

As you very kindly solicited remarks from correspondents on this subject, I have taken the liberty of sending you the foregoing for publication.

Yours, &c.,

CLERK 6TH DIV. COURT, CO. NORFOLK.

To the Editors of the Law Journal.

GENTLEMEN:—As your Journal is the only medium through which unfortunate country law practitioners can acquire any valuable information upon the practice of the Division Courts; and as you, hitherto, have always evinced a great readiness to devote time and space, for any thing pertaining to these Courts, I without any hesitation ask your opinion upon the *proper* practice in the following case:—

A has a claim against B for damages to the extent of $40, and also a claim against the same person for $100, for rent due on a lease. From his position he was obliged to sue on both claims. He brought his action for damages at one court, and at the following court sued for his rent. The Judge decided, that under the 59th clause, cap. 19, Con. Stat. U. C., the plaintiff (A) was barred from suing on his claim for rent, as he considered that the bringing of *two* actions was a dividing of the cause of action, within the meaning of this section, holding that the word "cause" *meant causes*.

Is it a dividing, where there are *two distinct causes of action?*

Yours, &c.,

Nov. 8th, 1861. ALPHA.

[The words "cause of action," as used in the section to which our correspondent refers, mean "cause of *one* action;" and no court, to our knowledge, has yet gone the length of saying that when two causes of action *may* be joined they *must* be joined. We refer to *Neale* v. *Ellis*, 1 D. & L. 163; *Brunskill* v. *Powell*, 19 & J. Ex. 362; *Grimsby* v. *Aykroyd*, 1 Ex. 407; *Wickham* v. *Lee*, 12 Q.B. 821; *Kempton* v. *Wiley*, 9 C. B. 719; *Bonsey* v. *Wordsworth*, 18 C. B. 525.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*

IN THE MATTER OF THE JUDGE OF THE COUNTY COURT OF ELGIN.

Refusal of Judge to act—Application for mandamus—Interest of Judge and relationship to parties.

A garnishee summons having issued in a county court suit, one H. opposed it as assignee of the judgment debtor, and in answer to his claim an affidavit was filed from which it would appear that the judge was interested with H. in his claim. He then declined to act further in the matter, and after several subsequent meetings signed a memorandum, stating as an additional reason for refusing to proceed the fact that H. was his brother-in-law.

The court under these circumstances refused a mandamus to compel the judge to dispose of the case.

(Easter Term, 24 Vic., 1861.

In Hilary term last *Richards*, Q. C., obtained a rule *nisi* calling upon Mr. Hughes, as judge of the county court of the county of Elgin, to shew cause why a writ of mandamus should not issue commanding him to grant a summons as such judge to one John Allworth, in a suit in the said court wherein Allworth was plaintiff and one Wegg and others defendants, and one Patrick Burke was garnishee, and to proceed upon and dispose of the application according to the 289th and following sections of the Common Law Procedure Act.

During this term *John Wilson*, Q. C., shewed cause.

The facts of the case are fully stated in the judgments.

MCLEAN, J.—On this application affidavits have been filed with a view to inform the court of the precise state of the proceedings, and the cause of staying such proceedings in the county court of Elgin, and it is not difficult to perceive that much of the difficulty which has occurred has arisen from the terms on which the parties are with each other, and which it is much to be feared manifest themselves even in the ordinary proceedings of the court.

In this case an order was applied for to attach a debt due by one Patrick Burke to one Asa Howard, to answer on a judgment recovered by John Allworth against Asa Howard and two other parties. The usual attaching order was granted and served on Burke, the garnishee, and a summons calling on the garnishee to appear and shew cause why he should not pay over that debt, or so

much as was necessary to satisfy the judgment recovered by Allworth against Asa Howard and others. At the time appointed Burke, the garnishee, appeared before the judge of the county court in chambers, pursuant to the summons. He admitted that there was a debt of a certain amount to be paid by him to Asa Howard, but alleged that it was only payable by instalments, for payment of which the time had not arrived. At the said time Mr. Edward Horton appeared before the judge, and claimed a right to be heard for the purpose of shewing that the debt could not be attached at the instance of Allworth, or any other execution creditor, on the ground that it had been assigned to him, Horton, by Howard, before the order to attach had been issued or served. The right of Mr. Horton to appear for such purpose was objected to by Mr. Abbott, attorney for Allworth, and by Mr. Stanton, who had several attaching orders for the purpose of attaching part of the same money in the hands of Burke.

The consideration of the application was postponed to give time to consider as to the objections urged to Mr. Horton having a right to be heard, and before the time appointed for proceeding with the hearing the objection was abandoned by Messrs. Abbott and Stanton; and then Mr. Horton produced an affidavit shewing that he had sold some lots of a property known as the Thompson farm to Howard; that Howard then agreed to hand him over the note of $500 which he held against Burke, of which Horton as his attorney was to collect $200 to pay himself for the lots, and the balance to be applied in some other suit in Horton's hands for collection: that relying on this arrangement made before Howard absconded, he, Horton, had procured conveyances to be made to one Thompson, to whom Howard was indebted, at the request of Howard, the purchaser of the lots, and that such arrrangement appeared in Howard's hand-writing entered in a book in his own possession, but found amongst his papers by his wife after he had absconded.

Mr. Abbott then, in reply to Mr. Horton's claim and affidavit, filed an affidavit of his own, stating that Asa Howard absconded from Canada some months previously: that a short time ago, and long after Howard absconded, Edward Horton, Esq., who clained a portion of the money due by the garnishee, Burke, to Howard, and who has made an affidavit in the matter, told him, Abbott, that he did not hold any assignment of any portion of the moneys owing from the said Burke to the said Howard; that he, Abbott was informed and believed that the Thompson farm mentioned in the affidavit of the said Edward Horton, including the two town lots therein stated to have been sold by the said Edward Horton to the said Howard, was on the 21st day of March last the property of the said Edward Horton, Edward M. Yarwood, William K. Kains, and David John Hughes, Esquire: that they were then, and had been for a long time, and still were the parties beneficially interested therein, and that he had good reason to believe that the name Horton & Co., in the memorandum referred to in the said affidavit of the said Edward Horton, meant the persons mentioned in the foregoing paragraph.

On that affidavit being read the judge objected to his name being made use of and mixed up in the matter, and asked Mr. Abbott whether he meant that he was interested in the application which Horton was making to prevent the order being made for paying over the money to Burke, and Mr. Abbot replied that he had made the affidavit to contradict the affidavit of Mr. Horton. Mr. Hughes then stated that if it was intended to be alleged that he was interested in the matter he could not proceed any further with it: that if he was interested he ought not to proceed with it, and if he was not that affidavit should be withdrawn; and he told Mr. Abbott to enquire from his brother-in-law Mr. Kains: that he knew every thing about the purchase of the Thompson farm, and could give every information on the subject; and that he would adjourn the further hearing of the summons till he, Abbott, should have time to enquire on the subject of the Thompson farm, and ascertain as to the alleged interest of the parties therein.

The consideration of the application was further adjourned, and Mr. Abbott then offered another affidavit similar in all respects to the other, except that the name of Mr. Hughes was omitted, and the words "and another" inserted in its place. The judge was requested to proceed on that affidavit, but declined doing so, alleging that he could not proceed so long as the charge of interest remained directly or indirectly, and he handed back the papers which had been laid before him in support of or against the summons at the instance of Allworth. Subsequently an application was made to the judge to allow another barrister to dispose of the matter, but Mr. Ellis, who was then acting for Mr. Horton, would not consent to that course. Finding that they could not proceed to get an order for their clients to have the money in Burke's hands paid on the judgments recovered against Howard, Mr. Abbott and Mr. Stanton again applied to Mr. Hughes to proceed in adjudicating on the several summonses which were pending before him, and, as Mr. Hughes says, they did so in a menacing manner, stating that Mr. Hughes compliance *would save more troublesome proceedings*, while they allege that no threat of any kind was used by either of them, and that all that either of them did was to request Mr. Hughes to re-consider the proceedings.

Mr. Hughes than told the parties he could proceed no further under the circumstances, and he drew out or dictated a statement to the clerk of Mr. Abbott or Mr. Stanton referring to matters of a personal nature, and the unhappy difference existing between them; and then for the first time, as far as can be seen from the papers, objected to proceed on account of Mr. Edward Horton being connected with him by marriage, and Mr. Horton being personally interested in the result. In closing this paper Mr. Hughes makes a statement amounting to a species of irritating reply, which I think a sense of his own position ought to have prevented his making: "Having said this much I am now prepared to await the result of the troublesome proceedings with which the parties *yesterday thought proper to alarm me*, and which *I have no doubt, indeed I have too much reason to feel*, have *not been forborne or spared on my account*, or from any *apprehension that they might be troublesome* to me."

There are various other statements and accusations contained in the affidavit of the judge to compel whose action in a portion of his judicial duty a mandamus in this case has been applied for, and whatever may be the bitterness of feeling or the hostility existing towards him on the part of the practitioners making the application, there is too much reason to fear that there is not a better or more kindly disposition entertained towards them by him. But while I must regret the existence of such evident hostility between gentlemen whose professional duties must bring them very often together, and while I cannot but think that a proper and conciliatory spirit on either side would long since or might certainly long since have led to the removal of the obstacles which have caused a stay of proceedings undoubtedly injurious to the parties interested, it is necessary without further delay to decide whether on the affidavits before us a mandamus can properly be issued to compel the performance of those acts of duty which the parties desire to have performed by the judge of their county.

I am not surprised that upon the reading of Mr. Abbott's affidavit, stating who the parties were in whom the title of the Thompson farm was vested on a particular day, the judge should make the enquiry whether it was intended to impute to him an interest in the subject matter of Mr. Horton's claim to the money payable by Burke to Howard for certain lots of that farm sold by Horton to Howard, and afterwards conveyed by the proprietors to one Thompson to discharge a debt of Howard. The terms of that affidavit are such that it is difficult to imagine what other object could have been intended by it. The disavowal of that object, while Mr. Abbott declined to withdraw that portion of it, which, as it appears to me, was useless to his case, could scarcely remove the impression that such must have been its original intention, and while that continued to be the case, I cannot say that the judge acted improperly in forbearing to act in a matter in which a charge of personal interest might even seem to be fastened upon him. The title to the Thompson farm might be vested in him as one of four proprietors, and yet he might not be interested in the proceeds arising from the sale by the managing owner of two small lots worth only £50 together. If the parties were desirous to get the money they had in view for their clients on the attaching order they might surely have abandoned such an affidavit, but the pertinacity in adhering to it would seem to indicate an intention to compel the judge to abstain from adjudicating on the question on which their right to the money depended, or to compel him, if he did so adjudicate, to submit to the charge of acting in

his judicial capacity in a matter in which his personal interest was concerned.

Then as to the ground assigned at so very late a period, that a brother-in-law was personally interested in the result, and therefore Mr. Hughes could not further entertain the application pend- before him, that must certainly be a sufficient reason for declining to act as a judge. Where any degree of relationship exists between a judge and a party personally interested in the litigation, the law and ordinary propriety will prevent the judge from acting judicially between the litigating parties, and had the reason been assigned in proper season, even those who desired to proceed with a view to have an order for the payment of money could not but have admitted its sufficiency, and would have proceeded by some other means to obtain their end.

As the matter now stands, I think it would be wrong to issue a mandamus to compel the judge on this occasion to proceed in a matter which a judge of one of the superior courts most certainly would not feel at liberty to entertain under the same circumstances. The parties may apply and remove their suits into one of the superior courts, and have the summons for the payment of the money by the garnishee to the persons claiming it on their executions decided by some judge not personally interested in the amount, and not connected with any one that is.

I think that the rule must be discharged with costs because long before the application for a mandamus was made the parties were aware that one of the reasons for declining to proceed was the near connexion of the judge with one of the parties interested in the questions to be decided on.

BURNS, J.—The purport of the affidavits upon which the rule was granted is as follows: on the 1st of September, 1860, an attaching order was made in the suit of *Allworth* v. *Wegg et al.*, attaching a debt said to be due by Patrick Burke to one of the defendants in the cause, and by summons to Burke he was called on to shew cause why he should not pay the debt, or a sufficient sum to pay Allworth's judgment. On the 8th of September, Burke appeared at the return of the summons, and admitted the debt. At the same time Mr. Edward Horton, an attorney, appeared before the judge on behalf of other parties who claimed a right to the debt so attached in preference to Allworth. The matter was adjourned. On the 17th of November the parties appeared again before the judge, and then Mr. Ellis, another attorney, appeared on behalf of Mr. Horton, and the Bank of the county of Elgin, Mr. Horton then claiming the amount due from Burke as assignee of the judgment debtor—the latter having absconded. The matter was again adjourned till the 24 of November, and then Mr. Abbott, the attorney for Allworth, produced an affidavit to answer Mr. Horton's affidavit, and among other things contained in it was a passage explaining how the judgment debtor became indebted to Mr. Horton; it being stated in Horton's affidavit, that the judgment debtor had bought two town lots on the Thompson farm, to pay for which the judgment debtor had assigned to him, Mr. Horton, the debt owing by Burke. Mr. Abbott stated in his affidavit he was informed and believed that the Thompson farm mentioned was on the 21st of March, 1860, the property of said Edward Horton, E. M. Yarwood, W. K. Kains, and Mr. Hughes (the judge). The judge, Mr. Hughes, declined to receive the affidavit on the ground of his name being mentioned in it, and the matter was then adjourned to the 4th of December. Mr. Abbott then proposed to put in and use another affidavit, which stated that the Thompson farm was the property of "Horton, Yarwood, Kains, and another," but the judge declined to receive that also, and dismissed the parties, and marked the summonses thus, "I decline to act further in this matter," and signed the same. Ineffectual attempts were made to induce Mr. Hughes to take up the consideration of the matter, and he finally made a memorandum with respect to it in these words;

"January 30th.—In the absence of the other parties, Mr. Stanton and Mr. Abbott applied this day for a re-consideration of my declining to act further in the matter of these summonses, *in order to save more troublesome proceedings.* I stated I would hear what they they had to say on the subject to-morrow, when the other parties are present.

"January 31, 1861.—Mr. Abbott and Mr. Warren appeared for the several plaintiffs, and Mr. Ellis for the Bank of the County of Elgin and Mr. Edward Horton. Mr. Abbott suggested that if I would appoint some other barrister to dispose of the cases they would be able to proceed, but as matters now stand the plaintiffs found it difficult, and were debarred of their remedy. I asked Mr. Ellis if he was willing that some other barrister should act in my stead, which he said he was unwilling to accede to, whereupon I read the following:

"I now definitely decline to interfere further in the consideration of these summonses, first, for the reasons already given by me when I last declined to do so, and because it has been suggested by the attorneys for these plaintiffs that I am personally interested; and for the following: because, secondly, I find Mr. Edward Horton, who is connected with me by marriage, and whose interest Mr. Stanton and Mr. Abbott have complained that I favor, is personally interested in the result: thirdly, and lastly, I place the case of *Foot* v. *Howard*, in which Mr. Stanton is the plaintiff's attorney, on the same footing as *Allworth* v. *Howard*, and *Lock* v. *Howard*, because Mr. Stanton placed the management of *Foot* v. *Howard* in the hands of Mr. Abbott, who placed them all on the same footing when he read the affidavit which suggested my interest in the matter, and Mr. Stanton being present sat by giving suggestions, prompting Mr. Abbott, and no doubt acting in consert in all he said and did; and it is too much for me to be expected to believe what is alleged now, that he did not so act in concert. He should have foreseen the effect of Mr. Abbott's course before he allowed himself to be committed to him.

"Having said this much, I am now prepared to await the result of the *troublesome proceedings* with which the parties yesterday thought proper to attempt to alarm me, and which I have no doubt indeed I have too much reason to feel, have not been foreborne or spared on my account, or from any apprehension that they might be '*troublesome*' to me.

"The attorneys acting for these plaintiffs voluntarily placed themselves in the present attitude towards myself, and however much it may be a subject of regret, I can only say it has been none of my seeking, and that if these plaintiffs suffer it is by the action of their own attorneys in making improper suggestions; for I cannot allow these gentlemen one day to say that I universally show partiality to another attorney, and allow myself on another day to be called upon to decide a case in which a relative by marriage is interested, and in the result of which they suggest I am myself personally interested, so as to open a door to further complaints in the event of an adverse decision, that I favoured that relation, or attorney, or my own interest. I conceive I have no right to be called upon to decide any case in which I am not free to act with all proper discretion, and to give a decision as law, justice and right may dictate, regardless of the feelings, opinions, to interest of any one, or in which my motives might be open to question, or my interfering obnoxious to censure.

"If I am wrong in these views the parties have their remedy, but feeling strongly as I do upon the impropriety of my acting otherwise, I must leave these matters as they stood when I before declined to act further in them."

On shewing cause several affidavits were filed.

The facts before stated are not denied or varied, but what took place at the different meetings is given more fully. Mr. Hughes states that it was not the use of his name in the affidavit which was produced at the meeting of the 24th of November that he objected to, nor did he object to Mr. Abbott using the other affidavit omitting his name. He says he asked Mr. Abbott what it was that was intended by the affidavits, and the reply was, that it was only intended to contradict Mr. Horton. The judge then said, "Do you intend to state that I am interested? If you do, I cannot go further in the matter;" or, "Do you think I am interested?" And to this it is stated Mr. Abbott would give no decided answer. The judge then further added, "If I am interested, as is suggested by the affidavit, then I have no right to decide this case; if I am not interested, the affidavit should be withdrawn; but with that affidavit before me, implying that I am interested, I will go no further. If you desire it I will enlarge the summons to give you an opportunity to inform yourself. Your brother-in-law, Mr. Kains, is acquainted with the whole business, and can give you every information." All this is confirmed by the affidavit of Mr. Parke, a solicitor, not having any thing to do with any of the

business connected with the suits mentioned, but who happened to be in attendance before the judge on the 24th of November. upon another matter. Mr. Parke adds in his affidavit, that the judge seemed to treat the matter as if the affidavit stated an interest in him, and when the question was put to Mr. Abbott, he neither admitted nor denied, nor did he explain what he meant by it; and Mr. Parke says he was under the impression at the time that if Mr. Abbott had disclaimed any desire to impute interest to the judge, or had withdrawn or explained the affidavit, the judge would have gone on with the matter; but it was enlarged that in the meantime Mr. Abbott might satisfy himself with regard to the judge's interest. What took place on the 4th of December, the judge says was this: when Mr. Abbott was proceeding to argue the matter, the judge stopped him until the question of the judge's interest was settled, and it was disclaimed that he had any interest; whereupon Mr. Abbott said he had not read his affidavit to shew that the judge had any interest, but to contradict Horton's affidavit, and as the judge did not like his name used he would make use of the other affidavit in which his name was omitted; and to this the judge remarked that it was only dealing with the shadow and not the substance; what was required was a disclaimer of imputing to the judge that he was interested in the matter he was called upon to adjudicate about. Mr. Abbott making no offer as the judge says, to retract the suggestion that he was interested, he declined to act further, and so endorsed the summons.

The point about the interest of the judge appears to be this from the affidavits: the judge and Mr. Horton, and the other two named gentlemen, joined together in the purchase of what is called the Thompson farm, for the purpose of laying it out into village lots and selling them. Mr. Horton had the management of selling the lots and accounting to the others for their different shares of the purchase money. He sold two of the lots on his own account to the judgment debtor, and there were also other accounts between them, and to settle up all the matters between them, and pay for the lots, as Horton contends, the judgment debtor assigned to him the debt due by Burke, the garnishee. The portion of the purchase money of the two lots which would be going to Kains, one of the proprietors, has been settled for with him by Horton, but he has not yet settled with the judge or Mr. Yarwood; and as Mr. Horton states, he will either owe each of them a share, or they will be entitled to take an equal portion of the land, and sell it for their own benefit. Evidently the question ultimately to be decided will be whether the assignment of the debt due from the garnishee to the judgment debtor was made, and whether done legally to vest the right in Horton of calling upon the garnishee to pay him. The judge and Mr. Horton are brothers-in-law.

There are many things in the affidavits on both sides which shew that the members of the profession at St. Thomas are not only not on good terms with each other, but are also at variance with the judge. Such feelings never conduce to the ends of justice, but on the contrary often thwart it, and the clients are made the victims in the way of unnecessary delays in the transaction of their business, and their pockets suffer by both unnecessary and very often unjust expenses, incurred in proceedings having no other end to serve than mere gratification either of pride, envy, or malice. I do not intend to say who are most to blame, or who are most in the wrong on this occasion, but it is evident, I think, if the feelings of the parties beyond the mere question in the case itself had not crept into it, there surely ought to have been no difficulty in the disposition of the matter upon the summons. The question was whether Burke should pay Allworth, the judgment creditor, or pay Horton. As we see it explained, whether Mr. Horton would have to pay the judge a proportion of the purchase money of the two lots, or whether the judge might sell some of the land and pay himself, was not of the slightest consequence. Why, therefore,, Mr. Abbott should have inserted in his affidavit any account of the manner in which the title of the property was held it is difficult to perceive, unless his object was to annoy and unnecessarily mix up the judge's name in the matter. He could have obtained information upon the point, if he had thought it necessary that he should have the matter explained. The judge was quite right in putting the question to Mr. Abbott, and insisting upon an answer, as to whether he intended charging him with having an interest in the matter to be disposed of; but then, on the other hand, if the judge had been, perhaps, a little less punctilious, and at once have stated what now appears, and particularly if Mr. Horton had stated in his affidavit what the meaning of the memorandum of Horton & Co. was, and had stated what appears in his affidavit now, that he sold the lots on his own account, we might have been spared the necessity of deciding an unnecessary dispute. Then again, had Mr. Ellis, who represented Mr. Horton and the bank, accepted the offer made by the other side of withdrawing the consideration of the matter from the judge, and left it to a barrister, the question might have been decided.

The question of the judge's interest being removed out of the way, as it is by the affidavit, a more serious one remains, and that is the relationship existing between the judge and Mr. Horton. The interest of Mr. Horton was not that of an attorney in his client's business, and to which the judge alludes in his memorandum of the 31st January that he has been accused of favouring by his partiality; but his interest was direct, which was to be determined, that is, whether he had or not a valid assignment of the debt due by Burke. The judge might well be excused from being called on to determine that question if he could avoid it.

The case of *Becquet* v. *Lempriere* (1 Knapp, P. C. C. 376) throws a great deal of light upon the point. Among the questions brought up on appeal from the Royal Court of Jersey, one was whether one of the jurats who sat in the court below was incapacitated. He had been objected to on the ground that his first wife was aunt to the respondent Lempriere. It appeared that the wife had died without children many years before, and that the jurat had married two other wives afterwards, by whom he had had children. The court held him incapacitated according to the law of Jersey.

In the argument of that case, it was mentioned that Mr. Justice Lawrence on one occasion refused to try a case in which one of his relatives was concerned, though he was not incapacitated by law to try it.

The question, therefore, now is, whether we should issue a mandamus to compel Mr. Hughes to proceed in a matter in which his brother-in-law has a direct interest. The writ of mandamus is not a writ grantable of right, but is a prerogative writ, and the absence or want of a specific legal remedy gives the court jurisdiction to dispense it; and if there be a legal remedy, either at common law or by act of parliament, it will be refused.

Now, when we look at the constitution of the county court, we see that the crown may appoint two persons, one to be the judge of the county court, and the other to be the junior judge. Of course it is provided that both shall reside within the county, and shall not practise the profession. No doubt the Crown would not desire to incumber the fee fund with the appointment of an additional judge to a county where perhaps the fund will scarcely pay the salary of one judge, but I am not sure this court should be governed by such a consideration of the subject. It so happens that the county of Elgin has but one judge, but if another were appointed, all difficulty in the way of the parties proceeding would at once be removed.

Then again, the 8th section of the act, ch. 15, of the Consolidated Acts, U. C., provides for the appointment of a deputy judge for temporary purposes, allowing him to practise his profession in the meantime. The question upon this section is whether such an appointment must necessarily be confined to the case of death, illness, or unavoidable absence, or the absence on leave of the judge. It may be that it would be held to be so confined, and yet it may be urged that the provision should be construed liberally in favour of justice, and to enable the Crown to appoint so that justice may be done.

Whatever may be thought about either of these courses to be attempted, I feel clear there is another course open to the plaintiff in the suit in the court below, and that is to apply to the superior court for a writ of *certiorari* upon the facts, to remove the record and proceedings to the superior court, in order that justice may be done. Mr. Tidd in his treatise on Practice, (vol. 1, 9th ed., p 400,) says: "And in cases of absolute necessity, as where the inferior court refuses to award execution, the court above will grant a *certiorari* after judgment, for the sake of doing justice between the parties," and for this he quotes 1 Lil. P. R. 252, 253.

In *Arthur* v. *The Commissioners of Sewers in Yorkshire*, (8 Mod. 331) the court uses this language: "It is true where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction, who proceed in a summary way, in such case he is entitled to a *certiorari ex debito justitiæ*, because he has no other remedy, being bound by the judgment of the inferior judicature."

With regard to Mr. Hughes' reason for not proceeding to adjudicate upon the summons by reason of his relationship to Mr. Horton, we can scarcely be expected to compel him by mandamus to do that which I have shewn a judge in England declined to do, and which has also occurred more than once in this province. Anciently a judge could not try a civil or criminal case in the county in which he was born or inhabited, so jealously guarded was the administration of justice, but that was remedied by statute.

Rule discharged.

VANEVERY ET AL. v. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

Agreement—Construction—Liabilities for moneys received by purser, and for goods supplied to steamer.

Defendants entered into an agreement to advance money to the plaintiffs to enable them to procure a steamer which was to run in connection with defendants' railway, and guaranteed them against loss up to a specified sum. The earnings of the vessel were to be shared as provided for; and it was agreed that defendants should name and pay a person to act as purser, and keep an accurate account of the receipts and expenditure. He was to be subject to their authority, but to mess with the captain at the plaintiffs' expense.

Held, that the defendants were not liable to account to the plaintiffs for moneys received by him and not paid over.

The plaintiffs also claimed for goods supplied to another steamer, but it was shewn that this vessel was chartered to one W., who ran her on his own account, of which the plaintiffs had notice. *Held*, that they could not recover.

Assumpsit on the common counts. Pleas, never indebted, payment, and set-off.

At the trial, at Goderich, before Draper, C. J., after the plaintiffs had closed their case and the defendants had examined a witness, the plaintiffs agreed to take a non-suit, with leave to move the court to enter a verdict for them for the three first items of their account, No. 1, for $89.85c., No. 2, for $11.37c., and No. 3, for $28, amounting together to $79.22c.; and that the affidavits of J. K. Gooding and J. L. McCormick might be read by the court, in order to decide as a jury would decide on the evidence therein contained whether the plaintiffs were entitled to such verdict, and to add to that the further sum of $193.64c., if the evidence on the judge's notes would sustain such verdict, and the plaintiffs were in law entitled to recover; defendants to be at liberty to file the charter party of the steamer *Troy*.

J. Wilson, Q. C., obtained a rule calling on the defendants to shew cause why the nonsuit entered should not be set aside, and a verdict entered for the plaintiff for $79.22c., and $193.64c., or for either or both sums, or any part of either, pursuant to leave reserved at the trial, if the court should be of opinion that the plaintiffs were entitled to recover on the evidence, and on affidavits to be filed of one Gooding on the part of the plaintiffs, and an affidavit to be filed by the defendants if they should choose to do so.

E. B. Wood, for the defendants, shewed cause against the plaintiff's rule, and filed, pursuant to leave reserved, the charter party of the steamer *Troy*, which had been run in connection with the defendants' railway, for supplies for which steamer part of the plaintiff's cause of action against defendants was, the boat being owned by them.

During Easter Term, *J. Wilson, Q. C.*, supported the rule.

Though leave was reserved to the plaintiffs to file affidavits from Gooding and McCormick none were filed, and the plaintiffs' right to recover rested on the evidence received at the trial, which is fully stated in the judgments.

MCLEAN, J.—It appears that in the year 1859, the defendants being anxious to have a steamboat communication opened from Goderich to East Saginaw, in the state of Michigan, so that it might be in connection with their railway, and establish a route for the transport of goods and passengers from Buffalo to Saginaw, entered into an agreement with the plaintiffs to induce them to purchase a boat to be run by them on the proposed route, with certain stipulations as to the part to be performed by each for the mutual advantage of both parties. The defendants agreed to advance $5000 to the plaintiffs to enable them to procure a sufficient boat to be placed on the communication, and mutual stipulations were entered into as to the amount to be charged for freight and passengers, and for the payment by one to the other of a portion of the moneys received according to the services rendered by either. For the purpose of keeping an accurate account of the expenses of the boat, and of the moneys received on board of her, it was agreed that the defendants might name a person to act as purser on board, and to be entitled to mess on board with the captain; his wages, however, to be borne by the defendants. He was to be subject to the authority of the defendants, but to do the usual duties of a purser on board.

Under that agreement, bearing date 29th of June, 1859, the plaintiffs procured and placed upon the route the steamer *Kaloolah*, and one J. L. McCormick was placed on board as purser by the defendants, for the purpose of keeping the accounts of the boat and doing any other duty otherwise usually devolving on a person in that situation. The three first items in the plaintiffs' account, for which leave was reserved to the plaintiffs to move to have a verdict entered, were for moneys alleged to have been received by McCormick while he was purser on board of the boat and not paid over to the plaintiffs, and the only evidence of the receipt of such moneys consisted of receipts signed by McCormick.

The defendants objected that they were not liable for any moneys received by McCormick; that though they nominated him as purser, and paid his wages on board of the boat, he was only placed there as a person in whom they had confidence to keep the accounts and to discharge the general duties of purser for the plaintiffs, so that at proper periods there might be no difficulty in settling the accounts according to the stipulations of the agreement as to the running of the boat.

There was a further objection, that McCormick had nothing whatever to do as purser in receiving freights or other moneys elsewhere than on the boat, and that the moneys for which the receipts were given appeared to have been received from a Mr. Gooding, the agent of the steamer at Saginaw, for the purpose of being transmitted to the plaintiffs, except to the amount of $11.37 freight on goods sent by railway and steamer from Buffalo to Saginaw, of which amount $5.25 was freight on the railway.

The through manifest of railway and steamer charges, amounting to $11.37, receipted by McCormick on the 12th of October, 1859, was produced, and the witness, Jonathan Black, the plaintiffs' book-keeper, proved the signature of McCormick to the receipt, and also to a receipt on a similar manifest dated 5th of October, 1859, the freight on which amounted to $39.85. He produced the ledger kept by McCormick as purser on board of the boat. By that the two first items, $39.85, and $11.37, appeared to be entered as due to the *Kaloolah*, and in another entry McCormick charged the plaintiffs with $28 as paid to them on account of freight. The receipt the witness says purposes to represent the $28 to be money received from Gooding on account of produce shipped by the plaintiffs to Gooding on consignment. The two first items are charged to Gooding in the ledger as unpaid.

On cross-examination the witness Black stated that he was employed at the wharf at Goderich, and Gooding on the American side. If goods were consigned to Gooding he had to collect the freights: Gooding acted as agent for the steamer at Saginaw. The first item was for freight on goods consigned to Copland & Co., at Saginaw, the second item was for freight under similar circumstances, $11.37, but the witness never knew of McCormick collecting freights at Saginaw except in these two instances.

There was nothing to show any liability on the part of the defendants for moneys received by McCormick in his capacity of purser of the plaintiffs' boat. He was not there as the servant of the defendants exclusively, though they paid him and he was placed there at their instance. He was performing a duty for the plaintiffs in fact, and all that was required of him by the defendants was an accurate account of moneys received and expended by the boat, as the defendants had by their agreement covenanted to guarantee the plaintiffs against loss by their enterprise in running the boat. If it had been intended that the defendants were to be responsible for McCormick, there would no doubt have been some

stipulation to that effect in the agreement between the parties, but that such was not the case is manifest from the fact that on the 14th of February, 1860, a settlement of accounts between the plaintiffs and defendants took place at Brantford, in which nothing whatever was said of the items claimed on account of McCormick, and a balance was then struck by which the plaintiffs became indebted to defendants in the sum of $3,799.55. That sum, according to the evidence of defendants' secretary. Mr. McLean, was paid to him, and he gave a receipt for the amount. In the plaintiffs' account on which that settlement took place were two charges which were again brought forward in the particulars in this suit, $80, one-half of J. K. Gooding's salary as agent for the steamer *Kaloolah*, and $20, one-half of his travelling expenses, but these items were then deducted from the amount of the plaintiffs' accounts, and they paid the full balance remaining after such deduction. No further evidence has been given in reference to these items, and they must be taken to be abandoned.

The residue of the plaintiffs' account was for articles furnished to the steamer *Troy*, belonging to the plaintiffs, while running on the same route as the *Kaloolah* in connection with the defendants' railway. To that portion of the demand the defendants object, on the ground that the steamer *Troy* during the whole period was chartered to one Henry Whittaker, who ran her exclusively on his own account. It was proved that the *Troy* was registered in Buffalo in the name of Mr. William McLean, secretary to the company: that during July, 1859, that boat was run under charter by Captain Whittaker on his own account; and Mr. Pell, the general agent of the defendants, proved that on the morning the *Troy* arrived at Goderich he told the plaintiffs that she was run by Whittaker on his own account, and that the defendants were not at all responsible. This witness stated expressly that he had himself told the plaintif Rumball of that fact, and that the plaintiffs knew the conditions on which the boat was run, and that the account for goods furnished to her was, for the first time, sent into the defendants a month or six weeks before the trial; that a person of the name of Hirst was put on board of the *Troy* by the defendants, for express purpose of making it known that Whittaker, the captain, had no right to charge the defendants by his contract, and that it was in reference to the law of the United States especially that Hirst was charged with the duty, to avoid a lien attaching on the boat by Whittaker's contracts.

The charter party made to Harvey Whittaker, bearing date 23rd June, 1859, was not produced on the trial, but it has since been produced pursuant to leave reserved, and shews conclusively that Whittaker was to run the boat wholly on his own account, and bound to return her free from any charges on the expiration of his term. On the whole case as it now appears, I do not see that the plaintiffs have established any grounds for disturbing the nonsuit, and the rule must therefore be discharged with costs.

Burns, J.—The charter party between R. S. Carter, the registered owner of the steamer *Troy*, and one Harvey Whittaker, shews that the steamer was leased to Whittaker for the year 1859, to run from Goderich to Green Bay in the state of Wisconsin, in the United States, and to run in connection with the Buffalo and Lake Huron Railway, charging a specific fare from Buffalo to the different ports on Green Bay, which was to be divided between the railway company and the boat in proportions mentioned in a schedule. The charter party provides that Whittaker will run the steamer at his own cost, expense, and charges, and furnish and supply her with all necessary outfittings requisite. It contains a provision that Whittaker will, in all cases, in his own individual name and on his own responsibility, and not in the name or on the credit of the boat, make all purchases. Various other stipulations are put in for the purpose of guarding against the effect of the laws of the United States with regard to lien on the vessel for supplies or necessaries furnished to her. In the present case the plaintiffs furnished provisions and wood in Goderich. The law of England is that the mere fact of one standing as the registered owner is not sufficient to shew that he is liable for the price of stores furnished to the vessel; but in this case it is not shewn that the defendants were the registered owners; at the utmost it was stated by parol evidence that another person was the registered owner in Cleveland, for the benefit of, or as a trustee for, the defendants. Besides his, however, it was proved at the trial that the plaintiffs were informed, before any part of the account they seek to recover was incurred, that the steamer had been leased to Whittaker, and that the railway company would not be answerable for supplies furnished to her. Under these circumstances there is no question the plaintiffs cannot recover against the defendants for any part of the charges made in respect to the steamer *Troy*.

The claim in respect of the *Kaloolah* arises in this way: the plaintiffs and the defendants on the 29th of June, 1859, entered into an agreement by which the plaintiffs were to buy or charter a steamer, and run her twice a week from Goderich to East Saginaw during the season of 1859, and the defendants were to guarantee the expenses of the boat to the extent of $100 per round trip. The boat was run in connection with the railway, and each party were to be entitled to receive and should receive from the charges for freight and passengers which should be carried by the said boat to Goderich, and thence eastward by the railway, or by the said railway to Goderich, and thence by the boat northward, according to rates in a schedule annexed. And it was provided that the settlement for the season should be in this manner: that the defendants should be debited with $200 per week during the season, and then that if the aggregate earnings during the whole season did not amount to the total sum thus guarranteed that the defendants should pay the deficiency.

Then comes the provision upon which the question turns with respect to the $78.22, which is this: "The company shall have power to place on board the said boat, during all the time aforesaid, a purser, who shall have the usual powers and shall discharge the usual duties of a purser on board vessels, and shall keep an account of the receipts and expenditure of the said boat, and be subject to the authority of the said company. The wages of the said purser shall be paid by the said company, but he shall, mess on board with the captain of the said boat, and at his table, at the cost of the said Vanevery and Rumball."

It was proved that the purser had received the $78.22 for freight, which it was said he had not accounted for to the plaintiffs, though he had accounted for every thing else. It was proved that on the 14th of January, 1860, the plaintiffs and defendants settled their accounts for the season of 1859, and the plaintiffs paid to the defendants the balance due them of $3,799.55, and then made no claim whatever for any sums received by the purser and not accounted for, and no claim was made until the bringing of this action. The question now is whose clerk or agent the purser was during the time he was on board in the character of purser. The plaintiffs contended that he was the clerk of the defendants? and that they should be answerable for the $78.22. On the other hand, the defendants contended they only reserved to themselves the power of appointment of the purser, and paid his salary, in order that they might have a guarantee that they were properly dealt by in the account of the receipts and earning of the steamer, and that he was under the authority of the capain, and subject to the plaintiffs keeping him or not, and accountable to the plaintiffs.

I certainly take the same view in that respect as seems to have struck the learned Chief Justice at the trial by his directing a nonsuit. The vessel belonged to the plaintiffs, and the freight would be the property of the owners for the time being. They alone could collect it or sue for it if necessary; the defendants could do neither; and although the defendants could under the power reserved to them appoint a receiver, and though the defendants were to pay him for so doing, yet his accountability would be to the true owners, who in this case were undoubtedly the plaintiffs. It is clear they must have so understood the purser's position, for he accounted for all with the exception of this sum to them, and they have settled with the defendants upon that basis. It is not, perhaps, unlikely, if we had the purser's statement, that it would turn out that even that sum was accounted for. The account which he was to keep was not only of the receipts but of the expenditure of the vessel, and it was not pretended that any other than the plaintiffs themselves to expend any thing, though undoubtedly the defendants were interested in knowing that a correct account of the expenditure was kept.

I think the plaintiffs' rule should be discharged.

The Chief Justice having been absent during the argument gave no judgment.

Rule discharged.

IN THE MATTER OF CHARLES WIDDER AND THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

Consol. Stats. C., ch. 66, sec. 5—Construction of—Lands injuriously affected—Right to compensation.

One W. owned land upon the navigable river Maitland extending to high water mark. The Buffalo and Lake Huron Railway Company constructed their road upon the river, not touching his land, but connected with the banks above and below it, thus shutting him out from the river except across the railway.

Semble, that this land was not "injuriously affected," so as to entitle him to compensation under the Railway Act, sec. 5.

Quære, whether the statute applies in any case where the land itself is not injured bodily, though the owner may sustain damage by its depreciation in value or otherwise.

Quære, also, whether the power given to this company by their special act, 19 Vic. ch. 21, sec. 46, is controlled by secs. 136 and 138 of the Railway Act, notwithstanding the provisions in sec. 139.

C. Robinson obtained a rule *nisi* on the Buffalo and Lake Huron Railway Company to shew cause why a *mandamus* should not issue commanding them to serve a notice upon Charles Widder, Esquire, containing a description of the powers intended to be exercised by them with regard to his land described in the affidavit filed, a declaration of their readiness to pay some certain sum as compensation for damages likely to arise to the said land from the exercise of their powers, and the name of an arbitrator to be appointed on their behalf if such offer be not accepted; and to proceed to make compensation to the said Widder for the damage to the said land, injuriously affected by the exercise of the said powers in the affidavit set forth, and to determine the amount of such compensation in the manner provided by "The Railway Act."

It was admitted that the Railway Company had been required to appoint an arbitrator, and to have the damages ascertained, as the applicant desired, and that they refused, because they denied the right of the applicant to any such compensation as he was seeking to obtain.

Mr. Widder made an affidavit that he was the owner of certain lands which he specified, and which were near the mouth of the river Maitland, lying along the bank of that river, and bounded by the river on the north, and that the land was conveyed to him by the Canada Company in the year 1852: that the Buffalo and Lake Hurom Railway had nearly completed a line of crib work upon the river, rising about four feet above the surface of the river, and extending along the whole front of his land, and connected with the bank of the river above and below his land, the effect of which was to shut out all access from his land to the river, except across the said crib work: that he was informed by the engineer of the company in charge of the works that they intended to lay down the track of their railway parallel to the line of crib work, between it and his land, and to fill up with earth the space between the crib work and his land: that the river Maitland is navigable from is mouth, where it enters into Lake Huron, up to and above his land: that before the erection of the said work he had laid out his land into lots, which he believed would have been valuable and saleable as water lots, having a frontage upon the river, but that such value, and all prospect of selling the lots, was wholly destroyed by the works of the company.

He shewed that in September, 1860, he notified the company that he intended to claim compensation, and requested them to state whether they were prepared to settle the same in the usual way, and that he received for answer that the railway works were being constructed on the company's property, and that they could not understand why any notice relating thereto shoulld be given to him.

A sketch was appended to his affidavit shewing the situation of his land in relation to the river and to the railway.

E. B. Wood shewed cause.

On the part of the railway company, it was shewn that by letters patent dated the 28th of July, 1835, the Crown deeded for 21 years to the Canada Company (with other property) the water lots in the river Maitland, extending from Lake Huron up the said river to a distance considerably beyond the land of Mr. Widder, with such conditions contained in it as shewed that the government treated the river in that part of it as navigable water, and provided for protecting the general privileges of the public in it.

And an affidavit was filed, made by the engineer of this railway company, and referring to a plan shewing the position of the railway track. This affidavit stated that the company, by deed of purchase from the Canada Company, dated the 14th of June, 1859, became the owners of the harbour at Goderich, and of the bed and soil of the river Maitland, and of the islands therein, below, and adjacent to, and along, and opposite to, and above Mr. Widder's lands: that Mr. Widder's deed limited his lands on the north by the high water mark of the river Maitland, expressly excluding him from all special right in the river and its waters: that the railway and work did not touch or encroach on the lands of Mr. Widder, but were entirely north of them: that the top of the bank on which his house stood was on an average 120 feet high, ascending from the river at an angle of 30 degrees, and was so rugged and steep that it could not be ascended except by persons on foot, and even so with difficulty.

E. B. Wood, for the Railway company, cited Angell on Watercourses, 10, 17, 51, 535; *Carroll* v. *The Great Western Railway Co.*, 14 U. C. Q. B. 614; *Wright* v. *Howard*, 1 Sim. St. 190: *Child* v. *Starr et al.*, 4 Hill 369; *Gould* v. *The Hudson River R. R. Co.*, 12 Barb. 616, 622; Shelford on Railways 428; *Wilkes* v. *Gzowski et al.*, 18 U. C. Q. B. 312; *Small* v. *The Grand Trunk Railway Co.*, 15 U. C. Q B. 283; *Wilkes* v. *The Hungerford Market Company*, 2 Bing. N. C. 287; *Snure* v. *The Great Western Railway Co.*, 18 U. C. Q. B. 376; *Wismer* v. *The Great Western Railway Co.*, Ib. 383; *Day* v. *Gand Trunk Railway Co.*, 5 U. C. C. P. 429.

C. Robinson, contra, cited *East and West India Docks and Birmingham Junction R. W. Co.* v. *Gattke*, 3 McN. & G. 155; *Glover* v. *North Staffordshire R. W, Co.*, 20 L. J. Q. B. 376; *Regina* v. *Eastern Counties Railway Co.*, 2 Q. B. 347; *Bell.* v. *Hull and Selby Railway Co.*, 6 M. & W. 700; *Rose* v. *Groves et al.*, 5 M. & G. 613; Addison on Torts 104; Woolrich on Waters 204.

ROBINSON, C. J., delivered the judgment of the court.

The first question is whether it is clear that the proprietor Mr. Charles Widder, can claim compensation for the injury which he complains of.

The Buffalo and Lake Huron Railway Company is incorporated under the statule 19 Vic., ch. 21. By the 33rd section of that act they are placed under the operation of the Railway Clauses Consolidation Act, at that time 14 & 15 Vic., ch. 51, now ch. 66 of the consolidated Statutes of Canada; and by section 36 of 19 Vic., ch. 21, they had power given to them to construct the work which gives rise to this question; that is, to continue their railway "to any point on the river Maitland, or to the waters of Lake Huron, at or near the town of Goderich."

Whether such power is to be considered as controlled by the 136th and 138th sections of the Railway Act, ch. 66, Consol. Stats. C., notwithstanding what is provided by the 139 section, it may be material to consider, because if the company had not authority to construct their railway where they have constructed it they would be simply trespassing, and we should have no authority to deal with them or with this application as if they had proceeded under the powers of the Railway Act. We assume at present that they had legal power given to them to do what they have done.

Then by section five of the Railway Act, it is provided that "for the value of lands taken and for all damages to *lands injuriously affected by the construction of the railway in the exercise of the powers by this* or the special act, or any act incorporated therewith, vested in the company, compensation shall be made to the owners and occupiers of, and to all other persons interested in, any lands so taken or injuriously affected." And by the next section it is enacted that unless otherwise specially provided by that act or the special act, the amount of such compensation shall be ascertained and determined in the matter provided by that act, which is by arbitration.

"Damages *to lands* injuriously affected by the construction of the railway," &c., is the language of our statute. Does that include a claim like the present, where the *land* of the applicant *is not injuriously affected*, but where it is correct rather to say that the enjoyment of the land is rendered less valuable, or convenient, or agreeable, by something rightfully done outside of it? There is no damage here done to the land. The allegation is rather that the owner of this land sustains damage as owner by something rightfully done on adjoining land, which makes no change upon the land itself, on the surface or otherwise.

The language of the English statute on which the case of *The Queen* v. *The Eastern Counties Railway Co.*, 2 Q. B. 347, 2 R. W. Cas. 736 was decided is very different. It provides (secs. 9 and 28 and several other clauses) for compensation to the owners of lands "for all damages *by them sustained*" in or by reason of the execution of the powers granted by the act.

It is material to consider the following parts of our Railway Act, namely, sections 4, 5, 6, sec. 7, sub-sec. 3. sec, 9, sub-secs. 3, 5, sec. 11 throughout, secs. 138-9.

We perceive nothing in them which seems to do away with the effect of that distinction between *lands* being *injuriously affected* by the railway, and persons sustaining damage from the construction of the railway.

The proprietor in this case has a right to go to the high-water mark of the river Maitland. The defendants' works are placed in the water of the river. The bed of the river for all that appears belongs to the Crown, and if any person by direction or authority of the Crown had for any purpose erected a wall along the bank of the river, or put up any work on the edge of the river and extending only towards and in the water, would each of the proprietors along the bank, and having no right in the soil beyond the edge of the water, have had a right to bring a civil action against the person who did it; or would he have a right to complain of any other injury than that as one of her Majesty's subjects he was excluded from access to the river from his land? And if he could for this common injury bring an action instead of relying upon his remedy by indictment, would his ground of complaint be that his lands were injuriously affected, or that he as owner of the land had suffered damage from the loss of a convenience or privilege of using the river which lay outside of his lands?

In *Day* v. *The Grand Trunk Railway Company*, (5 U.C. C.P. 420,) the Court of Common Pleas seem in principle to have decided this question against the claim of the proprietor to recompence.

So far as we have been able since the argument to investigate the very important principles involved in this application, we are not convinced that this applicant has a claim to compensation, but the question is a general one of much consequence to be clearly set at rest, and we have no objection to grant a rule for a mandamus *nisi*, as was done in the case of *The Queen* v. *The Eastern Counties Railway Co.*, 2 Q. B. 347, 2 R. W. Cas. 736; in order that the question may be decided in such a manner upon record as will allow of an appeal.

The applicant will consider whether it is worth his while to incur the expense of such a proceeding, while we do not at present incline to accede to his view of his rights, but the contrary.

COMMON PLEAS.

Reported by Robert A. Harrison, Esq., *Barrister-at-Law.*

Daniel Haight v. Edward Howard.

Sale of Goods—Statute of Frauds—Principal and Agent.

1. A contract for the sale of goods void by the Statute of Frauds, is no contract in law, and it is immaterial whether a party who makes such a contract either does so in his own behalf or in behalf of another.
2. Subsequent acts, such as a delivery and acceptance of part of the goods make the contract good.
3. On, but not before the happening of these acts, either party who is contracting for a principal, must disclose the fact, or be himself held liable to fulfil the contract.
4. Therefore, where a person enters into a verbal contract for the purchase of goods, without at the time disclosing that he is acting for another, but before part delivery, or part payment, discloses his principal, he is not personally liable to the vender of the goods.

(Trinity Term, 1861.)

This was an appeal from the County Court of the United Counties of Frontenac, Lennox and Addington.

The declaration was on the common counts for money paid by defendant to plaintiff for goods bought and sold by plaintiff to defendant—goods sold and delivered by plaintiff to defendant—work done and materials provided by plaintiff for defendant at his request—money lent by plaintiff to defendant—money paid by plaintiff for defendant at his request—money received by defendant for use of plaintiff—interest upon, and forbearance at interest by plaintiff to defendant at defendant's request—of money owing from defendant to plaintiff—money found to be due from defendant to plaintiff on accounts stated between them.

The pleas were—1st. Never indebted. 2nd. Payment before action. 3rd. That before action defendant satisfied and discharged plaintiff's claim by delivering to him goods. 4th. Set off.

The case was tried at the last March sittings of the county court.

The following witnesses were examined on behalf of the plaintiff:

William Butler—I was working with the plaintiff in September last, in a field; defendant came up to where we were; he said to plaintiff you have got some peas, do you want to sell them, or are you going to sell them; plaintiff said I want to sell the peas; defendant asked what was the price of them, and plaintiff said three shillings a bushel; defendant said I will take them; he asked how much peas he would have; plaintiff said about 800 bushels; plaintiff asked defendant if he was buying them for German; defendant said no; he said I want 300 bushels for my own pigs and horses; he said I have no order to buy peas for German not yet a while; plaintiff said he would bring him a load that night; defendant said his men were busy and he had no place then to put them in; defendant said so soon as I am ready you may bring them and your money will be ready so soon as I have room for the peas. After the peas had been delivered, I heard another conversation between plaintiff and defendant; plaintiff asked defendant if he wanted him to fulfil his contract for the 300 bushels of peas; defendant said no; defendant said no, I am not buying the peas for myself; this was after the peas was delivered; defendant said he had enough peas for 3s.

The conversation in the field took place in September; I heard nothing about barley; he said it was a pity to have all that straw wasted; I do not know German; I heard his name mentioned; I am sure Howard said he was buying for himself; plaintiff said he had rising on 300 bushels of peas; defendant said if plaintiff had 300 bushels he would give 3s. a bushel for them; he said he would give 3s. a bushel for 300 bushels if he had them; plaintiff drew all the peas over to Howard's; I think there were 300 bushels in the field; I think so by guess-work; defendant said he did not want any more peas; at this time he made mention of no name.

Elias Clapp—I reside in South Fredericksburgh; the defendant carries the mail and keeps a great number of horses; I had no conversation with him about 20th September last about peas; I asked him if he was buying peas, he said he was; I asked him if he purchased Daniel Haight's peas; he said that he bought Daniel Haight's peas, 300 bushels, at 3s. a bushel; defendant said he had some rye, and was going to sell it and feed the peas; he said he paid Haight $25; peas fell in price afterwards; in October they went down to 50 cents a bushel; I sold mine for 50 cents a bushel.

Peter D. Davis—I know defendant; he told me several times that he purchased peas from Haight, at 3s. a bushel; he said they were in the field cleaning them up when they were purchased; he said they were beautiful peas; he said if he bought them too high he would crack them and feed them for his cattle. In November I heard him say that he paid Haight $25 on the peas; he wanted plaintiff to sell the peas to somebody else to cover the 6d. on the bushel, peas in the meantime having fallen in price 6d. a bushel, defendant said he had used some of the peas for his pigs; they are stored in defendants store now. In the last conversation I had with defendant he said he bought the peas for German; he admitted he had the peas in his store and he would pay plaintiff $25 if he would take the peas, namely, the 250 bushels he delivered to defendant; I paid wharfage to Howard for peas that I sold to Mr. Sills.

Henry Lapoint—I drew some of the peas; I drew the second load; defendant told me that the plaintiff drew the first load; my load weighed 40 bushels and 46 pounds. In November defendant said I do not want them, but he took them after being angry some; plaintiff said he did not know anything about German; plaintiff said he thought he would have over 250 bushels; defendant said that is plenty, it is more than I ought to have at that price; defendant said to plaintiff that Sills was giving 50 cents a bushels and why not sell them to him for that amount, as with the $25 he already got it would be equal to 3s.; plaintiff said he sold them once and that was enough; Howard put a poor mouth on him and spoke about German; Haight said he would go over

to Alison's wharf and see Sills, that he would continue to draw the peas, and if Sills would come and take them on Thursday or Friday so that he would get his money, he said I will let Sills have them, but if not I will hold you to your bargain. It was at the request of Howard this was done. Defendant told me in September that he was out at Haight's and bought his peas, and that they were a fine lot; defendant said he bought them too dear, but if German would not take them he would feed them; he told me he used some of the first load; defendant said he did not want the peas there as Haight would be dunning him for the money; when I was drawing the peas he talked as though the peas had been purchased for German; he said he had done enough for German for nothing; German lives in Marysburgh, across from Howard, in Prince Edward's County.

Thomas Carnham—I was at Howard's in the middle of November, 1860, when the last load of peas was delivered; plaintiff came for the key of the storehouse; defendant looked round and said he would get his man at the storehouse; plaintiff said I have done drawing; defendant asked how many bushels there were; plaintiff said there was something about 250 bushels, something over 250 bushels, a bushel or two, it was a little over 250 bushels at any rate; defendant said that is pretty well.

The following witnesses were examined on behalf of the defendant:

George German—I live in Marysburgh; I rented a store in Fredericksburgh from the defendant in August last until the spring of 1861, for the storage of grain; I was purchasing grain; authorised the defendant to purchase for me; I authorised him to engage grain for me; about the 1st of September last I was at defendant's, he took a sample of peas from his pocket; he said he purchased 300 bushels of that sample for me from Haight, at 60 cents; it was between the 1st and 10th September; I said very well; I assumed the payment of the $25; I did not say to Carnahan that I was buying peas; I have not failed; I had trouble with the Company I was purchasing for.

William Lapoint—I live in Fredericksburgh; I was present at a conversation between plaintiff and defendant, at defendant's house, about the last of October or 1st of November; my brother delivered a load of peas; plaintiff came up; they began to talk about German; defendant said German had not furnished him with money to pay for the peas, that he had bought the peas for German; he would advise Haight to keep the $25, and sell the peas to whom he had a mind to, that the plaintiff would have no storage or wharfage to pay; defendant told him to take the key and put the peas in the storehouse, and sell them to whom he had a mind to; plaintiff did not say that he would or would not; something was said about Sills buying the peas at fifty cents at Oliphant's wharf; defendant said nothing the one way or the other; defendant said that he would not be responsible for any of the peas; plaintiff said that he did not know anything of German, he would look to the plaintiff for the price of the peas.

Dunavan Sills—I was purchasing wheat at Alison's wharf about the 10th November, 1860, in Adolphustown; plaintiff came to me there; he told me he was in some difficulty about peas he delivered at Howard's, that there was some difficulty between Howard, Beeles and German, and that the plaintiff wanted to make a payment that week to one Thompson; he said he had a lot of peas, partly at home and partly at Howard's, and asked me if I would take them, and how much I would give for them; I told him I would take them if he thought I could get enough to make a cargo, then I said I thought I would take them; he told me afterwards he would not give me the peas as he intended to look to Howard for them, it made no difference, I got a cargo without them; I paid him nothing; he did not tell me he was selling them for Howard; I thought Haight intended to give me the peas; he told me that there was difficulty with German, and that he was afraid that he would not get his money.

William Gower—I was present when defendant told plaintiff that he had $25 of German's money, and that the plaintiff might have it; I did not see the money paid; I heard plaintiff ask defendant if German was over; plaintiff said that he wished defendant would go and see him, or send him his money, or words to that effect; I was at the police station-house since I arrived in Kingston.

William Jones—I was present at a conversation between plaintiff and defendant, at Howard's, about the peas, in the latter end of November last; defendant told plaintiff and his man to draw for German when the vessel arrived; I lived with Howard for three years.

The learned judge told the jury that the defendant was personally liable if he made the agreement for the purchase of the peas in his own name, without telling the plaintiff at the time of the sale that he was purchasing as an agent; that if the defendant entered into the agreement in his own name for the purchase of the peas, making himself personally responsible at the time, he could not afterwards divest himself from the responsibility, by shewing that he was acting as agent for an undisclosed principal.

T. Parke, counsel for the defendant, took exception to the charge, contending that the judge should have told the jury that the defendant was not personally liable if his principal was disclosed or known to the plaintiff, and credit given to him before the acceptance or receipt of any part of the peas or part payment thereof.

Verdict for the plaintiff for $129 80.

During last April term of the county court, *Parke* obtained a rule *nisi* to set the verdict aside, on the ground of misdirection, as above stated.

The rule was argued during the same term. *Parke*, for the the rule; *J. A. Henderson, contra.*

MACKENZIE, J. Co. C., delivered judgment. — In Story's able and intelligent work on Agency, at page 269, (a work which is received in the English courts, as well as in the American courts, as authority) I find it laid down as law that, "A person contracting as agent will be personally responsible where, at the time of making the contract, does not disclose the fact of his agency, but he treats with the other party as being himself the principal; for in such a case it follows irresistably that credit is given to him on account of the contract. Thus a factor or broker or other agent buying goods in his own name for his principal, will be responsible to the seller thereof, in every case where is agency is not disclosed; but we are not therefore to infer that the principal may not also, when he is afterwards discovered, be liable for the price of the same goods; for in many cases of the sort the principal and agent may both be severally liable upon the same contract."

In Chitty on Contracts, at page 226, it is said, "Upon the principle that the contract of an agent is the contract of the principal, an agent is not liable upon an agreement which he makes in his representative character, provided he do not personally contract or expressly pledge his own credit by concealing his principal or otherwise."

In Paley on Agency, 372, it is stated, "that in all cases where a factor delivers goods as his own, and conceals his principal, he is is to be taken to all intents as the principal. This notification of the principal must be at the time of the contract: it is not sufficient to dicharge the agent to make it afterwards."

Lord Ellenborough, C. J., was of opinion, in *Morgan* v. *Corden*, that a defendant was liable — the principal not having been disclosed at the time of the contract; and no subsequent act being done to shew that the plaintiff waived his liability to the defendant.

In Broom's Com., page 545, I find it laid down as law that "Where an agent contracts for the purchase of goods as principal, he, by so doing, incurs a personal liability:" and at page 547, "If an agent makes an oral contract in his own name, the principal may sue as such or be sued upon it; for it is a general rule that whenever an express contract is made an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom in point of law it was made."

In the case of *Jones* v. *Littledale*, Lord Denham, in delivering the judgment of the court, lays down this as a general proposition of law, "That if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of contract, relieve himself from responsibility."

I would also refer to the cases of *Higgins* v. *Senior*, 8 M. & W. 834; *Greene* v. *Kopke*, 18 C. B. 549; *Reid* v. *McChesney*, 8 U. C. C. P. R. 50.

The case of *McGee* v. *Atkinson*, 2 M. & W. 440, is almost in point. In principle it differs in nothing from the present case. The present defendant made a contract, in his his own name, with the plaintiff for the purchase of peas as principal, and when asked if he was purchasing for German, answered, No; that he wanted 300 bushels of peas for his own pigs and horses The defendant became personally responsible to the plaintiff at the time he entered into the contract with him in his own name, and he cannot, according to the authorities I have cited, be allowed to relieve himself from that responsibility by subsequently shewing that he was acting as an agent.

By looking at the case of *Higgins* v. *Senior*, it will be seen that the point taken by the defendant upon the Statute of Frauds is not tenable. The delivery of the peas, which was made in pursuance of the verbal contract, refers back to the time of the contract, and makes it binding on the defendant.

There is no exception taken to the verdict upon the law and evidence; indeed none could be. And as the authorities establish, I think satisfactorily, that there was no misdirection of the law at the trial, the present rule must be discharged."

From this judgment the defendant appealed to the Court of Common Pleas, and contended that the rule should have been made absolute for a new trial, on the grounds that it appeared by the evidence that the original contract was verbal, and was not binding, being a contract for the sale of goods for the price of £10 sterling and upwards, and no part of the goods having, at the time of the contract, been accepted or received, or anything given in part payment, or to bind the bargain. And that before the goods, or any part thereof, were delivered, or any payment made, the defendant disclosed to the plaintiff (as the fact was) that the defendant was acting as the agent of German, and refused to be personally responsible; and any amount that was paid was paid and received as German's money and payment; and that the delivery that was made must be held to be a delivery to or for German; that there was no delivery to, or acceptance by, the defendant of the goods as a purchase for himself, or with any intention of making himself personally liable; that under the circumstances set forth in the evidence, it was a misdirection on the part of the learned judge of the county court to refuse to tell the jury that the defendant was not personally liable if his principal was disclosed or known to the plaintiff, and credit given to him, the principal, before his acceptance or receipt of any part of the peas, or part payment thereof.

S. Richards, Q.C., for the appeal.

R. A. Harrison, contra.

The following cases were cited during the argument:—*Jones* v. *Littledale*, 6 A. & E. 486; *McGee* v. *Atkinson*, 2 M. & W. 440; *Higgins* v. *Senior*, 8 M. & W. 834; *Green* v. *Koppke*, 18 C. B. 549; *Reid* v. *McChesney*, 8 U. C. C. P. 50; *Lerouz* v. *Brown*, 12 C. B. 801; *Bradford* v. *Roulstin*, 8 Ir. Ch. R. 468; *Warner* v. *Wellington*, 3 Drewry, 523, 581; *Waters* v. *Towers*, 8 Ex. 401; *Taylor* v. *Wakefield*, 6 El. & B. 765; *Taylor* v. *Ashton*, 12 L. J., N. S., Ex. 368; *Black* v. *Jones*, 6 Ex. 213; *Harler* v. *Carpenter*, 27 L. J. C. P. 1; *Clarke* v. *Arden*, 16 C. B. 227.

Draper, C. J.—The contract being verbal only was not binding until the purchaser should accept part of the goods sold, or give something by way of earnest to bind the bargain, or make a partial payment on account thereof.

It must necessarily be held immaterial whether a party who makes a bargain, void in itself by the Statute of Frauds, either does so on his own behalf or on behalf of another. No action could be brought against either the actual bargainor or against any person whom he names as his principal in the transaction.

Subsequent events, such as are stated to have taken place in this case, viz.: a delivery and acceptance of part of the goods, and a partial payment of the price, make a good contract, though there was nothing in writing.

Till some such subsequent event does happen, there is no contract; on this happening, there is one; and then either party who is contracting for a principal must disclose the fact, or may may be held liable himself to fulfil it.

The terms used in the charge of the learned judge are not open to exception. "That if the defendant entered into the agreement in his own name for the purchase of the peas, making himself personally responsible at the time, he could not afterwards divest himself of that responsibility by shewing that he was acting as an agent for German, or by disclosing his name."

And if, with this direction, the jury had been told that by the words "entered into the agreement" they were to understand not the first verbal bargain alone, but the contract evidencing that verbal bargain and the subsequent part delivery and part payment, or both, if they were concurrent, and that the disclosure of the principal at the time a binding agreement was thus made and entered into, would prevent any liability attaching upon the defendant. I should have been fully prepared to support the direction.

But from the form of the objection taken at the trial by the defendant's counsel, and from a part of the learned judge's judgment on discharging the rule *nisi*, I gather he ruled that the bargain as at first made though void by the Statute of Frauds, yet was so far effective as to prevent the defendant from discharging himself by naming his principal, when the part delivery or the part payment took place.

The objection taken at the trial, and renewed in the rule *nisi*, was, that the judge should have told the jury that the defendant was not personally liable, as his principal was disclosed or made known to the plaintiff, and credit given to him before the acceptance or receipt of any part of the peas, or part payment of the price.

And in the judgment the learned judge observed, "By looking at the case of *Higgins* v. *Senior*, it will be seen that the point taken by the defendant upon the Statute of Frauds is not tenable."

The passage in the judgment in *Higgins* v. *Senior* alluded to is, I presume, the following: "There is no doubt that where such an agreement is made, it is competent to shew that one or both of the contracting parties were agents for other parties, and acted as such, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals, and this whether the agreement be or be not required to be in writing by the Statute of Frauds."

I understand this passage in each case put, *i. e.*, whether required or not to be in writing, to refer to a valid and binding agreement. That whether it be one which is binding without writing, or one which, under the statute, must, in order to be binding, be in writing, makes no difference in the application of the rule just enunciated—that it is competent to shew that one or both of the contracting parties, &c., &c. If that be the true meaning of the passage, it does not sustain the conclusion of the learned judge, which I take to be that if a contract, not binding in its inception, be made between two parties, which is, by some subsequent act, made valid and binding, neither of the parties can shew that they were mere agents for others, unless the statements were made at the inception and not at the time of doing the act or acts, without which there would be no contract in law.

The truth is, that until the act is done there is no contract, and the declarations of either party which accompany the act of delivery, or of acceptance, or of payment, or of receipt, cannot be excluded, but must be treated as forming part of the complete and binding agreement.

I think, therefore, there should be a new trial; and assuming the evidence to be the same, the jury should be asked to say whether—the first bargain being verbal only—the defendant, at the time of a part delivery of the peas to, and acceptance thereof by him, or of the payment of the $25, whichever first happened, stated that he was only an agent, disclosing his principal, accepted for him or paid for him; and with that knowledge the plaintiff went on with the transaction on his part. If they find this to have been so, they should be directed to give a verdict for the defendant.

Richards, J., and Hagarty, J., concurred.

Per cur.—Appeal allowed without costs.

In the matter of Joseph Walker and the Provisional Corporation of Bruce.

County of Bruce—County Town—Mandamus to compel construction of County Buildings—Statutes 19 *Vic. cap.* 19—20 *Vic. cap.* 77—22 *Vic. cap.* 111.

In 1856, by statute 19 Vic. cap. 19, the reeves and deputy reeves of the several townships in the county of Bruce were constituted a Provisional Municipal Council for that county. In 1857, by statute 20 Vic. cap. 77, it was declared

that the Governor-in-Council should have power to fix the county town for the county, and to issue a proclamation for that purpose. On 15th June of the same year, Walkerton was proclaimed county town of the county. The provisional council refused to vote the necessary supplies for the construction of the county buildings in Walkerton. In 1858, by statute 22 Vic. cap. 111, the proclamation appointing Walkerton county town of the county was rescinded, and the selection of the county town was again left to the Governor General-in-Council. By the same act it was provided that each place desiring to do should present its claims to the Governor-in-Council before 1st October, 1858, and that a choice should be made from among such places. By the same act it was also provided that before any action should be taken by the Governor-in-Council the provisional council of the county should vote the necessary supplies for the county buildings, and pass a valid by-law for raising and applying the same. The provisional council thereupon passed a valid by-law for the purpose of raising the supplies; and the Governor-in-Council having again selected Walkerton for the county town, it was on 8th November, 1860, again proclaimed county town.

On an application, at the instance of a resident ratepayer of Walkerton, for a mandamus commanding the provisional council to proceed with the erection and construction of a court house and gaol at Walkerton, it was Held

1. That in such a case the court should be careful only to grant the writ on clear grounds established that, in some particular or particulars, the provisional council refused to discharge the duties imposed upon them by law, having been properly required so to do.
2. That applicant in this case had failed to establish a sufficient demand and refusal.
3. That the court before granting a mandamus should have distinctly before it—what was demanded—how the demand was made—how answered.
4. *Semble*, if a specific demand were made on the provisional council to purchase or contract, if they could truly answer they had been unable to raise the money, that could not be treated as a refusal.
5. *Quære*, If an application of such a character as this, belonging, among other things, to the administration of public justice, should proceed from a private individual, merely in his capacity of resident ratepayer?
6. *Quære*, as to the propriety of proceeding by mandamus on such a state of facts as that set forth?

(Trinity Term, 1861.)

In Easter Term last, *Harrison, R. A.*, obtained a rule *nisi* calling upon the provisional council and provisional warden of the county of Bruce to shew cause why a writ of mandamus should not be issued, commanding them to proceed with the erection and construction of a court house and gaol for the said county, in the town of Walkerton, the county town of the said county; and commanding the provisional warden forthwith to issue the debentures authorized by the by-law passed in that behalf.

The rule was granted on reading

1st. The by-law No. 4 of the provisional municipal council, intituled "To authorize the Provisional Municipal Council of the County of Bruce to raise the sum of six thousand pounds currency, for the purpose of defraying the expenses of erecting a court house and gaol, in the said county of Bruce." This by-law authorized the raising of £6,000 by loan on debentures, which the provisional warden was authorized to cause to be made, in sums of not less than £25 each, to be issued under the common seal of the county, payable within 20 years from the time the by-law should come into operation, bearing interest at six per cent., and imposing a special rate of one-fifth of a penny in the pound to pay interest, and form a sinking fund to pay off the debentures.

2nd. The proclamation of His Excellency Sir W. F. Williams, then Administrator of the Government, dated 8th November, 1860, appointing Walkerton as the county town, in the county of Bruce.

3rd. An affidavit of the relator referring to and partly setting forth the statutes and public proceedings relative to this matter; and further stating that a committee of the provisional municipal council reported in favor of procuring a particular site on which to erect the court house and gaol, and that the provisional council adopted that report; that the provisional warden made searches and enquiries respecting the title to that land; that since then there have been two meetings of the provisional council, at each of which a motion was made to carry into effect the provisions of the statutes relative to this matter and the by-law aforesaid, but both motions were negatived by a majority; that deponent demanded of the members of the council to proceed; that the deponent believes that a majority of the council have resolved to set the provisions of the statute and by-law at defiance, in order, if possible, by delay and obstruction to have a different place appointed for the county town.

In Trinity Term, *S. Richards, Q.C.*, shewed cause. He filed affidavits,

1st. Of George Gould, clerk of the provisional council, who stated that the only meetings of the council between 29th November, 1860, and 1st August, 1861, were held on 28th and 29th January and 17th May, 1861, and denied that the relator made any application or demand upon the council as a body, or through the warden or clerk, to proceed; stated that the municipal corporation are not owners of real estate in Walkerton, which is not an incorporated or police village, but is simply a part of the township of Brant, without legally defined boundaries; that the relator claims to be the owner of the land mentioned in the report of the committee of the provisional council, referred to in his affidavit. The deponent proved certain searches and certificates shewing that the lands of the relator were incumbered; that the only motion made at any of the said meetings of the council was as follows:—"That a committee of five be ballotted for, to report as to what they may consider the most advisable steps to be taken with a view of selecting and purchasing a site on which to erect the county buildings, in the village of Walkerton, in accordance with the proclamation," which was lost; and that this motion was not made on any application or demand made to the council by the relator, nor, as deponent understood, to any individual member of the council.

2nd. An affidavit, that on the twenty-seventh August, 1861, there were four writs of *fieri facias* in the hands of the sheriff of Huron and Bruce against the lands of the relator for damages and costs, in the whole amounting to £336 15s. 7d.

3rd and 4th. Two affidavits from members of the provisional council of Bruce denying that the provisional council appointed a committee to select a site for the county buildings, in the village of Walkerton; that a committee was appointed as set forth in the resolution above, and made a report, which was adopted about two in the morning of the 30th November, 1860, there being then only nine members of the provisional council present, two of whom voted against it, and that the whole number was sixteen, several of whom had retired at that late hour. They confirmed the clerk's statement that there has been no formal demand made by the relator on the council.

J. H. Cameron, Q.C., Eccles, Q.C., and *Harrison, R. A.*, supported the rule.

The cases cited were: *Regina* v. *Bishop of Chichester*, 6 Jur., N. S., 120; *Ibson* v. *The County of Peel*, 19 U. C. Q. B. 174; *Rex* v. *The Bishop of London*, 13 East 425; *Curtis* v. *The Kent Water Works Co.*, 7 B. & C. 314; *In re Township of Augusta and United Counties of Leeds and Grenville*, 12 U. C. Q. B. 522; *Rex* v. *The East India Co.*, 4 B. & Ad. 533; *In re School Trustees of Otonabee*, 17 U. C. Q. B. 275; *Justices of District of Huron* v. *Huron District Council*, 5 U. C. Q. B. 574; *In re Gibson and the United Counties of Huron and Bruce*, 20 U. C. Q. B. 111.

The statutes cited were: 19 Vic. cap. 19; 20 Vic. cap. 77; 22 Vic. cap. 111.

DRAPER, C. J.—There are many grave objections to making this rule absolute.

As to the demand. It has been contended that there has been such a refusal to act, on the part of the defendants, as to make a demand unnecessary. I am not prepared to adopt that conclusion, on the facts stated. If a deliberate determination to disobey the law, and to refuse to discharge duties imposed by law, existed, it might and ought to have been much more clearly proved than is done by the relator's affidavit, which only expresses his belief, coupled with the rejection of a particular motion, twice, as he asserts, only once, as is asserted in the contrary affidavits.

In considering the question it may be well to trace its history briefly:

By the 19 Vic. cap. 19, a provisional council for the county of Bruce was erected, upon and from 1st January, 1857. This act was passed on the petition of the reeves of the townships constituting that county

By 20 Vic. cap. 77, the Governor-in-Council was to fix the site of the county town by proclamation.

The 22 Vic. cap. 111, reciting that by proclamation, dated 15th June, 1857, Walkerton was appointed to be the county town of Bruce; and that the provisional council of the county had petitioned for an act to enable the municipal electors of the county to select a county town; that six places might be submitted to the electors (naming the places), and that the place receiving the greatest number of votes might be the county town; that the inhabitants of the county petitioned that the proclamation appointing Walkerton might be avoided, but that the selection should be

left to the Governor-in-Council; that the provisional council had refused to pass a by-law to raise the necessary funds for the erection of the county buildings at Walkerton: then proceeds to enact that the proclamation shall be rescinded; that the selection shall be left to the Governor-in-Council; that each place desiring to do so shall present its claims, in writing, to the Governor-in-Council; that the provisional council shall, before the Governor-in-Council acts, vote the necessary supplies for the county buildings, and pass a valid by-law for raising the same.

The passing of the by-law is asserted and not denied, but it is objected to as illegal, for it does not make proper provision to raise the money. As to this we are informed that there has been a mistake in bringing before the court a by-law to impose a rate of one-fifth of a penny in the pound, whereas there has been a by-law passed to raise one-fourth of a penny in the pound.

Then came the proclamation of the 8th November, 1860, re-appointing Walkerton for the county town, with the subsequent proceedings detailed in the affidavits.

It is abundantly obvious that there is great difficulty in the provisional council, and, I have no doubt, great disinclination to carry into effect the erection of the proper public buildings, and so practically to establish the county town at Walkerton.

In view of these difficulties, I think the court should be careful only to grant the writ prayed for on clear grounds established that, in some particular or particulars, they have refused to discharge the duties imposed on them by law, having been properly required so to do.

Now, the only act which they have actually refused to perform has been to pass the resolution set out in the clerk's affidavit. I certainly am not prepared to grant a mandamus to them to pass that resolution, for when they had obeyed that command the difficulty would remain untouched. Nor am I called upon to devise the mode in which proceedings should be taken.

The raising sufficient funds would appear to be a necessary step, before they can purchase a site or enter into a contract to build. I do not see that any demand has been made either upon the council or upon any officer having authority for this purpose; and though they may do all that they can to borrow, it is not a certain consequence that they will find anybody to lend. But while there are no funds available, I should deem it premature to order their expenditure; and if a specific demand had been made on them to purchase or contract, if they could truly answer that they had been unable to raise the money, I do not think that could be treated as a refusal.

In my view the court should have distinctly before them—what it is that has been demanded — how the demand has been made—and how it has been answered—before granting a mandamus; for I apprehend the command in the writ should be to do the act or acts refused; and, therefore, it is indispensable we should know what they are.

I have not been able to free my mind from doubts whether an application of such a character as this is, belonging, among other things, to the administration of public justice, should proceed from a private individual merely in his capacity of a resident ratepayer in Walkerton, and so interested in the location of the county town in that village.

Nor am I satisfied, apart from the want of evidence of direct refusal, which would put the matter on a different ground, that the delay which has taken place affords evidence that it is merely colorable. A long-continued delay — doing nothing — attempting nothing—and obstructing those desirous of acting, might well establish against the provisional council the charge of wilful neglect of a duty imposed, and would certainly deprive them of all answer, when they persisted in such refusal after specific demand.

At present, I think enough is not shewn to warrant our granting the writ.

Hagarty, J.—In my opinion the facts laid before us on this application are wholly insufficient to warrant our interference.

Assuming that we have the right to interfere by mandamus in such a case, it appears to me that the demand alleged to have been made was defective. Loose conversations with individual members of a corporation, or opinions as to their apparent determination not to proceed in any particular matter, wholly fail to satisfy my mind.

But apart from all technical objections, I feel the gravest doubts as to the propriety of proceeding by mandamus on such a state of facts. I should always be unwilling to interfere with the proceedings of a deliberative body, holding their seats by a popular vote, removable every year, and naturally reflecting, with reasonable fairness, the opinions of the ratepayers of the county on a matter in which it is clear the desire of the Legislature was to satisfy those who almost alone were, and are, interested in the separation of the counties. Outside the county, its existence or non-existence as a separate judicial municipality is a matter of trifling importance. The same, may of course be said of the erection or non-erection of county buildings. The Governor General has, it is true, finally named a place for the county town, but I am hardly prepared to hold it to be a wise exercise of the powers of this court, to force the ratepayers, by legal process, to hasten the expenditure of a large sum of money on the county buildings. They now have full powers in their own hands so to do when they please. I cannot satisfy myself that the provisional council are so clearly refusing to perform a well-defined legal duty as to warrant a mandamus on the application of an individual ratepayer to force them to its performance.

Richards, J., concurred.

Per cur.—Rule discharged.

IN CHANCERY.

(Reported by Thomas Hodgins, Esq., LL.B., Barrister-at-Law.)

In re Yaggie, infants

Master's report—Filing—Proceedings under.

Such Masters reports as are from their nature final, do not require to be filed fourteen days before proceedings may be taken on them.

One John Otter purchased the lands of the Infants under the order in this cause, but on his application the Court relieved him from his purchase, on his accounting for two-thirds of the crops of the year, and on payment of the costs, and ordered payment of the amounts when found by the Master.

The report was dated 29th June, 1851, and signed 29th August, 1861, filed 30th August, and same day a *fi. fa.* costs was issued and placed in the Sheriff's hands.

On 4th September a *fi. fa.* for the amount of the sum found due by the Master for the crops, was issued.

Fitzgerald moved to set aside the two writs of *fi. fa.*, on the ground that the Master's report had not been confirmed—not having been filed fourteen days before the issue of the writs.

Roaf, contra, relied upon *Empringham* v. *Short* (11 Sim. 78), and contended that in such cases as the present the Master's report did not require confirmation.

Spragge, V. C., considered himself bound to follow the case cited, and refused the motion with costs.

City Bank v. Amsden.

Amending bill—Judgment—Lands sold under fi. fa.

Where the state of facts made by an original bill does not exist when the defendant answers, the plaintiff cannot amend so as to bring in other facts to keep the bill alive, but must file a new bill.

In this case a bill was filed on a judgment recovered by the plaintiff against the defendant, alleging that certain lands were owned by the defendant in the County of Haldimand. Previously to the filing of the bill, writs of *fi. fa.* lands had been placed in the Sheriff's hands, and before the answer was filed, all the lands of the defendant were sold under the plaintiff's writs. The defendants answered setting out these facts.

Walkem, for the plaintiff, now moved to amend by setting out other lands in other counties.

Roaf, contra, objected on the ground that the amendments proposed would, in fact, make a new bill.

Esten, V. C., refused the motion with costs.

CHAMBERS.

(*Reported by* ROBT. A. HARRISON, Esq., *Barrister-at-Law.*)

WARELY v. POAPST.

Entry of appearance without authority—Remedy of defendant.

Where a defendant has been served with process and an attorney, without authority, appears for him, the Court will not interfere to set aside the proceedings if the attorney is solvent, but will leave the defendant to his remedy by summary application against the attorney.

If the attorney be insolvent, the Court may relieve defendant on equitable terms, if he has a defence on the merits.

Where, however, it appears that the suit instituted against the defendant is brought by collusion between plaintiff and defendant in order to enable defendant to cheat his creditors, a judge will not interfere summarily to remove the appearance, and thus assist the parties in the perpetration of a fraud.

(Chambers, 18th September, 1861.)

This was a summons calling on the defendant, his attorney or agent, to attend before the presiding judge in Chambers on the third day after the day of service thereof, to shew cause why the the appearance entered by John Walker, Esq., as attorney for the defendant in this cause, should not be set aside; and why the plaintiff should not be at liberty to sign final judgment in the same manner as if no appearance had been entered therein for the said defendant; and why the said defendant's attorney should not pay the costs of this application, on the ground that said appearance was entered without authority from the said defendant, and on grounds disclosed in affidavits and papers filed.

This summons was issued on September 2nd, 1861, and served at Cornwall on John Walker, Esquire, on the 3rd September. On the 6th September it was enlarged in Chambers till the 11th, and on the 11th further enlarged till the 15th, when it was moved absolute.

Jackson, shewed cause.

In support of the application an affidavit of Mr. Bergen, plaintiff's attorney, was filed, in which it was stated that the writ of summons in this cause was issued on the 8th day of August, and that, "as it appeared by the affidavit attached," was served on the same day upon the above named defendant; that upon the same evening the above named defendant absconded for the United States, and is now living in parts unknown; that on calling at the office of the Deputy Clerk of the Crown in Cornwall, for the purpose of entering up judgment on the 19th August, it was found that an appearance had been entered for the defendant by John Walker, Esq., as his attorney, and that Mr. Walker is merely employed as a salaried attorney in the office of the Hon. John S. McDonald of the firm of McDonald & McLennan; that the deponent has every reason to believe that the said appearance was entered without the knowledge or consent of the defendant, or any person authorised in his behalf; that writs had been issued in the County Court, from the office of Messrs. McDonald & McLennan on behalf of the creditors of the defendant, and had been served on the defendant before he absconded; and that deponent has reason to believe that the appearance in this cause was entered for the purpose of enabling the parties to the said suits to get judgment in advance of the plaintiff; and that if such judgments were obtained the plaintiff will lose his debt, as there is reason to believe there is not sufficient property to pay all his debts.

There was also an affidavit of Mr. Bergen filed, that he demanded from Mr. Walker an inspection of his warrant as attorney, and that Mr. Walker had promised to send it to him by a certain hour if he had taken a warrant, but that he had not sent any warrant.

In opposition to this application, there were several affidavits filed tending strongly to shew that this was a fraudulent suit, instituted for the express purpose of defeating the claims of *bona fide* creditors; that the suit was brought by collusion between the plaintiff and defendant; and that, in fact, there was no debt whatever due from the defendant to the plaintiff; and that if the plaintiff should recover, he was under engagement to forward the proceeds to the defendant for his benefit

An affidavit of Hiram W. Wood was filed, which stated that a conversation took place between him and the defendant, while the defendant was waiting for the steamer on the evening he absconded, in which the defendant stated that the plaintiff was then indebted to him, and that if he succeeded in that action which he had just brought against him, the defendant, the plaintiff would owe him about $3,000, and that plaintiff had promised to forward to him the proceeds, but he, the defendant, only had his word for it.

There was an affidavit also filed by defendant's father, in which he stated that he has known the plaintiff from his childhood, and that he was never engaged in any business which could enable him to get the defendant so largely in his debt as he states; that a few days after the defendant absconded, he saw in plaintiff's possession goods which had been in defendant's store, and which had come from Montreal addressed to the defendant, and on asking plaintiff how he became possessed of them, he replied that he had paid the cash for them to the defendant.

There were two other affidavits from persons of respectability in Cornwall, strongly corroborating the affidavits of Wood and Poapst as to the collusion and fraudulent character of this suit.

McLEAN, J.—There is in the affidavit of plaintiff's attorney something not by any means free from suspicion. In the first paragraph he states that the summons was issued on the 8th day of August, and, as appears by the affidavit attached, was served upon the same day on the defendant, thus intimating that it was only by the affidavit attached that he knew when the summons was served; but in the very next paragraph he says, that upon the same evening the defendant absconded for the United States, and he adds, that he is now living in parts unknown to him, deponent. If he knew that the defendant absconded the same evening for the United States, he could not but know that the summons must have been served either the same evening or in the course of the day, so that it was quite unnecessary to refer to the affidavit attached as shewing the time of service.

Then, in the third paragraph, it appears that Mr. Bergen called on the 19th of August, at the office of the Deputy Clerk of the Crown for the purpose of entering judgment, but found that an appearance had been entered by Mr. Walker. If he went for the purpose of entering judgment, he should at least have shewn what was the cause of action—whether it was liquidated or upon an open account, or whether the summons was specially endorsed, or whether, in fact, the proceedings were such that he, in case of default, could sign judgment.

If the suit is really collusive, no doubt the plaintiff would have good reason to know that no appearance was intended to be entered, and that he might expect to sign judgment for want of appearance at the expiration of ten days.

But there is a further circumstance which is calculated to throw still stronger suspicion on plaintiff's proceeding. His attorney swears that he absconded on the evening of the 8th August, and on the 20th August he swore that he was then living in parts unknown to him. On that affidavit a summons to set aside the appearance was obtained in Chambers on the 2nd September, and then on the 6th of September, four days after, an affidavit in the handwriting of Mr. Bergen is sworn to by the defendant at Windsor in the County of Essex, before a commissioner there, in which affidavit the defendant swears that the appearance entered in this cause for him, the defendant, was entered without his knowledge or consent, and that no power was ever given by him to any one to enter an appearance for him in this cause.

It is sworn that in the other suits instituted before the defendant absconded, appearance had been entered, but the justice of the several demands is not denied, while in this case it is manifest there was no appearance intended to be entered; from which, and the circumstances stated in the several affidavits filed against this application, the only reasonable inference that can be drawn is, that the whole of the proceeding in this suit is fraudulent, and the result of a foul conspiracy, by means of a spurious suit, to get possession of the defendant's property to defraud his creditors. The application complained of interferes with the proceedings, and the defendant joins the plaintiff in endeavouring to remove the obstacle.

I cannot interfere to assist the parties in what appears to me by the affidavits to be fraudulent. If the plaintiff's claim is honest, he has only to prove it as in other cases; if otherwise, the plaintiff may be examined respecting it at the trial, and the whole matter referred to a jury.

The attorney who entered an appearance for the defendant, if he has done so without any authority, is responsible to anybody injuriously affected by it, and as there is no complaint of his insolvency, I must leave any such persons to their actions against him. His act may delay ultimate recovery, but cannot prevent it if the demand be actually due—it may frustrate a fraudulent attempt to cheat creditors.

The case of *Bayley et al.* v. *Buckland et al.*, 1 Ex. 1, is strongly in point in this case.

In that case it was decided that when a defendant has been served with process and an attorney, without authority, appears for him, the Court will not interfere to set aside the proceedings if the attorney is solvent, but will leave the defendant to his remedy by summary application against the attorney. If the attorney be insolvent, the Court will relieve the defendant on equitable terms, if he has a defence on the merits.

In a case like the present, the question of solvency is of less importance, because the entry of an appearance is more likely to save than to cause an unjust recovery against the party for whom such appearance has been entered.

Summons discharged.

McInnes v. Hardy.

Consol. Stat. U.C. cap. 22, sec. 287; Consol. Stat. U.C. cap. 24, sec. 41—Examination of judgment debtor—Form of order—Mode of conducting examination—Refusal to answer, or unsatisfactory answers, how made to appear.

Semble.—The common form of order for the examination of a judgment debtor, blending the provisions of Consol. Stat. U. C. cap. 22, sec. 287, and Consol. Stat. U. C. cap. 24, sec. 41, is not proper. These acts have very different objects in authorizing the oral examination of a judgment debtor. The affidavit applicable to the one, by no means necessarily will be suitable to the other.

If a question or a series of questions be put, which the judgment debtor *refuses* to answer, there should be some statement to this effect in the certificate of the examiner, either general—that questions of such a purport were put, which the defendant refused to answer—or, better still, that some specific question or questions were put—setting them forth in substance—and that defendant would not answer them, or that defendant's answers to such and such questions were not *satisfactory*, or giving questions and answers, so that it might be determined whether they were satisfactory or not.

Refusing to answer, or answering questions unsatisfactorily, are matters which, if not certified by the examiner, must be made specially to appear, either in the report of the examiner, or in an affidavit setting forth questions which were put and were wholly unanswered, or that an answer given (stating it) was unsatisfactory.

Semble.—The former is the better course. The examiner should require answers to his questions, and the defendant's refusal to answer, or his unsatisfactory answer, should be entered in the report of the examination.

(Chambers, Nov. 5, 1861.)

On the 5th August last, Draper, C. J., made an order in the comman form for the examination of the defendant.

The defendant was examined; and on 14th September last, *Mr. Jackson* obtained a summons from McLean, J., calling on defendant to show cause why he should not be committed to the common gaol of the county of Brant, on the grounds: 1st, That he refused to disclose his property, and his transactions concerning the same; 2nd, that he did not make satisfactory answers respecting the same; 3rd, that he concealed or made away with his property, in order to defeat or defraud his creditors.

Mr. Jackson obtained the summons on reading the examination of defendant before the county judge of Brant, and upon reading an affidavit of Mr. Bruce, who examined defendant.

James Paterson showed cause, and filed the affidavit of defendant, and affidavits of two other persons.

Draper, C. J.—The former part of the order to examine defendant is framed under the Consolidated Statutes U.C. cap. 22, sec. 287; the latter under the Consolidated Statutes U.C. cap. 24, sec. 41. The order is in a form commonly in use.

It did not occur to me, when signing the order, that these acts have very different objects in authorizing the oral examination of a defendant, and that the affidavit applicable to the one by no means necessarily will be suitable to the other.

I think the course of blending the two acts into one has in the present case produced inconvenience, and may frequently do so. As at present advised, I shall not make a similar order.

The summons on defendant is to show cause why he should not be committed to the county gaol of the county of Brant, on the grounds: 1st, of his refusing to disclose his property, and his transactions concerning the same; 2nd, that he did not make satisfactory answers respecting the same; 3rd, that he has concealed or made away with his property, in order to defeat or defraud his creditors.

The affidavit of Mr. Bruce bears directly only on the second objection, and inferentially on the third, in this way, that because the account given as to what has become of his property is not satisfactory, and because he admits he had certain property at one time, and asserts that he has none now; therefore he has concealed or made away with it in order to defraud his creditors.

I do not think the following passage in Mr. Bruce's affidavit: "I particularly required the defendant just before the close of his "examination, to give any account of payments made or losses "suffered by him that would make up the deficiency between the "money paid and the losses sustained by him, and the amount of "his full purchases, but he could or would give no other or fuller "information than appears in his said examination" sufficient to establish a refusal to disclose his property and his transactions concerning the same.

If a question or a series of questions were put which the defendant refused to answer as the first objection suggests, there should be some statement to this effect in the certificate of the County Judge, either generally, that questions of such a purport were put which the defendant refused to answer, or better still, that some specific question or questions were put, setting them forth in substance, and that defendant would not answer them; or coming to the second objection that the defendant's answer to such and such questions were not satisfactory; or giving questions and answers so that it might be determined whether they were satisfactory or not.

Then as to the third objection, the evidence of concealment of or making away with his property must not only be given, but that such acts were done to defeat or defraud creditors—an inference however, that would in most cases follow. The fact that a man's balance sheet shews a deficit, would not *alone*, I apprehend, be sufficient for this purpose.

The examination of the defendant which is returned, contains a vast number of statements made, I assume, in answer to questions, shewing sales and purchases of property, payments of various sums of money to numerous individuals, transactions of receiving and of transferring promissory notes, making promissory notes, making payments upon them—in short, four closely written pages of details, neither systematically arranged nor very clearly explained.

An expert accountant might possibly form a balance sheet out of these statements, or the materials might be found wholly insufficient. I do not pretend to undertake the task of eliciting the real facts from such confused statements. If the defendant had been distinctly required to furnish a statement in writing by a day appointed by the Judge, in which should be made to appear his actual property and receipts, his expenditure and losses, and the deficit, accompanied with explanations how the deficit arose, and had either refused or had neglected after reasonable time to do so, this might have supported one of the objections; or the statement itself when examined might have supported another. But in what is placed before me, placed as it is, I am not prepared to say the examination leads to either conclusion, and with the aid of Mr. Bruce's affidavit there is no satisfactory or certain ground on which to determine that the defendant should be committed as a fraudulent debtor.

I cannot find certainty, and I will not condemn upon suspicion.

The defendant in reply, has filed his own and two other affidavits. They assist in leading me to the conclusion that refusal to answer or answering questions unsatisfactorily, are matters which if not certified by the examiner must be made specially to appear, either in the report of the examiner or on an affidavit setting forth questions which were put and were wholly unanswered, or that an answer was given (stating it) which it is contended was unsatisfactory. I rather incline against the latter course, for it appears to me it would be better that the examiner should require his questions, and the defendant's refusal to answer, or his unsatisfactory answer, to be entered in the report of the examination. The examiner may call for such accounts and statements as I have above suggested; in short, for any account or statement which may be necessary to arrive at the truth; and the Judge or officer taking the examination might be asked to appoint a day for

the production of such statements, giving sufficient time in his judgment to produce them, and then a neglect to produce them might be deemed equivalent to a refusal.

On the whole I think this summons must be discharged without costs.

Summons discharged without costs.

PRACTICE COURT.

(*Reported by* ROBT. A. HARRISON, Esq., *Barrister-at-Law.*)

MAGDALENA KLEIN, ADMINISTRATRIX OF MICHAEL KLEIN, PLAINTIFF V. ANDREW KLEIN, DEFENDANT;

MAGDALENA KLEIN, PLAINTIFF V. ANDREW KLEIN, DEFENDANT.

Judgment on specially endorsed writ—Fraud—Right of subsequent judgment creditor to impeach—Feigned issue.

The court possesses the jurisdiction, upon the application of a subsequent judgment creditor, to inquire into the *bona fides* of a prior judgment, obtained on a specially endorsed writ against the same judgment debtor; and to direct the trial of a feigned issue, in order to inform the conscience of the court as to fraud or *bona fides.*

Form of such an issue, *Wilson* v. *Wilson*, 2 U. C. Prac. Rep. 374, upheld.

(Trinity Term, 1861.)

In these cases, rules were obtained last term by *Mr. Jackson*, calling on the plaintiff to show cause why the judgment in each case should not be set aside as fraudulent and void, as against John Brown and J. H. McKenzie, judgment creditors of defendant, or why an issue should not be ordered to try which of the judgments was founded upon a valid consideration or fraudulent.

The application was founded on on affidavit, in each case, of Wardell, the attorney for Brown and McKenzie, and also the affidavit of Mr. Howard.

An action was commenced by Brown and McKenzie against defendant, Andrew Klein, on 31st May, 1860, and judgment obtained last November, and *fi. fa.* issued. Appearance had been entered for defendant, and plea put in, but no defence was offered at trial. The action was on a bond for a large amount: verdict rendered for $7,821 06. After this suit commenced, the now plaintiff, Magdalena Klein, took out administration to the estate of her husband, Michael Klein, who died in 1848; and the present suits were thus commenced.

The first suit was, by writ specially endorsed, for wages due deceased Michael Klein, from 1834 to 1840, at $130 a year and interest thereon, $1,053; and for wages to Michael Klein and plaintiff, Magdalena Klein, from 1840 (when they were married) to the year 1847, at $130 per year and interest thereon, amounting to $1,545; and judgment was obtained thereon for default of appearance, and execution placed in the sheriff's hands the26th September, 1860, prior the execution of Brown and McKenzie.

The other suit was commenced on the same day in May, 1860, and, by writ specially endorsed, for $1,260, wages due Magdalena Klein herself, from 1847 (when her husband, Michael, died) to 1860; nad judgment in like manner obtained by default, and execution issued in September, 1860, prior to the writ of Brown and McKenzie.

These were the facts sworn to. The attorney and his client filed affidavits almost verbally alike, swearing to a great number of things, of which they were informed and verily believed, tending (if correctly informed) to raise strong grounds for inferring that the two judgments moved against were collusively obtained on a pretended consideration to defeat the claims of Brown and McKenzie.

During Easter term, *Mr. Harrison* shewed cause, contending that Brown and McKenzie, as strangers to these judgments, could not be heard, referring to the case of *Wilson* v. *Wilson*, decided in this court by Burns, J., 2 U. C. Prac. R. 374; and *Armour* v. *Carruthers*, 2 U. C. Prac. R. 217, distinguishing the former case, and denied that the authoriities there relied on supported the judgment; and further that there was no power to order an issue. He filed several affidavits. Magdalena Klein, the plaintiff, swore in each case in substance, that her late husband, on coming of age in 1834, assumed the charge of defendant's farm, in Waterloo; from thence till his death in 1847, with deponent's assistance, at defendant's (his father's) request, on promise that he should have the farm at defendant's death; that Michael and she chopped and cleared about 50 acres, and after her marriage in 1840 she always did a man's work on the farm, defendant using the produce himself; that after Michael's death defendant requested her to continue working the farm, which she did down to the commencement of these suits, on the understanding that she and her family should have possession of the farm at defendant's death; that her claim for wages was justly and fairly due for her services and that of her son; and that her claim in the administration suit was also just, and that both were reasonable.

Defendant is an old man of 75. He also filed affidavits denying collusion and fraud, and that he did not defend these actions because he knew their claims were just, &c., &c. Four or five affiavits were filed on same side, giving a kind of history of the doings of the Klein family since 1834, and expressing, in each instance, deponent's belief that the claims were just. They were all exactly similar—verbally alike. In all the statements appeared to have been drawn with blanks for the names of the several deponents and afterwards filled up. The verbal similarity of statement appeared on both sides.

Jackson, in reply, cited *Farr* v. *Alderly*, 1 U. C. Q. B. 337; *Keys* v. *Horwood*, 2 C. B. 905; *Sharp* v. *Thomas*, 6 Bing. 416; *DeMedina* v. *Grove*, 10 Q. B. 152; *Remmett* v. *Lawrence*, 15 Q. B. 1004; *Imray* v. *Magnay*, 11 M. & W. 266; *Christopherson* v. *Burtin*, 3 Ex. 159; *Ward* v. *McCormack*, 6 O. S. U. C. 215; *Harrod* v. *Benton*, 8 B. & C. 217; *Martin* v. *Martin*, 8 B. & Ad. 933.

HAGARTY, J.—I have carefully examined the judgment of Burns, J., in *Wilson* v. *Wilson*, and have come to the conclusion that the court does possess the jurisdiction contended for, both as to right to enquire into an alleged fraud on behalf of a stranger to the suit, and to the direction of a feigned issue to inform the conscience of the court.

The jurisdiction of the courts over judgments entered on warrants of attorney and cognovits seems clear and undisputed. The cases are not so clear as to judgments otherwise obtained. I presume that on a judgment, after a trial on the merits, no interference could take place. But the cases of specially endorsed writs are certainly within the mischief arising from warrants of attorney; and I can see no sound reason for distinguishing them on such an application as this. All I can find in our own courts on this point is the case of *Young* v. *Christie*, 7 Grant 317, where the Chancellor says, "The Legislature did not mean to prohibit the creditor from suing; so it is, I apprehend, equally clear they did not mean to prohibit the debtor from defending. But although the debtor might have the right to defend if so minded, there is nothing in the statute which compels him to adopt that course. There is nothing in the act to interfere with his power to defend or refrain from defending: a consequence, which must have been foreseen, is that the injustice complained of has been left, to a great extent, without a remedy. There cannot have been any intention of interfering with a judgment recovered in ordinary course of law, and such judgment is consequently not within the equity of the statutes, (viz., the 22 Vic. cap. 96,) making void a fraudulent preference of a creditor."

If the court refuse to interfere here, the only course open to the injured creditors would be, I presume, either by acting against sheriff for a false return, notifying him of the alleged fraud in the prior execution, as in the well-known case of *Imray* v. *Magnay*, 11 M. & W. 1, which seems (though slightly questioned by Lord Campbell, in *Remmet* v. *Lawrence*) 15 Q. B. 104, to have been adopted as law in *Christopherson* v. *Burton*, 3 Ex. 159. Lord Tenderden very naturally said, in *Harrod* v. *Benton*, 8 B. & C. 21, "It is hard upon the sheriff that the question should be tried at his expense."

In *Imray* v. *Magnay*, 11 M. & W. 275, Parke, B., says: "The creditor has no other way of avoiding the judgment than by forcing his execution for the debt, notwithstanding an execution upon it; or by application to the equitable jurisdiction of the court to set it aside, which, we apprehend, has arisen in comparatively modern times. Whatever right the creditor had at the time of the statute (13 Eliz. cap. 5) he has now." The judgment is, by statute, void as against creditors, but by implication it is void against a sheriff who acts in right of a creditor.

I am willing to follow the judgment of Burns, J., as to both rights. I do not dissent from his conclusions.

The amount in dispute here is large; and the affidavits on either side are not at all of that precise or satisfactory nature that would enable the court to decide so grave a matter on materials so very loose.

I therefore direct that the parties do proceed to the trial of a feigned issue in each case (unless it be agreed that one shall decide both); that Brown and McKenzie be the plaintiffs, and Magdalena Klein be defendant: that the question to be tried shall be, whether the judgment obtained by her against Andrew Klein, in the one cause, and the judgment obtained by her as administratrix of Michael Klein against Andrew Klein, in the other cause, was founded upon a valid and *bona fide* consideration, or whether the same was fraudulent and void, as against Brown and McKenzie, creditors of said Andrew Klein: that such issue or issues be tried at the next assizes for the county of Waterloo: that the rules granted last term be enlarged till the determination of such issues: and that all questions of costs be reserved; the issue to be delivered within 20 days from 23rd September, 1861, and to be returned in eight days from delivery.

I also refer to *Bell* v. *Todd*, 6 Jurist 59; *Bainbridge* v. *Wildman*, 1. Dowl., N. S., 774; *Cooke* v. *Edwards*, 2 Dowl. N. S. 55; *McMartin* v. *Cline*, 7 Grant 550.

Per cur.—Rule absolute for an issue in the terms directed.

McDonald v. McDonald et al.

Setting aside award on compulsory reference—Sufficiency of materials—Practice.

On an application to set aside an award on the ground that the arbitrator was mistaken in point of law and fact, the court will not interfere unless the alleged mistake appear on the face of the award or is disclosed by some contemporaneous writing.

In this respect there is no difference between awards made on compulsory references under the Common Law Procedure Act and other awards.

(Practice Court, Trinity Term, 1861.)

In Easter Term last *Mr. McKelcan* obtained a rule calling on the defendants to shew cause the following term why the award made on the 30th April last, by A. Logie, Esq., should not be set aside on the ground that the arbitrator had acted improperly in allowing to defendants credit for the amount of a note for £250, made by defendants McDonald and Ross in favor of plaintiff, dated 18th January, 1856.

In support of this motion were filed the rule of reference, award and an affidavit of plaintiff.

It appeared that all matters in difference in the cause were by order of Mr. Justice Richards on 17th October last referred to the award of A. Logie, Esq., Judge of the County Court for Wentworth.

Mr. Logie made his award in favour of plaintiff, directing defendants to pay plaintiff $103.84, the amount he found to be due from them to him.

The plaintiff filed an affidavit in which he swore that he duly proved his account, and the arbitrator gave defendants credit for the amount of the £250 note, of which a copy was produced; that the evidence shewed that the plaintiff received the proceeds of that note from a bill broker who discounted it, and that he applied the proceeds in the works carried on in partnership between him and defendants A. P. McDonald and Ross, for the Great Western Railway Company at Hamilton, under an agreement, of which a copy was produced; that by the terms of partnership they were bound to find funds but did not, and he, plaintiff, was obliged to raise money by getting notes discounted which they should have retired; tha ta Chancery suit is pending between him and his late copartners A. P. McDonald and Ross, concerning their business; that he endorsed many notes for them; that he should not be charged with any portion of said note; that his claim in this suit was for moneys expended for defendants in connexion with the works at the Chats Canal on the Ottawa and services connected therewith; that the note was not in any way connected with said works or the claim in this suit, and the books of the works on the Chats Canal and in which plaintiff's account is entered were produced to the arbitrator and contain no charge of any such sum; that evidence was given that he, plaintiff, had stated to a person after the note became due he wished A. P. McDonald and Ross would take up the note as it was standing against him, the plaintiff, and was detrimental to his credit; that he proved before the arbitrator the agreement, of which a copy was produced, signed by A. P. McDonald, Ross being then his partner, and plaintiff also a partner in the Great Western Railway works, of which he, plaintiff, had the superintendence.

This document was dated 30th January, 1856, (after the date of the note,) and stated that plaintiff had signed and endorsed several notes, cheques, &c. for him and for A. P. McDonald & Co., at different places, and agreeing to indemnify plaintiff from any payments, &c. on said notes, &c., except what had been used for the work in which he was interested at the Great Western Railway depot, as he received none of the value or products of the above in any other way.

J. B. Read shewed cause, filing an affidavit of defendant McDonald positively swearing that if all just credits were allowed, defendants owed plaintiff nothing, and that plaintiff was in their debt; that plaintiff discounted the £250 note, received the proceeds, and (to deponent's certain knowledge,) used the money for his private purposes, and so informed deponent; that it was never entered in the Company's book nor credit given therefor, or account rendered of it, and it has been paid by deponent and defendant Ross; that his note was not made for partnership purposes but was endorsed by plaintiff for his special benefit, and was understood when given to be a private transaction unconnected with any work in progress or the letter of indemnity.

For defendant were cited *Burns* v. *Hillabee*, 1 H. & N. 729; *Fuller* v. *Fenwick*, 3 C. B. 705; *Hutchison* v. *Shepardton*, 13 Q. B. 955; *Lalta* v. *Walbridge*, 7 U. C. Law Journal.

For plaintiff it was urged that this being a compulsory reference the Court should enquire more readily into the merits than under the old system, citing *In re. Hall* v. *Hynes*, 2 M. & Gr. 847; *Kent* v. *Ensloff*, 3 East. 18; *Jones* v. *Coery*, 5 Bing N. C. 187; *Bernard* v. *Wainwright*, 7 Dowl. 299, S. C. 1 L. M. & P. 455; *Hodgkinson* v. *Ferine*, 3 C. B. N. S. 189.

Hagarty, J. Assuming the law to be as Mr. McKelcan urges in some of the earliest cases, it would still be impossible to set aside an award like this on such materials as the plaintiff has laid before the Court.

The plaintiff has merely his own affidavit as to the evidence adduced and his own version of the facts, and on this he is flatly contradicted by the defendant's affidavit. No evidence whatever is before me as to how the arbitrator, a Judge of the County Court, proceeded, or on what view of the law or facts he has based his decision.

There are certainly authorities to shew that when the award or some contemporaneous statement in writing of the arbitrator shews a clearly mistaken view of law, or a clear mistake in fact, or possibly where the arbitrator communicated to the Court or the parties for their use, a statement of his conclusions or admission of his error, the Court may have interfered.

The case in East. where the award or a paper taken as part of it in a collision case stated that both ships were equally to blame and in the wrong, but nevertheless awarded large damages against one of them may illustrate this practice.

But the law seems clearly stated in a late case by a very high authority, the late Baron Watson. In *Hodge* v. *Burgess*, 3 H. & N. 296, "This is a motion to set aside the certificate of an arbitrator on the ground that he was mistaken in point of law and "fact. The law as regards awards not under this Act is clear, "where an arbitrator professes to decide according to law but "does not do so. If this mistake appears on the face of the "award or is disclosed by some contemporaneous writing, the "Court will set aside the award. So also with respect to a mistake in fact. To that extent the law has gone but no further. "That being the general law, the only question is whether there "is any difference with respect to awards under the compulsory "clauses of the C. L. P. Act." The Act provides, "the proceedings upon any such arbitration shall be subject to the same rules "and enactments as to the power of the Court for enforcing or "setting aside the award as upon a reference by consent under a "rule of Court of Judges' order," therefore he continues, "the Legislature has not left the matter in doubt, but has clearly expressed its intention that these compulsory references should be "governed by the rules of law applicable to ordinary references." Martin and Channel, B. B. concurred.

The same view seems to have behn taken in a case in the preceding year, (1857) *Hodgkinson* v. *Fernie*, 8 C. B., N. S. 189, where the whole law as to setting aside awards is discussed.

Now this case before me is wholly wanting in materials to bring it within the influence of any of the cases cited. There is no statement of the arbitrator or admission as to his proceedings, or of his views of either law or fact. I am naturally struck on reading the papers, with the apparent difficulty of understanding how in a claim against A. P. McDonald, Schram and Ross, the defendants, were entitled to set off the money received by plaintiff on a note to which Schram seems to have been a stranger, and which A. P. McDonald swears was retired by him (McDonald) and Ross, and apparently not with money in which Schram had been interested.

But I strongly suspect both from the language of the affidavits filed, the form of the motion, and the argument addressed to me, that the contest before the arbitrator was chiefly, if not wholly, as to the proceeds of this note being applied by plaintiff to the partnership business in Hamilton in which he was interested, or whether he appropriated the proceeds to his own use, and thus was chargeable therewith, and that very possibly the right of Schram to have the benefit of this set off may not have been denied, or at all events attention called thereto. On the other hand it may have been fully in question and there may have been strong reasons undisclosed in this motion for allowing it as a set off.

The utter obscurity of this point is a strong illustration of the danger of setting aside an award on such meagre materials as have been laid before me.

I think I should be far outstepping all decided cases and introducing new practice if I acceded to this motion.

It is shewn that a suit is pending in Chancery to settle the partnership accounts between plaintiff, A. P. McDonald and Ross. If so there can be little danger of plaintiff having to pay the note in question more than once. The fact of his application of the proceeds seems to have been fairly in issue, and I see no reason to question its having been fairly decided.

Per Cur.—Rule discharged with costs.

DIVISION COURT CASE.

(In the First Division Court of the United Counties of York and Peel, before GEORGE DUGGAN, Esq., Recorder for the City of Toronto.)

BROWN ET AL. V. MUCKLE.

Carriers—Wharfingers—Contract—Negligence—Cross action, when necessary.

It is an established rule of English law, that negligence or breach of duty cannot be set up as a defence in actions for the recovery of freight, where the defendant has derived a partial benefit under the contract, but defendant obliged to bring a cross-action for damages in respect of such negligence or breach of duty.

Such rule must be taken to prevail in division courts, notwithstanding the provision of the Division Courts Act enabling the judge to decide according to equity and good conscience.

A different rule prevails in several States of the neighboring republic, and is highly convenient as calculated to prevent multiplicity of suits.

The defendant caused to be delivered to the master of Captain Perry's steamer the "Bowmanville," at Quebec, where the steamer was then lying, property of her's, a cask of china and crockery-ware, value at least of £10; also a quantity of household furniture, value not shown; which he there received, to be carried for the defendant to Toronto, at a charge of $30, as shown by an informal bill of lading produced at the trial by Captain Perry; although by another bill of lading, produced by plaintiffs, not signed by or on behalf of the captain, carriers, or others interested, $35 was charged as the freight. The sum of $35 was advanced by plaintiffs, as wharfingers at Toronto, to Captain Perry, on a supposed receipt of the goods for which it was incurred.

The plaintiffs held the goods, subject to this and two other charges, viz., $5 for wharfage and storage, and $2 50 for harbor dues.

The defendant, on application at Toronto to plaintiffs for her property, was refused delivery, unless all the above charges were first paid.

Subsequently plaintiffs delivered the goods, upon the undertaking of a friend of defendant that plaintiffs' claim should be paid.

The defendant, on receiving her furniture, found a portion of it damaged and broken, to the extent of $20.

Plaintiffs delivered to defendant a cask, as for that containing her china and crockery, but it was found to contain moccasins, and not to be defendant's cask, and was returned to plaintiffs, who disclaimed all knowledge of defendant's cask, and all liability in respect of it, and denied that it came into their hands.

The defendant refused to pay the above charges, unless her missing property (exceeding in value the amount of freight) was first restored, and her losses for injury to furniture allowed her on account.

Plaintiffs thereupon brought this suit, to recover for freight $35, wharfage $5, and harbor dues $2 50, in all $42 50, besides interest.

Defendant paid into court $7 50, covering plaintiffs' claim for wharfage and harbor dues; and urged that this being a court not of strict law, but of equity and good conscience, the plaintiffs, who voluntarily advanced their money to Perry, cannot be held to be in a better position to claim for the freight, which is the only claim now in dispute, than Perry himself would be had the advance not been made, and were he the plaintiff instead of Brown & Co.; that it would be unjust to permit plaintiffs to recover anything for freight on the contract for the safe carriage and delivery of the defendant's property, whilst the defendant, under this identical contract, has a legal and just claim against Perry exceeding that for which this action is now brought, the payment into court being the full amount of the plaintiffs' charges on the goods distinct from the charge which they voluntarily took the risk of by assuming the carrier's place in relation to them, in so far, at all events, as the freight of them was concerned. The defendant was willing to forego all excess of claim beyond sufficient to meet the charge for freight.

Defendant urged also that the voluntary advance for this freight made by plaintiffs to Perry, cannot give them a right of action against the defendant, but that admitting plaintiffs right to sue defendant, still defendant is entitled to set up her loss and damage growing out of the contract with Perry, against the claim for freight growing out of the contract and payable only in respect of the goods in question.

DUGGAN, R.—I have examined the various cases cited on both sides, and such others as I could find bearing upon this case, disposed if upon authority or precedent in law or equity I could do so to give effect in this action to defendant's just claims under the contract out of which arises the demand for freight, and avoid the necessity of another suit.

By the agreement between the plaintiffs and defendant for the delivery of the goods, and the defendant's acceptance of a portion thereof, I think she is liable to plaintiffs in this action to the extent to which she would have been liable to the carrier, Perry, for freight, had the latter made the delivery in question to the defendant direct, without the intervention of any other party. I find, however, that Perry omitted to carry defendant's cask, and earned no freight in respect thereof.

I consider it an established and inflexible rule of law, that negligence, or breach of duty or of contract, cannot be set up as a defence in actions for the recovery of freight of goods, or for the recovery of an attorneys bill of costs, where the defendant has derived a partial benefit by carriage and delivery of the goods, or had derived a partial benefit from the services charged in the bill of costs, but in these cases the defendant is invariably obliged to resort to an action for redress.

I find this distinctly stated by Baron Park, in the case of *Mondell* v. *Steel*, S. M. & W. 858, in which I was referred by the defendant on the doctrine of set off, and reduction of plaintiffs' demand, by setting up his laches in relation to the subject, or the contract out of which his action arises.

The law is so expressed, without doubt or qualification, in modern standard text books. I refer to the recent edition of Abbot, on shipping, and the able and learned work of Mr. Machlaclan, on the same subject, just issued from the English press.

I am unable to find that courts of equity have acted on a different rule where relief has been there sought in cases like the present. The rights and liabilities of the parties in such cases,

with the mode of enforcing them, do not seem to be in any respect doubtful.

It is true that in several States of the neighboring republic a different rule prevails, as shewn in the cases cited by the defendant, of *Battersmore* v. *Pierce*, 3 Hill. 171, and *Stone* v. *Yarwood et al*, 14 Illinois, 423, which rule appears just to all parties, and highly convenient, as calculated to avoid circuity of action and multiplication of suits, by enabling the defendant in a case like the present, to set up the loss and injury to his property for which the carriers would be liable in full discharge of their claim, for freight, if it amounted to so much, or if otherwise, then to the extent of the amount thereof in reduction of such claim.

Our laws appearing to me to be plain on the subject, and what is also important, the defendant having ample means of redress by action against the carrier, whom it is not suggested is in insolvent circumstances, or without the jurisdiction of our courts; I decide against the defendant's setting up in this action her claim for loss or damages under the contract referred to, and that she is liable for the full freight of the goods actually carried, amounting to $25, which sum the defendant is ordered to pay within fifteen days, with costs, excepting witnesses fees.

Judgment accordingly.

COUNTY COURT CASES.

(Before His Honor KENNETH MACKENZIE, Judge of the County Court of the United Counties of Frontenac, Lennox and Addington.)

MACE v. RUTTAN.

When land is assessed against an occupant, the collector of taxes cannot proceed to collect the taxes, as in the case of "Lands of non-residents," by distress and sale of goods under sec. 97 of the Upper Canada Assessment Act.

The term "Lands of non-residents" means unoccupied land not assessed against the owner or occupant.

Trespass for seizing and taking a colt of the plaintiff's at the Village of Sydenham, in the Township of Longborough, of the value of one hundred dollars.

The defendant pleaded that before the time in the declaration mentioned, to wit in the year 1861, certain land and premises in the township of Longborough liable to taxation were assessed in the said township, and at the time the assessment was made were not occupied by the owner but by one Edward Upham, and the owner did not reside, nor had he a legal domicile or place of business in the said township of Longborough, nor had he signified personally, or by writing, to the assessor that he owned the said land, or desired to be assessed therefor, and that the same was assessed in the name of the said occupant, Edward Upham; and that the clerk of the council of the said township made out a collector's roll, under the authority of a by-law of the council in that behalf passed, and delivered the same certified under his hand to the defendant as collector of taxes for the said township, before the 1st day of October, 1861, and the taxes unpaid and charged under the said by-law on the said land and premises against the said Edward Upham, and set down on the said roll, amounted to 78 dollars and 76 cents, and the defendant upon receiving the said collector's roll proceeded to collect the taxes therein mentioned, and called at least once on the said Edward Upham, and demanded payment of the said taxes, and that the said Edward Upham neglected to pay and did not pay the said taxes for more than 14 days after such demand, and after the expiration of one month from the date of the delivery of the roll to the defendant, and after 14 days from the time of the said demand and while the defendant was duly authorised as collector as aforesaid, the defendant found the goods and chattels of the plaintiff in the declaration mentioned on the said land, and the plaintiff was then the owner and occupant of the same land, and thereupon the defendant, as collector as aforesaid, made distress of the said goods and chattels, and levied the said taxes by the sale thereof as he lawfully might, which is the supposed trespass in the declaration alleged.

The plaintiff demurred to this plea, assigning as causes of demurrer: 1st, that the defendant after demand from Upham, the occupant, proceeded to recover the taxes as in the case of lands of non-residents, without making the demand required by law in the case of lands of non-residents: 2nd, that the plea shows that at the time of the assessment the owner of the land was not resident, and that the land was assessed in the name of the occupant, Upham, and not as lands of a non-resident: 3rd, that the plea does not show that the goods and chattels were the property of Edward Upham, or in his possession; 4th, that the plea does not show that the land was assessed against the owner at the time of the assessment, or against the plaintiff, nor does it allege that the plaintiff was the owner at the time of the assessment.

J. A. Henderson for the plaintiff; *G. L. Mowat*, contra.

Fraser v. *Page*, 18 U. C. Q. B. 330, and the 23, 24, 92, 93, 94, 95, 96, 97, 122, sections of Consol. Stat. U.C., cap. 55, were cited upon the argument.

MACKENZIE, Co. J.—It does appear a little singular that the attention of the Court was not directed to the sixth section of the Assessment Act upon the argument, as the sufficiency or insufficiency of the plea must be got at in a measure through that section. At all events the sixth section serves as a key to the solution of the legal question raised upon the demurrer, and should not be lost sight of.

The defendant states in his plea, that the land in question at the time of the assessment thereof was occupied by one Edward Upham, and was assessed in the name of and against Edward Upham, as occupant thereof, while at the same time an unnamed non-resident was its owner; and that at the time of the seizure of the colt, the plaintiff was the owner and occupant of the same land.

From this state of facts the defendant has assumed in his plea that he had a right, as collector of Taxes, to treat the land as "The land of a non-resident," and to proceed to collect the taxes under the 97th section instead of under the 96th section of the Assessment Act.

Had the defendant at the time of seizure any right to treat this land as "the land of a non-resident" under the Assessment Act? If not the plea must fail.

I think that any person who will read the sixth section of the Assessment Act, in connection with the other sections which were cited during the argument, must feel satisfied that the defendants plea must fall to the ground.

The sixth section explains the meaning of the term "Lands of non-residents" under the Act in the following explicit words: "Unoccupied land owned by a person not resident, and not having a legal domicile or place of business in the township, village, town or city where the same is situate, or whose residence or domicile or place of busines therein cannot, upon diligent enquiry by the assessor be found, and who has not signified to the assessor personally or in writing, that he owns such land, and desires to be assessed therefor, shall be denominated 'Lands of non-residents.'"

Unoccupied lands only can be treated by the assessors and collectors as the "Lands of non-residents." Land occupied by the owner shall be assessed in his own name. If the owner be not resident or be unknown, and has not requested to be assessed therefor, then if the land is occupied, it shall be assessed in the name of, and against the occupant; but if the land be not occupied then and only then, it shall be assessed as "the land of a non-resident."

Land may be assessed against the owner and occupant when the owner is known; when that is the case, the assessor must on the roll add the word "owner" to the name of the owner, and the word "occupant" to the name of the occupant when the taxes may be recovered from either or from any future owner or occupant, saving his recourse against any other person.

The assessor must write opposite the name of any non-resident freeholder who requires his name to be entered upon the roll, the word "non-resident" and the address of such freeholder. The 31st section of the Assessment Act, even without the unambiguous interpretation given in the 6th section of the term "lands of non-residents," points out, in my opinion, that the Legislature intended to mean "unoccupied lands" by that term.

By the 31st section it is enacted that as regards "the lands of non-residents" who have not required their names to be entered on the roll, the assessors shall proceed as follows: they shall insert such land in the roll separated from the other assessments, and shall head the same as "Non-resident Land Assessments," and to carry out the same idea uniformly throughout the Act, it is

enacted by the 92nd section that the clerk of every municipality shall make out a roll in which he shall enter "the lands of non-residents" together with the value of every lot, and enter opposite to each lot all rates or taxes with which the same is chargeable, and transmit the roll so made out to the treasurer of the county in which his municipality is situate, or to the city chamberlain; and subsequent clauses contain directions to the county treasurer and chamberlain in respect of the "lands of non-residents."

In the case of *Teeples* v. *Carson* decided in this Court in the year 1855, the Court in giving judgment said, "The collector derives his authority to collect the taxes mentioned in the collection roll, and his power to levy taxes in arrear, by distress and sale of the goods and chattels of parties in default from the roll itself. The roll must be looked upon in the nature of a warrant or writ delivered to the collector.

The same doctrine has been recognized by the Court of Queen's Bench in *Fraser* v. *Page*, 18 U. C. Q. B., 330.

The land would require to appear on the defendants' collection roll as "the land of a non-resident" before the collector could proceed to collect taxes on it, as on "lands of non-residents." The fact, as stated in the plea, appears to be the other way. It appears that the land was assessed in the name of and against Edward Upham. This of itself, under the statute, divested the land of the character of "the land of a non-resident." It being assessed in the name of the occupant Upham, made it for the purposes of the Assessment Act the land of a resident, Upham being in fact and in the eye of the law residing upon it. Consequently he should have proceeded to collect the taxes according to his roll, namely, against Upham, as directed by the 94th and 96th sections.

It will be seen by the 24th section of the Act that when land is assessed against the owner and occupant, the taxes may be recovered from either or from any future owner or occupant. In the present case, the name of the owner at the time of the assessment, whoever he was, does not appear at all, nor does the name of the plaintiff appear on the roll. I am at a loss to conceive by what right the defendant, a mere collector of taxes, has invested this land with a character inconsistent with what appears on his roll in this respect. It formed no part of the defendant's duty to invest the land with attributes of a more general form than what appears on the roll, as he appears by his own plea to have done. It was the duty of the assessors to return the land in its proper character, and of the municipality to see it was so returned. It was no affair of the defendant, as collector, whether the land was returned right or wrong. His duty was to collect the taxes according to his collection roll. The roll was his warrant. He had no right to travel out of it to establish by means *dehors* the roll, that the land was the land of a non-resident. It was no affair of his whether the owner's name was properly or improperly omitted from the roll. As the name of the plaintiff does not appear on the roll as the owner or occupant of the land, he stands, for the purposes of collecting the taxes, in the same relation to it, so far as the collector is concerned, as a stranger.

It is not averred in the plea that the colt was in the possession of Upham, the occupant at the time of its seizure; nor does the defendant profess to have acted upon the 24th section of the Act, and he could not, as the name of the owner was not on the roll.

The defendant seems to me, by his proceeding and his line of argument, to have confused two distinct and separate terms used in the Act, namely, the term "lands of non-resident," and the term "non-resident freeholders," into one idea, and hence his error in seizing the plaintiff's property. The term "lands of non-resident," I have already explained, according to the 6th section of the Act, as unoccupied lands, not assessed against the owner or occupant, and whose taxes or rates are charged on the roll against the land itself, and not against any owner or occupant whatever; whereas the term "non-resident freeholder" means a non-residents owner whose name is on the roll as the owner of unoccupied lands, or non-resident owners whose names are inserted on the roll together with the name of the occupant of occupied lands, under the 24th section of the Act.

The collector must transmit to such non-resident freeholders, by post, a statement and demand of the taxes charged against them on the roll, before he can proceed to enforce payment.

It will be observed that the wording of the 97th section of the Assessment Act, as published in the Consolidated Statutes of Upper Canada, and the wording of the 42nd section of 16 Victoria, from which it is taken, differ materially. By the latter, the collector was authorized to make distress of any goods which he might find upon "the lands of non-residents," on which the taxes inserted on the roll against the land were unpaid, one month after the date of the delivery of the roll to him. The enacting words of the former, namely, the 97th section, were:—"In case of the lands of non-residents, the collector, after one month from the date of the delivery of the roll to him, and after fourteen days from the time of such demand, may make a distress of any goods which he may find upon the land." The former clause gave a clear right to the collector to make a distress of any goods he might find upon the "lands of non-residents," that is to say, upon lands not assessed against any person.

It is possible that the peculiar wording of the 97th section renders it inoperative, and that the powers conferred by other clauses of the Act upon county treasurers and sheriffs, in respect of lands of non-residents, must be exercised to enforce the payment of taxes standing against the same. It is not necessary, however, to decide that point now; whatever view may be taken of it, the defendant has acted illegally. He had no right to treat this land as "the land of a non-resident" unoccupied, as his roll showed that it was occupied and assessed against Edward Upham, the occupant. He could not treat the plaintiff, or any other person, as a non-resident owner, because his name does not arpear on the roll as such; and if his name had been on the roll as a non-resident owner, the defendant could not proceed to seize property for the non-payment of the taxes until he sent by post the statement and demand of taxes mentioned in the 95th section of the Act. I think that judgment should be for the plaintiff on the demurrer.

Per Cur.—Judgment for the plaintiff on the demurrer.

WALKER V. O'REILLY ET AL.

Promissory Note—Indorsement—Guarantee.

The words "I guarantee the payment of the within," written upon the back of a promissory note, over the signature of the payee, treated as an endorsement of the note and not as a guarantee or collateral engagement for its payment.

Action on two promissory notes made by the defendant, O'Reilly, payable to the defendant, John A. Shibley, or bearer.

It was averred in the declaration, "That the defendant, John A. Shibley, endorsed the same notes to the plaintiff, Abraham Walker," and that the notes were duly presented for payment, and were dishonored.

The defendant, O'Reilly, allowed judgment against him by default. The defendant, Shibley, pleaded:—

1. That he did not endorse the notes.

2. "That the said notes, respectively, were made payable to the said John A. Shibley, or bearer, and that the said notes were and are transferable by delivery, and were so delivered by the said John A. Shibley to the plaintiff, and that the said John A. Shibley wrote on the back of the said notes, respectively, the words, 'I guarantee the payment of the within,' and signed his name at the end of the said notes, respectively; not for the purpose of completing the transfer of the said respective notes, but for guaranteeing the payment of the said notes."

The plaintiff took issue on both pleas.

The cause was tried at the last September sittings of the Court, before Judge Mackenzie, when the plaintiff put in evidence two promissory notes, made by the defendant, O'Reilly, payable to "John A. Shibley, or bearer," with the following endorsement on the back of each of the notes:—"I guarantee the payment of the within." Signed "J. A. Shibley."

It was admitted that the endorsements, respectively, were in the hand writing of the defendant, Shibley.

By consent, a verdict was entered for the plaintiff for 172 dollars and 52 cents, with leave reserved to the defendant, John A. Shibley, to move to enter a non-suit, on the ground that the writings on the back of the notes were not endorsements, and that the defendant, Shibley, was not liable to pay the notes on the present pleadings.

J. A. Henderson, in October Term last, obtained a rule *nisi* to set the verdict aside and to enter a non-suit, pursuant to leave reserved, and on the grounds taken at the trial.

A. S. Kirkpatrick shewed cause.

J. A. Henderson supported the rule.

MACKENZIE, Co. J.—This Court had to consider the effect of an endorsement similar to these now under consideration, in the case of *Shibley* v. *Lee* and others, decided in the year 1858.

The defendant in that case pleaded that he did not endorse the note only. The present defendant has gone further, and pleads that he signed his name on the back of the note, at the end of the words "I guarantee the payment of the within," not for the purpose of completing the transfer of the notes, but for the guaranteeing the payment of the said notes. The plaintiff denies the truth of this statement of the defendant.

The defendant has offered no other evidence, but the notes and the writing on the back of them, in support of his plea.

In the case of *Shibley* v. *Lee* the Court stated, "Does the writing on the back of the note constitute a collateral agreement of a guarantor or a primary undertaking of an endorser? An endorser becomes a party to the note itself. A guarantor becomes a party to an agreement *dehors* the note. Every endorser guarantees the payment of the note or bill he endorses, and makes himself liable to be sued on such note or bill accordingly, but a guarantor is only liable to be sued on his contract of guarantee. A guarantor is generally a person who comes in to guarantee the engagement of the parties to the note for some consideration appearing in the agreement, keeping himself unconnected with the note, while the endorser becomes a party to the note as much as the maker, liable to be sued on it to the same extent, after default by the maker, as the maker himself. When the Court will find a person's name written across the back of a note in the usual way in which endorsements are made, accompanied with a writing of a dubious signification, it will incline to treat the matter as an endorsement, and not as a collateral guarantee. A collateral agreement for the payment of a note by the fourth section of the statute of frauds, will not only require to be in writing, but the consideration requires to be set out in writing, and the fact that no consideration appears in the writings, now under view, is in the opinion of the Court an additional reason for treating it as an immediate indorsement and not as a collateral gurantee."

Such was the interpretation which this Court gave to a similar writing on the back of a promissory note, three years ago.

I have made diligent search in the Upper Canada, as well as in the English Reports, for a case similar to the present one but have found none. And none has been cited upon the argument.

In the absence of better authority, I feel that I am bound by the doctrine laid down in the case of *Shibley* v. *Lee*, decided here.

I cannot accede to the proposition that the second plea entitles the defendant, Shibley, to a different interpretation on the present endorsement, from that given to a similar endorsement in the case of *Shibley* v. *Lee et al.* He has offered no evidence to show that writing was placed in the present notes for the purpose alleged by him in his second plea, and probably he could not do so in law or in fact. The second plea substantially amounts to a plea, that the defendant Shibley, did not endorse the notes as alleged in the declaration. The new facts which he professes to give in his second plea are nothing more or less than his interpretation of the writing endorsed on the back of the notes. The plaintiff by taking issue denies the interpretation, and the parties are thrown back to the place where they would be placed by the first plea. If the interpretation which this Court gave to the writing in *Shibley* v. *Lee et al.* was correct, the same interpretation must be given to a similar writing in the present case, notwithstanding the interpretative allegations contained in the second plea.

I have found a digest of some American cases in the American edition of Chitty on Bills 250, where the United States Courts seemed to have viewed the matter as this Court has. In *Hough* v. *Gray*, 19 Wendell Reports 202, and *Watson* v. *McLaren* 19 Wendell Reports 557, it would appear that the Courts held that a guarantee written upon a negotiable note, may be treated as an endorsement.

The digest of the last mentioned American case are given in Chitty in the following words: "Where an absolute guaranty is endorsed upon a note payable to bearer, at the time of the making thereof, and the note and guarantee are transferred by the payee, the assignee may maintain an action in his own name against the guarantor. But such guarantee is not negotiable, unless it be upon the note, in which case it may be treated as an endorsement, without a necessity of demand and notice."

Although the decisions of the Courts of the United States are not precedents for us, still their adjudications are received in Canada and England with great respect. In the present case the defendant Shibley was the payee mentioned in the notes. And in the absence of anything to the contrary it must be presumed that the note and endorsement were transferred to the plaintiff Walker, at the same time by the payee Shibley.

I think, as now advised, that the words, "I guarantee the payment of the within" upon the back of a negotiable promissory note over the signature of the endorser, may be treated as an endorsement; and that the writing itself is *prima facie* evidence that it was so intended and written at the time of the transfer.

I think the rule should be discharged.

Rule discharged.

In the County Court of the County of Elgin, before His Honour JUDGE HUGHES.

HILLIS V. TEMPLETON, MCBETH AND BLACKWOOD.

Held, that a person taking a negotiable security for a valuable consideration without notice of the equities between the original parties, is not bound by them. *Held*, also, that a pre-existing debt is a sufficient consideration for value.

In this case the defendant Blackwood bought lands of defendant McBeth, in the village of Tyrconnell, which Blackwood surveyed into village lots. The plaintiff became a purchaser of some lots, at an auction; and, in compliance with the terms of the sale, defendant Blackwood gave plaintiff a bond, conditioned to convey the lots so purchased by plaintiff free from incumbrances, &c., when all the instalments should be paid. Plaintiff had paid part of the purchase money at the day of sale, and given his promissory notes for subsequent yearly instalments. Defendant Blackwood had not paid defendant McBeth all the purchase money for this land, but had secured the amount unpaid by mortgage upon the same premises. At this time there were no judgments existing against defendant Blackwood, but what had been since discharged. Defendant Blackwood also owed defendant McBeth for an independent debt of £225, money lent, secured by mortgage upon a property at Port Stanley, consisting of a water lot and warehouse. Defendant Blackwood subsequently wished to remove his warehouse to Tyrconnell, and erect it anew upon unincumbered property there. McBeth assented, upon condition that defendant Blackwood should assign notes he had procured from the purchasers of village lots at Tyrconnell, to the extent of £1,017 3s. 6d. The amount due upon the Port Stanley premises—*i. e.*, for the borrowed money—was made a first charge upon the notes, and it was arranged that the mortgage upon the Port Stanley premises was to be first paid out of the proceeds of the notes, and the balance was to go in discharge of the Tyrconnell mortgage. When the notes were assigned to McBeth, Blackwood took a receipt for them, setting forth the foregoing terms, and distinctly specifying that the arrangement was not to be held or construed as suspending McBeth's remedy upon either mortgage.

After some of the notes fell due, they were placed in the Division Court for collection, in the name of the defendant Templeton. Plaintiff was sued, amongst others; but he filed a complaint in this Court, and obtained an injunction restraining the further proceeding in the Division Court, on the allegation that Templeton was only the trustee or agent of McBeth—*i. e.*, a nominal plaintiff—whilst McBeth was the beneficial plaintiff; and asking to have the recovery on the notes restrained until a title could be made; and alleging that McBeth had given no consideration to Blackwood for the notes; that Blackwood obtained them without value, inasmuch as he had only an equity of redemption in the property sold to plaintiff, which was heavily incumbered by judgments obtained against Blackwood; and that plaintiff had received no consideration or value for making the notes. The injunction was unopposed; judgment went *pro confesso* against both Templeton and Blackwood. Defendant McBeth put in an answer, denying

the allegations in plaintiff's complaint, and set forth that the notes were transferred to him by Blackwood for a good and valid consideration.

Plaintiff afterwards obtained an order for an issue, to be tried by a jury, first, as to whether there was a consideration passing at the time of the transfer of the notes by Blackwood to McBeth or not; second, as to whether the notes were taken as collateral security, or as payment for an existing debt; third, whether or not McBeth had notice of the consideration for which they were given by the plaintiff to Blackwood. At the trial the defendant McBeth was sworn as a witness, at the instance of the plaintiff, and proved the transaction as hereinbefore stated, but said he did not know what precise property plaintiff's notes were given in payment for. The judge charged the jury, first, that it was not necessary for the defendant to show a *new* consideration, in order to establish and maintain his right to recover on the notes, but that the important question was, was there any valuable consideration passing or passed for the transfer of the notes, and it was enough if a consideration then existed; second, that the existence of a debt from Blackwood to McBeth was a sufficient consideration, and that the plaintiff had proved the existence of it by the evidence of McBeth, and that it mattered not whether the notes were taken as collateral security or as payment of an existing debt; third, that the agreement put in by the plaintiff showed a sufficient consideration passing at the time of the transfer of the notes from Blackwood to McBeth; fourth, that the jury themselves must decide whether or not McBeth had, at the time he took the notes or before, given any valuable consideration, further than notice of the consideration for which they were given by the plaintiff to Blackwood, and told the jury there was no evidence at all that he could see that McBeth knew what exact land the plaintiff bought from Blackwood that these notes were given in payment of—whether it was covered by McBeth's mortgage or not, or whether Blackwood had bought it from Col. Talbot or others. *Abbott*, for plaintiff, objected to the judge's charge, because he urged that the mere pre-existence of McBeth's mortgages would not be a consideration within the meaning of the issue. The jury rendered a verdict for the defendant on the issues.

Afterwards, *Abbott*, for plaintiff, moved a rule absolute for a new trial, on the objection taken at the trial, and because the verdict was rendered contrary to evidence.

Ellis, contra, showed cause on behalf of McBeth.

HUGHES, Co. J.—The question involved in this matter is simply whether a mortgage creditor can take promissory notes as a collateral security some time after the mortgage is due, and whether the existence of mortgage security is a good consideration for the transfer of such notes. I never heard it doubted before that a previous debt due to the holder of a negotiable instrument is a good consideration, nor that a previous debt of any kind due by a mortgagor to a mortgagee may not be a sufficient consideration for the transfer of a negotiable bill or note from the mortgagor to the mortgagee. That was done by the defendant Blackwood to the defendant McBeth in the present instance. The plaintiff, who complains of it, shows that the notes were given as collateral security, but that the defendant McBeth guarded against the suspending of his remedy on the mortgage until the maturity of the bills, as the circumstances might have otherwise been held to raise an implied agreement so to suspend the remedy. It is true that *Thompson* v. *Brunskill*, 7 Grant, 542, goes to shew that the defendant Blackwood might be restrained from recovering on the notes until he shewed a good or perfect title to the plaintiff, but I do not see that that case affects the question between the plaintiff and the defendant. McBeth is no doubt an endorsee for value, and not the mere agent or trustee, or colorable endorsee of the defendant, Blackwood. If he had been the trustee or agent of Blackwood, and merely collecting the notes upon a colorable transfer, I think the plaintiff would be entitled to restrain the collection of the notes under the authority last named. The plaintiff, at the trial, by his own witness, and by the documen the produced, shewed a *transfer and endorsement* of the notes to McBeth, on the understanding that out of the proceeds he was to pay himself first the mortgage on the land and warehouse at Port Stanly, and secondly, the residue was to be applied on the Tyrconnell mortgage, the notes to be considered collateral security for both claims, so that the title of McBeth in the notes is made out to my mind most clearly. I think the case comes within the principle that is laid down in *Bosanquet* v. *Dudman*, 1, Starkie 1.

At the trial I told the jury as to the first issue it was not necessary establish a *new* consideration, that the question was, was there any valuable consideration passing or passed, for the transfer of the notes, and it was enough if a consideration then existed, that the existence of a debt from Blackwood to McBeth was a sufficient consideration, and that the plaintiff had himself proved the existence of it; that it mattered not whether the notes were taken as collateral security or as part of an existing debt; that the agreement put in and proved by plaintiff's counsel shewed a sufficient consideration for the transfer of the notes to McBeth. I told the jury as to the second issue, they must decide whether or not McBeth had at the time he took them, or before giving any valuable consideration for them, notice of the consideration for which they were given by plaintiff to Blackwood, and that there was no evidence at all that I had seen of his (McBeth's) knowing what exact land these notes were given for, whether it was that part of the land sold to the defendant (Blackwood) by McBeth, or by Colonel Talbot, or others. I can see nothing in the authorities which I have read, to satisfy me I was wrong in so directing the jury. The case of *De la Chaumette* v. *The Bank of England*, was most relied upon in argument. That was an action of trover to test the right of property in a bank note which had been stolen. The plaintiff who presented it for payment at the Bank of England, brought the suit, because the bank kept it without payment and without returning it. He merely shewed it had been transmitted to him by his agents at Paris, who owed him a balance, and was part of a remittance, and that his title to the note was the title of his agents, and their title was not proven; that they were mutually agents for each other as money changers and brokers, and responsible to each other for the bills transmitted for collection, and bears but little analogy with a case wherein the title to the note is undisputable, acquired *bona fide* and by honest means. The case cited by Mr. Abbott, *Gooderham* v. *Hutcheson*, 5 U.C C., P. 241, is an authority decidedly against his client, and in favor of McBeth. The late lamented C. J. of that court, at page 259, says, "Having considered the cases bearing upon the subject, I think the weight of argument is in favor of a pre-existing debt being a sufficient consideration for value;" and in the next paragraph he says, "under the evidence I do not feel warranted in holding that the plaintiffs did not give value for the note in question if obtained *bona fide*, even although exclusively on account of the pre-existing debts;" and again, about the middle of page 260, he says, "As relates to pre-existing debts, no doubt they would constitute ample consideration to support an action upon a promissory note made by the debtor to secure the creditor." It was not pretended that there was any mere colorable transfer or secret trust; and as there was no evidence of any *scienter* in McBeth that the notes were taken by Blackwood in payment of land, of which he either had not a title, or the title of which was encumbered; and as is shewn, they were taken *bona fide* as a collateral security for an existing valid debt; and McBeth's affidavit in answer to the plaintiffs' rule, makes out a good consideration, and is not contradicted, I think it would be unnecessarily prolonging litigation to grant a new trial; indeed, I never could see the slightest reason for bringing this suit at all, for all the questions that have been raised here might have been brought up in the Division Court, which is a court of equity and good conscience, and could as easily have been dealt with in that tribunal as by the proceeding in this court, or as could the suits of *De la Chaumette* v. *The Bank of England*, and *Gooderham* v. *Hutcheson*, in superior courts of common law. The defendant, McBeth, having received the notes before they were due, shews that his doing so was not subject to any equities that subsisted respecting the notes as between the plaintiff and the defendant Blackwood. I decide therefore that the rule shall be discharged. I think also, that as the issues go to the very root of the action, the injunction should be dissolved and the plaintiffs' bill, in so far as the defendant McBeth is concerned, dismissed with costs.

Rule accordingly.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Osgoode Club.

Sirs,—Can you tell me why it is that there is not a better attendance of the law students of Toronto at the weekly meetings of the Osgoode Club than there appears to be? It cannot be that there are no law students in Toronto, for the many offices of the city are full of them. Then why do they not attend weekly meetings designed for self-improvement, and a proper training, in that profession by which they hope to earn their livelihoods? Perhaps you will be good enough to administer a rebuke to the many who neglect so proper a mode of preparing themselves for the profession.

Your obedient servant,

Toronto, Nov. 1, 1861. One who Works.

[The attendance of law students at the meetings of the Osgoode Club is not, we believe, all that can be desired. The cause is a neglect on the part of those who are most interested in the success of the club. In a city like Toronto there are not only many law students but nightly many objects of amusement. These objects, we presume, on the night that the club meets are, to some students, more attractive than the meetings of the club. Men are not born lawyers, nor are they born advocates. The talents for the one and the other if not really acquired by study, are much improved by practice. Young men aspiring to the profession of the law, who, for the transient and unprofitable amusements of city life, neglect to devote one night in the week during the winter months to self-culture at the meetings of the Osgoode Club, certainly act most unwisely. They throw away opportunities of self-improvement that never can be recalled. They are blind to their own interests. They act like fools, and learn the nature and extent of their folly when it is perhaps too late to attempt to retrace their steps. Students in country places, with few facilities, often make better lawyers than city students with every facility that can be fairly and reasonably desired. One reason is, that in the country there is less to distract, less allurements to frivolity and dissipation, than in the city.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. Harcourt v. White. *May* 23.

Waste—Tenant for life—Timber improperly cut by a prior tenant for life—Stale demand—Devise for payment of debts.

An expectant tenant for life in remainder, who sees a tenant for life in possession, improperly cut timber, and takes no step to prevent it during his life, cannot in a suit instituted nearly twenty years after the death of such prior tenant for life, charge his estate with the burden of making good the value of the timber so improperly cut by him.

Upon the principle of preventing the assertion of stale demands, the lapse of time alone will form a bar in equity to such a suit, although the statute of limitations has no application.

The creation of a trust for the payment of debts does not create a debt where none existed before, or remove from a creditor the consequence arising from his negligence or acquiescence express or implied.

C. J. Griffiths v. Cowper.

Practice—Defendant out of jurisdiction—Substituted service.

The defendant to a suit in which a decree has been made was British Consul at Pernabuco.

Held, that service of the decree on the defendant's solicitor, who resided in London, and who corresponded with him, was good service on the defendant.

V. C. K. Stone v. Parker. *July* 24.

Will, construction of—Effects—Conditions of residence—Exoneration

A gift of household furniture, plate, linen, china, glass, books, fixtures, and other effects of a like nature, does not include cows, horses, carriages and farming stock.

A devise of a house and estate with the furniture and effects to trustees upon trust, to permit the testator's wife to occupy, use and enjoy the same for life, if she should so long continue his widow, and from and after her decease or second marriage, or in case she should refuse to occupy the house, upon trust to sell, is a condition which applies to the house only, and to willful non-residence, the occupation being that of an ordinary tenant for life.

V. C. K. Wright v. Vernon. *Aug.* 2.

Partition—Contract with a stranger—Jurisdiction—Direction to Commissioners.

Where one of the tenants in common under a partition directed by the court, has dealt with a stranger, and he asks a direction to the Commissioners to make a particular allotment in respect of such dealing, the court has no jurisdiction to grant such an application.

Where tenants in common under a partition, have had dealings *inter se*, the court will interfere by giving directions to the Commissioners as to such dealings.

V. C. K. Grimsby v. Webster. *Aug.* 6.

D. having a lien on a fund, by express agreement with the parties entitled to it, they by their acts depart from that contract, and D. is obliged to get a stop order, and appears to ask for these costs and claim his lien.

Held, that he was entitled to the costs of the stop order, and of his appearance.

Parties having a claim upon a fund in court, are not entitled, as a general rule, and under all circumstances, to the costs of getting a stop order.

V. C. K. Mullins v. Smith. *July* 24.

Will—Construction—Residuary gift—Goods and chattles—Specific and demonstrative legacies distinguished—Annuity.

A testator may make a residuary gift at the commencement of his will, if there be no other gift of that nature, and the words "goods and chattels" in such a clause may pass general personalty; but where there is a subsequent and clearly residuary clause, "goods and chattels" must be taken in the ordinary sense.

Where there is a gift to one for life, with a direction not to sell the interest so given for a specific time, if the tenant for life dies within the time, the term expires by the death.

A legacy of stock out of stock is specific, but money out of stock is not, but demonstrative.

A specific legacy is not liable to abate—a demonstrative legacy is. A specific legacy is liable to redemption—a demonstrative is not. A specific legacy carries with it the dividend from the death of the testator—a demonstrative legacy does not.

A general legacy may be given to a specific legatee, although expressed to be "in addition to" the specific legacy—an annuity is comprised in the word "legacy."

V. C. S. DAWSON v. NEWSOME. *June* 11.

Practice—Petition—Order enforcing compromise—Jurisdiction.

The plaintiff and defendant in this suit entered into an agreement to compromise the same, with liberty to the plaintiff to make the agreement a rule of court in default of payment by the defendant of a sum to be ascertained on taking an account. The court on petition of plaintiff ordered that the agreement should be made a rule of court, and that the defendant should pay the amount due with costs.

V. C. S. THOMAS v. GRIFFITH.

Administration—Suit by creditor after the assets had been distributed under administration decree.

T. brought in his claim, under an administration decree, against the assets of G., a deceased person, for the balance of a complicated account. The chief clerk disallowed part of the demand. After the assets had been distributed, T. had to advance money on behalf of G.

Held, that T. was entitled to file a bill against G.'s legatees, and to have an account of what was due to him both on the original demand and for the subsequent advances. *Held* also, that the executors of G. were not necessary parties.

V.C.W. COLEMAN v. THE WEST HARTPOOL RAILWAY CO. *Aug.* 1.

Injunction—Contempt—Publication of proceedings by parties to a suit—Costs.

Pending litigation the court will restrain the publication by any of the parties to the suit of *exparte*, garbled accounts calculated to prejudice the case of their opponents of any of the proceedings in court, or before the examiner.

The circumstance that such publication is by way of defence, and in answer to similar publications by the other side, although it may excuse the party sought to be restrained, from the costs of the motion for that purpose, will not prevent the court from granting the injunction.

V. C. S. NOTLIDGE v. PRINCE. July 26.

Undue influence—Spiritual dominion—Gift of stock set aside.

L. N. joined an institution over which P. exercised control, having acquired influence by maintaining that the purposes of God were revealed to him. The institution was conducted with considerable luxury, and many of the members made over their property to P., but continued to share the advantages of the institution. L. N. was forcibly taken therefrom by her relatives, and placed in a lunatic asylum. At P.'s instance, the commissioners of lunacy instituted an inquiry, which resulted in her liberation; and immediately afterwards she made over all her property to P. By a written document, subsequently executed, she declared that by the gift of her property she had testified that all he possessed belonged to God, not to her.

Held, that the gift was made under undue influence, and must be set aside.

COMMON LAW.

C. P. YATES v. CASH. May 30.

Bill of Exchange—Payee.

That is not a valid bill of exchange, in which the payee is merely described as "the treasurer for the time being" of an institution.

REVIEWS.

THE WESTMINSTER REVIEW. New York: Leonard, Scott & Co.—The number for the quarter ending October, 1861, is received. The contents are: Mr. Goldwin Smith, on the study of History Biography, Past and Present; A Visit to the Mormons; Count Cavour; The Apocalypse; The Rival American Confederacies; Trades' Unions; Contemporary Literature. The first is a very severe criticism of a work entitled, The Study of History, being two lectures delivered by Goldwin Smith, M.A., Regius Professor of Modern History in the University of Oxford. While giving the author credit for ability the writer of the review charges him with want of candour. The writer of the review contends that the facts of human society are capable of *scientific* treatment. The Oxford professor is of a different opinion. The result is the criticism to which we have adverted. It is a well written paper, containing much argument and much originality of thought.

BLACKWOOD for October. New York: Leonard, Scott & Co., is also received. The contents are: Democracy teaching by example; Meditations on Dyspepsia; Chronicles of Carlingford; The Book Hunters Club; Social Science; What seems to be happening just now with the Pope; Among the Locks; Captain Clutterbuck's Campaign. The article on Democracy is, as one would imagine, a paper by no means in praise of the system of government hitherto prevailing in the United States of America, judged by its present results. The article on Social Science, suggested by the recent meeting of the National Association for the promotion of social science in Dublin, is an amusing and well written paper.

THE ECLECTIC for November is also received. We intuitively turn to the first page for the portrait of some illustrious person. In the number now before us we find a really beautiful and well executed portrait of "Frederick the Great," whose name is suggestive of deeds of valour and true greatness. The letter-press of the number is varied and interesting as usual, viz.: Revolutions of English History; Edwin of Deira; Equatorial Africa; Mad Dogs; The Constable of the Tower; Literature and Philosophy of the early Christian Ascetics; History of England, from the Fall of Wolsey to the Death of Elizabeth; Duelling in Modern times; Gone, gone gone! Volcanoes; Madame de Krudener, Military Panics; Greatness; Frederick the Great; History of the Pope's Train; Blown through a Tube.

GODEY for November is also received. This magazine is attractive and useful as usual. Its attractions and usefulness are on the increase as the current volume draws near its close. The number for November contains the well known engraving "The New Boy." It is admirably executed. No less than eight distinct figures, perfect in detail, are made to appear on it. The fashion plate is double, and contains no less than seven figures, said to be five more than any other magazine. The reading matter is such as to instruct every lady in the land who may choose to devote some attention to the reading of its pages. The magazine is so well conducted as to please all without offending any. Every page reflects judgment, experience, and a strong desire to please and instruct. The subscription is only $3 per annum.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

WILLIAM IRVINE STANTON, of Cobourg, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted October 12, 1861.)

HENRY McPHERSON, of Owen Sound, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted October 12, 1861.)

ALEXANDER MILLAR, of Berlin, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada.—(Gazetted October 12, 1861.)

ARTHUR R. BOSWELL, of Cobourg, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada.—(Gazetted October 12, 1861.)

TO CORRESPONDENTS.

"A CLERK"—"CLERK 6TH DIVISION COURT, CO. NORFOLK"—"ALPHA"—Under "Division Courts."

"ONE WHO WORKS"—Under "General Correspondence."

DIARY FOR DECEMBER.

1. SUNDAY ..... *Advent Sunday.*
2. Tuesday ..... Last day for notice of Trial County Court.
8. SUNDAY ..... *2nd Sunday in Advent*
10. Tuesday ..... Q. Sessions and County Court Sittings in each County.
12. Thursday ..... Sittings of Court of Error and Appeal begins. Las day for service of Writ for York and Peel Assizes.
14. Saturday ..... Last day for collection of money for School Teachers' Salaries. Collectors to return Assessment Roll to Treasurer or Chamberlain.
15. SUNDAY ..... *3rd Sunday in Advent*
22. SUNDAY ..... *4th Sunday in Advent.*
23. Monday ..... Nomination of Mayors. Last day to declare for York & Peel Assizes.
25. Wednesday ..... CHRISTMAS DAY.
29. SUNDAY ..... *1st Sunday after Christmas.*
31. Tuesday ..... End of Municipal year. Last day on which remaining half of Grammar School Fund is payable. Last day for notice of Trial for York and Peel Assizes.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

DECEMBER, 1861.

TO SUBSCRIBERS.

Subscribers are reminded that the present No. completes Volume Seven of the Upper Canada Law Journal. Those, indebted to the Journal are requested to make an immediate settlement of our demands against them. All such, by looking to the covers of their paper will ascertain the amount demanded. Remittances to be addressed to our publishers, Messrs. W. C. CHEWETT & Co., King St. East, Toronto.

COUNSEL FEES.

The profession of an advocate is in every civilized community esteemed one of distinction, as it is of influence.

In some respects akin to the "orator" of the Romans, it partakes of many of its characteristics.

One feature in common is, that the advocate of modern no more than the orator of ancient times, is allowed to sue for his services.

Sir John Davis, in the sixteenth century, wrote as follows: "The fees or rewards which they (barristers) receive are not of the nature of wages or pay, or that which we call salary or hire, which are indeed duties certain and grow due by contract for labour or service; but that which is given to a learned counsellor is called *honorarium*, and not *merces*, being indeed a gift which giveth honor as well to the taker as to the giver; neither is it certain or contracted for; no price or rate can be set upon counsel, which is invaluable and inestimable; so it is more or less according to circumstances—namely, the ability of the citizen, the worthiness of the counsellor, the weightiness of the cause, and the custom of the country. Briefly, it is a gift of such a nature, and given and taken upon such terms, as albeit the able client may not neglect to give it without note of ingratitude (for it is but a gratuity or token of thankfulness), yet the worthy counsellor may not demand it without doing wrong to his reputation, according to that moral rule, *Multa honeste accipi possunt, quæ tamen honeste peti non possunt.*" (Preface Davis' Reports.)

Quaint as this language may sound, and absurd as it may appear in this utilitarian age, it is law, almost as inflexible to-day as when first written.

On 10th June, 1858, Sir R. T. Kindersley, upon reading the petition of a barrister, for payment of his fees by a solicitor, and upon the argument being addressed to him that a barrister has a right in law to recover fees paid to a solicitor for him, said, "I hope the time will never come when such a rule is established. I will never make a precedent. If you bring me precedents and establish your case, I must make the order; but I will never willingly derogate from the high position in which a barrister stands, and by which he is distinguished from an ordinary tradesman." (*In re May*, 4 Jur. N. S. 1169.)

Barristers however, like other men, must live, and in modern times at least it has been found imprudent for them to trust to the gratitude of clients for subsistence. In what way, therefore, is the difficulty overcome? The same law which says they "shall not sue for their fees," says they shall in all cases "receive them in advance," and, worse still, "keep them though no service is performed for them."

On an application to compel an attorney in a cause to pay counsel fees collected by him, Erle, C. J., said, "I do not mean to sanction in any degree the notion of such applications. It may be that an attorney is wrong in delivering a brief with fees marked on it without their being paid; but then counsel are equally wrong who accept it on these terms, and we cannot be called on to entertain any proposition for us to interfere in such a case" (*In re Angell* 6 Jur. N. S. 1373.)

So where a person had given a brief with a fee to counsel on an expected trial, and the counsel neglected to attend, it was held that the fee could not be recovered back, because the fee was a present to the barrister by the counsel,

and not a payment or hire for labor (*Turner* v. *Phillips*, Peake, 122.)

Such is the rule and such are its consequences. Designed to elevate the members of the profession, it tempts men to dishonesty. It enables the client to cheat the barrister, and the barrister to cheat the client. That which is in fact a reward for services performed, or to be performed, is called a gratuity, and the idle form is retained while the substance is entirely changed.

The orator of ancient times sought his reward in the applause of multitudes, the gratitude of his countrymen, elevation to the highest offices in the State. His aim was high, and it suited his purposes to appear to despise gain. But the same rule, applied to the advocates of modern times, is little less than ridiculous.

Few men are born to affluence. Most men have to earn their livelihood by labor, mental or bodily. The laborer in either case is worthy of his hire. The hire is the natural fruit of his labor. Without it he cannot subsist. When he earns it he should not be ashamed to receive it, and the law should not be backward in seeing that he gets it.

We do not like to see a grasping covetous advocate. His profession is a liberal one, and we like to see his conduct square with the attributes of his profession. But at the same time we must condemn that false modesty which compels men to call that one thing which is in substance and in fact an entirely different thing—that a gratuity which is a reward for services performed or intended.

The following language of Bayley, J., is more in accordance with our views. "The suggestion is that by law no man is liable to pay for counsel at all. That seems to me to arise entirely from a mistake in point of law. It is never expected, it never has been the practice, and in many instances it would be wrong that counsel should be gratuitously giving up their time and their talents without receiving any recompense or reward. It is the recompense and reward which induce men of considerable ability and certainly of great integrity and with every qualification which is necessary to adorn the bar, to exert their talents. It is the emolument in the first instance, to a certain degree, that induces them to bear the difficulties of their profession, and to wear away their health, which a long attendance at the bar naturally produces; and it is of advantage to the public that they should receive those emoluments which produce integrity and independence; and I know of nothing more likely to destroy that integrity and independence than to deprive them of the honorable reward of their labors." (*Morris* v. *Hunt*, 1 Chit. R. 544.)

The rule is day by day becoming less stringent. In Ireland it has been held, that although a barrister cannot sue on an implied contract for business performed, yet he may make an express contract for his fees and sue upon that contract, (*Hobart* v. *Butler*, 9 Ir. Com. L. R., 157,) and even in England barristers have been allowed as creditors to prove upon the estates of bankrupt solicitors for the amount of unpaid fees (*In re Hall*, 2 Jur. N. S., 1076. *Teed* v. *Beere*, 5 Jur. N. S., 381).

In the United States it is said that the rule was in Pennsylvania asserted for the last time in *Morney* v. *Lloyd*, 5 S. & R., 412. Chief Justice Gibson, of Pennsylvania, in speaking of the *honorarium* said, "Its principle had its origin in the Roman law, when the practice of oratory was so elevated as to be fancifully thought to be incapable of stooping to mercenary consideration without debasement. And the dignity of the robe, instead of any principle of policy, furnishes all the argument that can be brought to support it at the present day; for it is hard to imagine a principle of policy that would forbid compensation for services in a profession which is now as purely a calling as any mechanical art. The English courts adopted it practically and professedly on the foundation of dignity; they studiously restricted it to advocates. (*Foster* v. *Sacks*, 4 Watts, 33; see also *Adams* v. *Stevens*, 26 Wend. 455; *Stevens* v. *Morges*, 1 Hare, 127.)

In Upper Canada the same person is often both barrister and attorney. In England, from the earliest time, the attorney was allowed to sue for his fees. In Upper Canada therefore, neither is the necessity for the rule so great nor the rule so easily carried out as in England. By the old King's Bench Act it was enacted that the Court should "by rules or order, to be from time to time made, ascertain, determine, declare, and adjudge, all and singular, the fees which shall and may be taken or be allowed to be taken by any clerk of the Crown *counsel*, attorney, sheriff, officer, or other person, for or in respect of any business to be done in the Court of King's Bench, as well in civil causes as in criminal proceedings." The court accordingly framed a tariff of fees payable to counsel, which since has been from time to time amended and enlarged. As it now stands it will be found in Harrison's C. L. P. Acts, 712. It is a principle that where an Act of Parliament or Rule of Court casts upon a party an obligation to pay a specific sum of money to a particular person, the law enables that person to maintain an action for it. Accordingly it has been held that counsel claiming a fee under the statute or rule of court, and such as mentioned in the tariff, may maintain an action for it. Except in the case of fees taxable by the tariff, the principle of the English law which denies to counsel the right to sue for professional services, has been held to apply to Upper Canada (*Baldwin et al.* v. *Montgomery*, 1 U. C. Q. B., 283; see also *Smith et al.* v. *Graham*, 2 U. C. Q. B., 268).

NE SUTOR ULTRA CREPIDAM.

Often in courts of justice are Judges and Lawyers puzzled in attempts to decipher the meaning of some "document" composed of solemn nonsense.

Once we saw a memorandum of agreement prepared by an amateur conveyancer, in which the vendor agreed to sell a parcel of land to the vendee "without impeachment of waste," upon payment of a specified sum of money and interest.

On another occasion, we saw a deed of a lot of land from a man to a widow, to hold to her heirs and assigns for ever, "by the courtesy of England."

Instances such as these are of daily occurrence in Upper Canada. Now what is the source of them? It is that a most important branch of professional practice is open to all the world, including the man who sells you your groceries, the man who makes your boots, the man who sells you quack medicines to kill or cure your horse or dog and afterwards is ready to buy the hide of your horse or dog at the best price.

These remarks have been suggested by an advertisement cut from a local paper and sent us, of which advertisement the following is a copy:—

A —— B ——

COMMISSIONER, Q. B., CONVEYANCER, &c. Also, Dealer in Groceries & Provisions, Boots & Shoes, Crockery & Dry Goods, Room Paper & School Books, Patent Medicines, Blank Deeds and Memorials, &c., Cheaper than ever.

Cash paid for Hides, &c.

We respect an honest man of whatever calling. We despise no man because of his calling. Each is to be respected in his station. The grocer, the shoemaker, and the tanner, is each a useful member of society; but in order to be as useful as possible without danger to life or property, each should keep to his calling until fitted for a different one.

The villager, however parsimonious, would be more likely in case of sickness to entrust his malady to a known medical man than to a horse doctor or the village shoemaker. Why then should he, when about to acquire his "little all," entrust the transfer to a man whose only fitness is his effrontery or ability to write better orthography than his neighbours, when a skilled conveyancer may be had in the same locality?

The system is one of folly, often pregnant of penny wise and pound foolish consequences. It may be that the village shopkeeper, who knows more of a pound of Souchong tea than an estate in fee simple, will draw a deed for less money than the lawyer, who has spent years in acquiring a knowledge of estates, their nature, extent and mode of transfer. Time spent by a lawyer in acquiring a knowledge of his profession is capital. Money expended in the purchase of books is capital. When therefore he (the lawyer) is needed to make use of his skill so acquired, he must of necessity seek a greater recompense for his services than the man who did not spend a day in the study of the law, or buy a book with a view to its practice.

Many men, influenced by the paltry consideration of thus saving a dollar, lose thousands. We have known men incur the costs of heavy chancery suits in order to cure the blunders of ignorance or incapacity—too dear at any price. We have known other men lose properties, made valuable by years of toil, because of entrusting to incompetent men the responsible duty of transferring estates. Such men learnt wisdom by experience, but at such a price as to reduce them perhaps from a state of comparative affluence to absolute want. Others should be warned by their example.

THE LAW SOCIETY OF UPPER CANADA.

The institution of Scholarships has proved a decided success. The examinations during last term were of a very high character. Much interest was felt in them, and the successful candidates were warmly congratulated by their fellow students. The following is the result:—

FIRST YEAR.

John McKindsey	291	
L. C. Moore	282	
Codrington Reid	278	*æquales.*
George Kilpatrick	278	
Samuel Hoskins	258	

SECOND YEAR.

George Holmstead	267	
Richard Walkem	256	*æquales.*
Frederick Fenton	256	

THIRD YEAR.

Donald McLennan	298
George Rae	271
J. D. Edgar	240

The maximum number of marks that could be obtained by any candidate, either for the 1st, 2nd or 3rd year, was 320. The names of candidates whose marks were under 240 are not made known.

FOURTH YEAR.

Thomas Ferguson	360

The maximum number of marks that could be obtained by any candidate for this year was 480. The names of candidates whose marks are under 360 are not made known.

Much of the success of the Law Society is due to the well known energy of its Treasurer. The reforms which have been originated since his election to office, and are now being carried out under his guidance, are in every respect calculated to elevate our profession, by making its members more learned than they would be without the many advantages which the Society now affords.

ENGLISH LAW OF COPYRIGHT.

We have been informed on good authority that the Provincial Act 10 & 11 Vic. cap. 28, to which we referred in our last issue as being inconsistent with the Imperial Act 5 & 6 Vic. cap. 45, was disallowed by the Queen.

It is well that this fact should be known to all in any manner concerned in the subject of our remarks. It does not seem to have been known to the Commissioners when consolidating the Statutes of Canada. They appear to have incorporated all the provisions of 10 & 11 Vic. cap. 28, in chapter 81 of the Statutes of Canada. The result is that the greater part of that Consolidated Statute is not only not law but calculated to mislead. The sooner the condemned portions of the act are expunged from the pages of the Statute Book the better.

We cannot understand why our Legislature should not be allowed to amend our laws, including Imperial statutes, directly or indirectly made to apply to us—especially in matters of local concern. If we have the right to enact a copyright law, we should also have the power to alter the terms of an English statute on the subject which is in conflict with our ideas and our wants.

LAW SOCIETY OF UPPER CANADA.

HILARY TERM, 1861.

EXAMINATION FOR ATTORNEYS' ADMISSION.

WILLIAMS ON REAL PROPERTY.

1. Explain the feudal system, and state the effect of its introduction into England.
2. What are the rights of married women, with respect to real estate?
3. What are the limitations upon a mortgagor's right to redeem? and how is this affected by statute?
4. Distinguish between the different kinds of conveyances and their operation.
5. Explain the effect of the provisions of the Statute of Frauds upon interests in real estate.

STORY'S EQUITY JURISPRUDENCE.

1. Distinguish between a bill for account and an action of account at law?
2. Give the principal rules attending the administration of assets in equity.
3. Distinguish between revocable and irrevocable assignments.
4. When is misrepresentation fraudulent.
5. Under what circumstances will a purchase be deemed a trust?

SMITH'S MERCANTILE LAW.

1. Can there be a binding verbal agreement to renew a bill or note? Will it make any difference in the validity of such agreement whether it was contemporaneous with the executing of the instrument or not? Give your reasons.
2. What is the general effect upon a creditor's claim of his taking his debtor's bill or note for the amount; and what would be the effect of the creditor negotiating such bill or note? Will it make any difference in the effect of his so negotiating it whether he does or does not render himself liable on it?
3. Has one partner in a firm of Attorneys an authority to bind his co-partner by a negotiable instrument? Give your reasons.
4. Will a warranty made after a sale be binding? Give your reasons.
5. What is particular and what general average?

BLACKSTONE, VOL. 1.

1. When was the Habeas Corpus Act passed?
2. What is comprised in the right of personal security?
3. What is the definition of municipal law?

STATUTES, PLEADINGS, AND PRACTICE.

1. Give briefly the statutory provisions affecting the exercise of the jurisdiction of the Court of Chancery in this Province.
2. What is the effect of an order for the production of documents?
3. When does publication pass?
4. What changes have the general orders made as to parties?
5. In what cases can a suit within the jurisdiction of the superior courts be sent for trial by a county court judge?
6. In what cases can mesne profits be recovered in the action of ejectment?
7. In what cases and under what circumstances can a writ of replevin issue without leave of a judge?
8. What facts must a plea disclose to amount to a good equitable plea?
9. Under what circumstances can the court or a judge order a person not originally joined as plaintiff in an action to be so joined?

EXAMINATION FOR CALL.

WILLIAMS ON REAL PROPERTY.

1. What are the various kinds of tenures?
2. In the deduction of a title why are sixty years required?
3. Give the effect of the provincial statute as to barring estates tail.
4. How do voluntary conveyances stand with respect to purchasers and creditors respectively?
5. Distinguish between a stipulation to diminish, and a stipulation to raise interest respectively?

STORY'S EQUITY JURISPRUDENCE.

1. How are purchases from persons in fiduciary relations regarded in equity?
2. What consequences result from the principle that a surety is entitled to all the securities of the creditor?
3. Distinguish between actual and constructive notice?
4. In what cases will an interpleader lie at law and in equity, and when not?
5. What is the doctrine of election?

TAYLOR'S EVIDENCE.

1. When is more than one witness necessary?
2. What is the rule as to the competency of witnesses, and wherein does the law of Canada differ from the law of England in this respect?

3. What writings is a witness not bound to produce?

4. How far is a witness compelled to answer questions degrading in their nature?

5. When are admissions evidence?

BYLES ON BILLS.

1. What warranty results from the transfer or endorsement of a bill or note?

2. When are the various kinds of bills to be presented for acceptance and payment respectively?

3. When may presentment be excused?

4. What is the effect of the alteration of a bill or note?

5. When does the acceptance of a bill or note operate as a satisfaction, and when not?

SMITH'S MERCANTILE LAW.

1. Is there any, and if so, what difference in the effect upon the contract of sale between a breach of warranty made on the sale of a specific chattel and of unascertained goods?

2. In the ordinary case of a sale at auction, what is the writing to satisfy the Statute of Frauds?

3. What is the duty of the insured in a marine policy when he wishes to treat the injury done to his vessel as a constructive total loss; and under what circumstances is he entitled so to act?

STEPHENS ON PLEADING.

1. In what order must pleas of different degree be pleaded, and what is the effect of pleading any of them on a defendant's right to plead one prior in degree?

2. What is a new assignment, and in what cases is it necessary?

3. What is the effect of demurring to a pleading, as regards the facts stated in the pleading demurred to?

4. Show how *liberum tenementum* amounts to a good plea in confession and avoidance.

ADDISON ON CONTRACTS.

1. Is there any, and if so, what difference between a contract partly legal and partly illegal, and a contract founded partly on legal and partly illegal consideration?

2. How do simple contracts, negotiable instruments, and contracts under seal, differ with regard to proof of the consideration on which they are founded?

3. Enumerate the contracts required by the Statute of Frauds to be in writing.

STATUTES, PLEADINGS AND PRACTICE.

1. When a cause has been sent from one of the superior courts to the county court, what steps should be taken to prevent entering judgment if it is desired that the case should stand for motion in the superior courts?

2. What notice of appeal to the Court of Error and Appeal must be given to the opposite party, in cases in which notice is necessary?

3. What is the statutory rule with regard to speeches of counsel at Nisi Prius?

4. In what cases can a submission to arbitration be made a rule of court?

5. What is the course to be pursued where several causes of action have been joined, if, in the opinion of the judge, they cannot be conveniently tried together?

6. To what extent and of what facts is a protest, by the law of Upper Canada, evidence?

7. When may a statute be relied upon as a ground of demurrer, in equity, and when not?

8. What are valid objections to discovery?

9. When will a writ *ne exeat* be granted?

10. When may the court proceed without a personal representative?

11. In what cases will a receiver be granted?

EXAMINATION FOR CALL WITH HONORS.

DART ON VENDORS AND PURCHASERS.

1. Who are generally and relatively incompetent to purchase or sell respectively?

2. When is a purchaser entitled to compensation?

3. Distinguish between dependent and independent stipulations in a contract of sale: state their effect: and illustrate by examples.

4. When will the execution of a contract, partly varied by parol, be decreed?

5. Does a purchaser of real estate in this country, from the heir-at-law, take the estate free from or subject to the simple contract debts of the ancestor? Give reasons for your answer.

STORY'S CONFLICT OF LAWS.

1. How is the capacity of a person affected by change of domicile?

2. Upon what principle are the laws of one country recognised by another? Illustrate by reference to bankruptcy, and laws of a similar character.

3. Show how the *lex loci actus* or *contractus* is to be considered with respect to the disposition of moveable and immoveable property, situate within another state or jurisdiction?

4. What is the effect of a foreign probate and administration upon assets in this country?

5. What force and effect has a foreign judgment (*Exceptio rei judicatæ*) and give the opinions of different jurists upon this question.

JARMAN ON WILLS.

1. Distinguish between conditions precedent and subsequent?

2. What is the rule of construction of the word "heir" in a gift to him of both real and personal estate?

3. When may "survivor" be construed "other?"

4. When a bequest is made to A. with a gift over, in case of his death, what is the effect of it?

5. What is the effect of a gift over, in default of issue, with respect to personal and real estate respectively?

JUSTINIAN'S INSTITUTES.

1. Translate Lib. 14., Tit. 6, sec. 1, and give explanatory notes upon the legal terms used therein.

2. What was the jurisdiction of the Prætor with respect to *damnum infectum*?

3. Classify servitudes.

4. What is the *capitis diminutio*? how may it arise?

5. Explain *addictio*, *arragatio*, *interdictio*, *exceptio*, *depositum*, *delegatio*, *peculium*.

6. Give an outline of the Roman law treated of in the Institutes.

STORY ON PARTNERSHIP.

1. To what extent can partnership property be seized for the debt of a single partner, and what interest is acquired by a purchaser at a sale under such an execution?

2. If an infant either actually becomes, or holds himself out as a partner, what will, in either case, be his position on arriving at full age with regard to parties dealing with the firm?

3. In what ways can a partnership be dissolved?

4. If the firm of A. B. C. are the holders of a negotiable instrument made by the firm of C. D. E., can they sue the latter firm upon it? Upon what principle does this depend?

5. What is the position, with regard to the partnership, of the personal representatives of a deceased partner?

RUSSELL ON CRIMES.

1. What is the distinction between murder and manslaughter, and what is the presumption in all cases of homicide?

2. What is the common law definition of forgery, and what class of crime does it amount to? How does it, in this respect, differ from forgery by statute?

3. Where money is given to a servant by his master for a specific purpose, and the servant converts it to his own use, does this amount to embezzlement or larceny? Give your reasons.

4. Can an indictment, in any case, be sustained against several persons for conspiring to do that which would be lawful for them to do individually? Give your reasons.

5. In what cases is a wife not excused from criminal responsibility when acting under the direction of her husband?

COOTE ON MORTGAGES.

1. What is meant by tacking?

2. What is an equitable mortgage, and how can it be created?

3. If it is desired that the mortgagee should pay a greater amount of interest in the event of the interest not being punctually paid, is there any, and if so, what means of effecting such intention?

4. What is the position of a lessee, under a lease from a mortgagor made after the mortgage, as regards the mortgagee?

5. If two persons advance money on mortgage, and one die, to whom will the debt belong?

SELECTIONS.

THE LIABILITIES OF RAILWAY COMPANIES AS CARRIERS.

The plain and simple principles of the common law have been severely tried in their application to the enormous extension of traffic and complicated transactions produced by the railway system. Contracts and wrongs, the two main branches of common law jurisdiction, appear in new shapes not easily recognised by the light of ancient rules and authorities. The law of carriers, occupying as it does an anomalous position with reference to this division of common law jurisdiction, not being exclusively assignable to either branch, or, in modern statutory language, "partaking of the character of both," was always, for this reason, a complex and embarrassing subject and required a liberal use of fictions and technicalities to preserve it from confusion in its administration. The native complexity of the subject, however, has been extraordinarily aggravated by the novel complications which have called for an application of the law; and in several instances extraordinary remedies have been devised to meet the emergencies which have arisen in the progress of railway traffic.

The duties and liabilities of railway companies as carriers of goods have been brought to something like a settlement by the Railway and Canal Traffic Act of 1854. Under this Act a quite new common law jurisdiction was instituted—not remedial, but mandatory, exercising a regulative supervision over the action of railway companies as carriers, for the purpose of securing to the public all reasonable facilities for traffic upon equal terms, and of preventing any undue favour or preference. The Act also restricts the common law right which carriers, by railway or canal, equally with the rest of the world formerly enjoyed of making what special contracts they might think fit, by annexing the statutory proviso that the terms of their contracts must be such as, if called in question, a judge shall deem to be just and reasonable. Their position, as carriers of goods, may be described broadly as still resting on the basis of the common law, with the restrictive incidents thus imposed by the statute, that they must deal on equal terms with all, and that the limitations of their liability by special terms and conditions must be reasonable. On the whole, the system appears to act well, and certainly abundant liberty is reserved to the companies for the protection of their interests.

As carriers of passengers, the duties and liabilities of railway companies show similar deviations from the common law. It is remarkable that this branch of traffic was considered by the original projectors of railways of far less importance than the carriage of goods; but on the opening of railways was at once found to constitute their chief and most lucrative business. This unforeseen extension has given birth, in a corresponding manner, to unforeseen difficulties in its legal incidents, which have not yet been fully recognised or adequately provided for. The Railway and Canal Traffic Act applies equally to the traffic in passengers and to the traffic in goods; and its operation seems equally necessary and salutary in both cases. But besides this Act, Lord Campbell's Act for compensating the families of persons killed by accident, imposes a new and serious liability upon railway companies in regard to their passenger traffic. The recent fatal collisions on the London and Brighton and North London Railways have unfortunately given a wide field for the operation of this statute, and have directed an unusual degree of attention to its provisions. A few observations upon its policy and results will therefore, it is hoped, at this time be found not inappropriate.

The common law was not so stringent with carriers of passengers as with carriers of goods. The passenger carrier was bound to carry all comers who tendered themselves in a suitable state, both as to person and pocket, so long as he had accommodation to carry them; but beyond this there was no duty or liability except as provided by the terms of the contract. The carrier of goods was under a similar liability to carry, and was also an insurer of the goods received for carriage, which he was bound to make good if they were damaged or lost from any cause during the transit. The carrier of passengers was not an insurer, and was only liable for injuries to the passenger occasioned by the carrier's negligence; and in case of the death of the passenger all liability for negligence died with him. In theory the law remains unaltered in respect of the passenger carriers being liable for negligence only; but under the railway system the practical impossibility of a railway company escaping the imputation of negligence, combined with the extended consequences of negligence imposed by Lord Campbell's Act, render the railway carrier of passengers in effect an insurer; at least, every passenger may travel with a well-grounded confidence that in the event of accident his life is insured for the benefit of his family.

Lord Campbell's Act has now been tested by an experience which for a modern statute may be pronounced long. The result of this experience, and of much consideration of the statute itself leads us to the belief that however valuable it may have proved as a palliative for a pressing evil, it is not sufficiently complete and comprehensive for permanent use, or a

least is capable of considerable amendment. We say this not in any spirit of disparagement of its late distinguished author, to whom is due the credit of having provided some practical remedy for an evil of present urgency, but as a comment upon the Act considered as a piece of legal mechanism which we are induced to make in the interests of law, and which we think will be found to be justified by fair argument and criticism. This statute, however, may be referred to in passing, as a characteristic specimen of the rough and ready, but not always scientific workmanship of its author, while the great popularity with which it has been received may be also notified as an appreciation of his services. As, however, the tendency of the enactment is all in favour of the public and against railway companies, its popularity is sufficiently accounted for without accepting it as any proof of the strict equity of the measure, still less of its perfection as a specimen of jurisprudence.

In criticising the act as the work of the Legislator, common fairness requires that a due regard should be paid to the antecedent state of the law, and the occasion which called for it. It was professedly a substitution for the ancient system of deodands. By the ancient common law, in case of death by accident, the instrument of death was forfeited as a deodand, to be disposed of for the benefit of the soul of the deceased. The specific deodand was gradualy converted into a pecuniary fine assessed by the jury as the value of the instrument, in place of which it was paid; and this fine became forfeited beneficially to the crown, or the lord of the manor, after the ulterior purpose to which it was formally applied had been declared superstitious. Juries, however, were naturally disinclined to inflict a fine in this manner and with this destination, and gradually took upon themselves to diminish the amount, until the practice prevailed of assessing the deodand at an amount merely nominal. Upon the introduction of railways, however, their feelings were excited in an opposite direction, and they vented their indignation at the supposed negligence of railway companies by an exercise of their long dormant power of assessing the deodand at a substantial amount. This attempt to revive deodands was found to be quite alien to the spirit of the age, and quite inadequate to the requirements of the occasion; and at the same time the novel apprehensions excited by railway accidents called urgently for some legislative interposition. Accordingly, deodands, which had become practically obsolete, were abolished by statute, and in their stead was enacted the statute, which now passes by the name of the late Lord Chancellor, which was thus inspired by the twofold intention of providing a suitable penalty in place of the deodand, for the cause of death, and of appropriating the amount of the penalty by way of compensation to the relatives of the deceased.

The statute is now no longer to be considered on historical grounds, and only with reference to the purpose which called it forth. It retains a prominent place in our statute book, and occupies a position of serious importance in our social system. It must stand or fall by its own merits or demerits with respect to the circumstances of the present day, and by its intrinsic capacity to fulfil the functions which it undertakes to discharge. In this view we propose to discuss it, and we may fairly take as a test its manner of dealing with the relation between railway companies and their passengers, which is by far the most important and frequent subject of its operation, and that which it was most particularly designed to regulate. As the subject, we find, is too extensive for our present limits we must reserve our observation on the details of the measure for another week, and confine our attention at present to a single point. It is a point, however, of vital importance, as it touches the very groundwork and principle of the statute.

Before this act came into operation, the action for damages caused by negligence, which resulted in death, was barred by the maxim of the common law; "*actio personalis maritur cum personâ.*" This maxim was originally universally applicable to all actions for wrongs, whether to person or property; but the superior wisdom of after ages appear to have interpreted it as exposing the deficiency rather than expressing the policy of the common law, and to have arrived at the conviction that in common justice every vested right of action, so far as practicable, should pass to the representatives of the deceased party entitled. Rights of action in respect of injuries to property, real and personal, had already been thus secured to the deceased's estate by successive enactments; but rights of action in respect of injuries to the person had remained hitherto extinguished, as at common law, by the death. Was it then the policy of the statute to supply this defect of the common law in a similar manner in respect of rights of action for personal injuries? Does the statute in effect operate by transferring the deceased's right of action to his estate or representatives? or does the statute leave the common law untouched, and create an entirely new cause of action? The language of the enactment will be found most undecided and ambiguous upon this point, which nevertheless we venture to suggest is a point of serious importance, and one which goes to the very root of the claim. The question has on one occasion been incidentally mooted, but not in a manner to require a decisive examination. It may be safely predicted, however, that it will one day again present itself to the judges in a manner which will demand a solemn decision. We have only to suppose the very probable case, that a person injured in a railway accident should accept compensation from the company in satisfaction of the cause of action, and after receiving satisfaction should die of the injury, and that claim under the statute in respect of his death should afterwards be prefered by his representatives against the company. The questions might then be raised; would the right of action against the company for their negligence be wholly discharged by the satisfaction made to the deceased? or would the representatives of the deceased acquire a new and distinct cause of action notwithstanding the satisfaction?

In whichever way the point is decided, the results will be remarkable; if the action in question is that of the person injured, the company by a speedy adjustment of their claims for compensation may often avoid the more serious liability arising upon the death; if on the other hand the action is that of the representatives, the company may be actually compelled to pay full compensation to the deceased, and yet remain liable for damages to his relatives, who at the same time, may be the very persons who have become entitled by the death to the previous compensation.

The fact that this question is left open to argument on the face of the statute is a conclusive proof that in framing its provisions their bearing upon the previous state of the common law did not receive a due measure of consideration. Attention appears to have been directed too exclusively to the avowed objects of replacing the ancient deodand by other form of penalty and providing for its distribution amongst the family of the deceased. It appears to have been overlooked, that the party injured, if he survived a sufficient time for the purpose, might himself have his action for the negligence of the company, and recover compensation, which, in case of serious injury might and probably would be greater in amount than that assessed upon his death. It could scarcely have been intended that the company should suffer the penalty for their negligence twice over; nor on the other hand that by a speedy settlement with persons slightly injured they should be enabled to escape the risk of ultimate liability to the family in case of death. The liability of the company ought at any rate to be adjusted on such terms as would avoid these uncertainties; and the statute requires a corresponding amendment. What particular form of amendment is expedient, and upon what principles the lability of the company should be finally adjusted, are questions to which we can only attempt an answer after a full consideration of all the provisions of the statute which we are compelled to postpone to a future occasion.—*Jur.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office.

All other Communications are as hitherto to be "The Editors of the Law Journal. Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 281.)

Not only the Town, Village, or place is to be appointed, but the particular building in which the courts are to hold their sitting should be designated by the judge. In England court-houses are provided, furnished, and maintained at the public expense, for holding similar courts to our own.*

No such provision has been made for the Division Courts, and the voluntary and gratuitous aid of the Municipalities or residents of a Division, is commonly invoked to secure a place for holding these courts, the Legislature neither by a tax on the suitors, (as is done for the Superior Courts at Osgoode Hall,) nor otherwise having supplied the necessary funds.†

There are many and grave objections to holding a court of justice in a tavern, and the sittings should not be held in such a place if it be possible to procure another for the purpose. The practice of transacting public business of a *quasi* judicial nature in a tavern has been emphatically condemned by the Legislature in a provision of the Municipal Act, which expressly prohibits the holding a Municipal election in a house of public entertainment where spirituous liquors are sold‡ and the principle of such a prohibition applies with greater force to courts of justice. The reasons that induced the legislative provision should prevail with the judge to keep his courts out of taverns.§

In determining then where the sittings of the court are to be held; it becomes necessary to ascertain what building accommodation can be secured for the *decent* and *orderly* conduct of business. If a Town or Township Council Chamber, School-house or other public building in a Division, will be placed at the disposal of the officers of the court on court days, lighted and warmed as occasion requires it should be chosen. The appointment of two places in a Division for holding the court alternately, seems warranted by the very broad language used in section six. "The judge may appoint and from time to time alter the time and places within such Divisions where and at which said courts shall be holden." And although such an arrangement tends to produce errors and confusion in the business, cases may occur where the public convenience can possibly be served

* The English Statute 19 & 20 Vic., cap. 108, sec. 85, provides that "the expen-"ses of building, purchasing or providing any messuages and lands for the purposes "of the County Courts, and of repairing, furnishing, cleaning, lighting, and "warming the court-houses and offices, and of payment of the salaries of neces-"sary servants for taking charge of such court-houses and offices, and of supply-"ing the courts and offices with law and office books, and stationery and postage "stamps, and the disbursements of the high bailiffs in conveying to prison per-"sons committed by the Courts, and all other expenses incident to the holding of "the said courts, shall be paid by the Commissioners of Her Majesty's Treasury "out of any monies to be from time to time provided for such purposes." Cox. C C., p. 5.

† Mr. Justice Burns, an early friend of the Division Court system, and at one time a County Judge, in proposing some amendments in our system in a letter published by him in 1847, thus refers to the subject. "The clerks in the Division "Courts of the Province as the law stands, are compelled to furnish at their own "expense, the books necessary for the records of the court; and yet these books "are made public property. This has always appeared to me to be very unjust to "the clerks. It will be seen that by the English Act such an expenditure can be "provided for. There has been another oversight committed in our Act in not "allowing the judges to permit the clerks to retain other current expenses of the "courts; such as for fuel, lights, and the use of rooms to hold the courts in. "It has happened that the judge has been obliged to adjourn the court after "going to the place appointed for it, because the person at whose house it had "been holden took it into his head to withhold the premises. It has also "been the case that the judge has been obliged to pay out of his own pocket for "fuel to warm the room; and when he has been unable to finish his cause list "before dark, to pay for candles rather than adjourn over till next day. No one "could imagine that either the judge or clerk should pay these charges, or should "be obliged to furnish a room. It is true that the hospitality of the people in the "country is great in respect of these accommodations; but it is not right that the "courts should depend upon that, or that it should be expected that individuals "should furnish such things gratuitously for the community. There must have "been an oversight in the Legislature which I should propose now be remedied "by merely adopting the provisions of the English Act." The Act referred to by Judge Burns, was the County Court Act of 1846, and at a later period the following remarks appeared in the *U. C. Law Journal*: "The Division Courts are not "private establishments, they are public tribunals for the administration of jus-"tice, established by law, regulated by law, and for the benefit of the whole com-"munity. * * * In the Superior Courts offices are provided for the officers at "the public expense, and all accommodation necessary for due and regular ad-"ministration of justice. But the Division Courts, to which the main body of "suitors resort, are left entirely unprovided for. Why this invidious distinction—"why this strange anomaly? All courts of justice are equally under the State, "and all should be placed on the same footing. The suitors in the small courts "pay quite as much in proportion towards the maintenance of the tribunals they "resort to as suitors in the superior courts. Let at least their own money be ap-"plied for their own benefit, if the necessary expenses we have referred to are not "disbursed from the public purse. There is something decidedly wrong in the "state of things which throws upon the clerk of a court the expense of renting "a building in which a public court is to be held. There is no more reason that "he should do so than any suitor in the court. Every dollar disbursed in this "way is so much of a contribution from the individual clerk towards supporting "the administration of Justice. Is the Country too poor to support the necessary "establishments? If it be then let not the court fees be applied to any other "purpose than the support of the courts in which they are collected. The Divi-"sion Court clerks are not over-paid by any means; and yet that 'all things may "be done decently and in order' in the courts they are connected with, they must "put their hands in their pockets and pay for public property and public accom-"modation. We look upon it as exceedingly unfair that this *forced benevolence* "should be squeezed out of clerks; and the instances are very numerous. Occa-"sionally town or township hall, or other building belonging to some private "association, is allowed to be used for holding Division Courts; but in all such "cases it is a mere matter of sufferance and courtesy, and the privilege is at any "moment liable to be refused, by which much unseemly trouble and annoyance "might be caused to officers and suitors." U. C. L. J., Vol. 5, p. 81.

‡ Municipal Act, sec. 81.

§ "Division Courts are often obliged to be held in taverns; and we know of more "than one instance in which tavern keepers have gone to the expense of erecting "a building for their accommodation. The inducement for doing this is easy to "conjecture, and the effect produced by the contiguity of a bar-room on the order "and decorum of the court may be imagined." U. C. L. J., Vol. 5, p. 81. Far better would it be in the interests of order and morality to hold a court in a school house or other like place in the most remote corner of a Division, than in the very centre of it in a tavern.

by shifting the place of sitting from one place to another, and back again.

It will be seen from the foregoing consideration, that no general rule can be proposed as to the place where the sittings of a court should be held in a Division, the question as it arises in each case must be settled with reference to the particular circumstances involved.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—In a certain Division Court East of Kingston, a judgment was given upon a state of facts, which I shall detail, upon which judgment your opinion would be read with pleasure by the parties interested, and others.

The facts condensed are these: A. hands a note to B. a lawyer, to collect. B. notifies D. the defendant; D. goes to a bailiff of the court and gives a confession. B. hands in the claim to the clerk of the court for suit. The clerk issues a summons, and the defendant is sued in the usual way.

The case comes on for trial—the judge decides that the bailiff had no *right* to take such confession under the statute; but notwithstanding having taken it the clerk should not have issued a summons but should have annexed the claim when it came for suit to it, and then have treated it as an ordinary confession of judgment—gives judgment for the plaintiff, the clerk and bailiff each to pay a *moiety* of the costs for blundering. Who, think you, blundered—the judge, the clerk, the bailiff, or did they all do so? What think you of the judgment?

Yours truly, D.

[The 117th sec. of the Act respecting Division Courts, 22 Vic. ch. 19, provides, that "any bailiff or clerk *before or after* "*suit commenced* may take a confession or acknowledgment "of debt from any debtor or defendant desirous of executing "the same," and we apprehend that in the case mentioned by our correspondent, the bailiff had this provision in view, and if he complied with the directions given in the rule regulating the practice in such cases, he certainly was justified in taking the confession.

The 31st rule provides, that "every confession of debt taken "before suit commenced must show thereon, or by statement "thereto—attached at the time of taking them, of the par-"ticulars of the claim or demand for which it is given" &c., and also that "unless application for judgment on such con-"fession or acknowledgment shall be made to the judge "within three calendar months next after the same is taken, "or at the sittings of the court next after the expiration of "such period, no execution shall be issued on the judgment "rendered without an affidavit by the plaintiff or his agent "that the sum confessed, or some and what part thereof "remains justly due, and application for judgment shall be "made at a court holden for the Division wherein the confes-"sion or acknowledgment was taken."

The intention of the Legislature is evidently to afford the debtor every facility for avoiding the payment of costs, but although approving of the motives, we doubt the wisdom of the provision on account of the evident difficulties in the way of carrying it into effect so as to insure the intended benefit to the debtor. However, the discussion of the merits of the enactment is foreign to the question before us at present, although we should be glad to return to it again in that aspect if any of our correspondents would take it up.

In the case put by our correspondent, if we assume (as we have a right to do, nothing being said to the contrary,) that the bailiff in taking the confession followed the practice prescribed by rule 31 in respect to annexing a proper statement of claim thereto, we must allow that he acted within the bounds of his duty; and it became the duty of the clerk to receive the confession and claim and await the action of the creditor thereon, and his mode of proceeding in such a case is clearly pointed out by the above rule.

Unless "D." has overlooked or neglected to state some material fact, we do not see how any blame could attach to the bailiff, and if it did not, then the action of the clerk in issuing a summons was clearly wrong. Instead of doing so he should have made the plaintiff or his agent when putting in the claim, aware of the fact that a confession had been already given.

If the bailiff took the confession without the required formality, it seems to us that the clerk might be excused for thinking himself justified in treating it as a nullity, although it might happen that legally he was not so.—EDS. L. J.]

November 28, 1861.

To the Editors of the Law Journal.

GENTLEMEN,—A. holds a judgment, on which execution has been returned "no goods," against B., who afterwards absconds. C. swears out an attachment against the goods of B., hunts up and seizes property. At the next sittings of the Division Court, as soon as C. recovers judgment, A. directs the clerk to issue an alias execution on his judgment. The clerk makes out both executions and hands them to the bailiff at the same time. The bailiff, having read the endorsement on C.'s execution first, marks it 1, and A.'s 2. The property attached is then sold, and the proceeds paid into court. To which party, A. or C. is the clerk to pay over the money?

An answer in the next *Journal* will much oblige

A DIVISION COURT CLERK.

[Our correspondent is referred to the clauses of the Division Courts Act regulating the proceedings against absconding debtors, where he will find that the proceeds of the sale of the absconding debtor's goods and chattels in such cases, are to be ratably distributed amongst such of the creditors as have obtained judgment against the debtor, in proportion to the amount really due upon such judgments.

A. seems in this case to be in the same position as he would have been if he had commenced proceedings but had not obtained a judgment before the attaching creditor. The return of his execution *nulla bona* and the *fi. fa.* having been as it were received after C.'s writ would, we think, deprive him of any advantage of priority his prior judgment might have given him. The Absconding Debtors Act allows any person who may have had process served before an attachment issued to have the full benefit of his *execution* if he obtains one before the attaching creditor, but this provision is not found in the Division Court Act, and even if applicable thereto, would not we think, change the aspect of the present case, as A. had no execution in force when C.'s was issued.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*

HENDERSON V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Horses escaping on Railway—Plaintiff's possession of close.

The plaintiff owning land adjacent to the railway, permitted one D. a servant of the company living within their fences, to cultivate a small piece free of rent. D. made a gate in the railway fence to give him access to this land, and the plaintiff's horses passed through it to the railway track and were killed.

Held, affirming the judgment of the county court, that the plaintiff was sufficiently in possession of the close from which the horses escaped to entitle him to recover. (E. T., 24 Vic.)

This was an action in the County Court of the United Counties of Frontenac, Lennox and Addington, to recover damages from

the defendants for unlawfully, and negligently, and injuriously omitting and refusing, pursuant to the statute in that behalf, to erect and maintain sufficient fences on each side of their line of railway of the height and strength of an ordinary division fence, by means whereof two mares of the plaintiff lawfully depasturing and being in a certain close of the plaintiff adjoining the said railway of the defendants, strayed from the said close into and upon the said railway, and were there run over and killed by a certain locomotive steam-engine and carriages of the defendants.

The second count was for neglect in erecting and putting up fences on each side of defendants' railway, by reason of which omission and neglect in erecting and maintaining the same according to the statute in that behalf, a horse of the plaintiff depasturing in a certain close of the plaintiff adjoining the said railway of defendants, escaped and strayed from the said close of the plaintiff into and upon the said railway, and was there run over and badly injured by the locomotive steam-engine and carriages of the defendants, whereby the plaintiff lost the use of his said horse for a long time, to wit for the space of two months, and was thereby otherwise greatly damnified.

There were four counts in the declaration, varying the injury complained of, and the defendants pleaded not guilty to the whole declaration; and 2ndly, to each count of the declaration, that the defendants did erect and maintain on each side of their said line of railway fences of the height and strength of an ordinary division fence.

The plaintiff took issue on the several pleas, and the case was tried at the last December sittings of the county court, and a verdict rendered for the plaintiff, and $165 damages.

On the trial it was proved that the horses were at pasture in a field on the plaintiff's farm, and that from defect of fences they strayed from that field into a small piece of ground belonging to the plaintiff immediately adjoining the railway track, which the plaintiff had permitted one Patrick Daly, a servant of the defendants residing in a small house at the Gananoque railway station, to use free of rent for the purpose of raising a few potatoes and vegetables for his own use. It was proved further that Patrick Daly had opened a small gate in the railway fence for the purpose of passing to and fro from his own house inside the railway fence to the ground adjoining on the outside, which he cultivated with the assent of the plaintiff as a mere matter of indulgence.

It was shown that the tracks of horses were seen through that gateway from the plaintiff's premises adjoining, and there seems to be no doubt from the evidence that the horses came from the plaintiff's field to that portion of the plaintiff's land worked by Patrick Daly, and then that they strayed from thence through the gate which Daly had made for his own convenience in the railway fence close to his house, and so got on the railway track, and were killed or injured by a locomotive and carriages passing along the line of railway.

The defendants' counsel called no witnesses, but objected to the plaintiff's case, that according to the evidence the horses broke into Daly's garden first, and then escaped from it to the railway, and not from the plaintiff's close as alleged in the declaration. 2. That there was no evidence of the ordinary height of division fences in the township of Leeds. 3. That there was not evidence of the killing; and 4. That there was no evidence to support the second count.

The learned judge overruled these objections, and the case went to the jury with a charge as to the nature of the possession of the ground on the plaintiff's farm from which the horses had strayed or escaped to the railway, to which no objection was made on either side. He told the jury that if Daly had such a possession as entitled him to hold against the plaintiff for any time, however short, then the plaintiff could not maintain this action; that he must have a right to the exclusive possession, so that the horses must have passed from premises over which he was entitled to exercise entire control, to enable him to sue for injury arising from want or defect of fences on the part of the defendants; that if Daly was merely working the ground as a matter of indulgence, having no right to do so except at the mere will and pleasure of the plaintiff, then the plaintiff must be regarded as still in possession, and entitled to enter at any moment on his land without being liable to any one for damages in doing so. The jury found for the plaintiff, after a full explanation of the law as to the necessity of the plaintiff being in possession of the land to entitle him to sue for the damages sought to be recovered in this action.

A rule *nisi* was obtained for a new trial on the gounds previously urged by defendants against the plaintiff's right of action, and from the judgment discharging this rule the defendants appealed.

Bell (of Bellville) for the appellants, cited *Walker* v. *Great Western R. W. Co.*, 8 U. C. C. P. 164; *Gillis* v. *Great Western R. W. Co.*, 12 U. C. Q. B. 427; *Dolrey* v. *Ontario, Simcoe and Huron R. R. Co.*, 11 U. C. Q. B. 600; *McLellan* v. *The Grand Trunk R. W. Co.*, 8 U. C. C. P. 413.

Britton, contra, cited *Doe dem. Warren* v. *Fearnside*, 1 Wils. 176; *Bertie* v. *Beaumont*, 16 East 33; *Doe James* v. *Stanton*, 2 B. & Al. 373; *Leith* v. *O'Neill et al.*, 19 U. C. Q. B. 233.

MCLEAN, J.—The case of *Henderson* v. *Harper* in our own court (1 U. C. Q. B. 481) shews that a tenant-at-will cannot set up such tenancy against his landlord, and that the entry on the land by the owner, and turning out his tenant at will, are justifiable for the purpose of terminating the tenancy at any time the owner may think proper. The possessor of a parcel of land may maintain trespass against a stranger, but the owner will also be entitled to sue for any injury to his land, though it may be occupied by a tenant-at-will who merely holds without any interest derived from the owner. Though at first I was inclined to think that Daly must be regarded as in possession of the ground through which the horses passed to the railway, and therefore that the plaintiff could not maintain this action, I am now satisfied that the direction of the learned judge in the court below was correct, and that the plaintiff's action is sustainable. The defendants are bound by law to keep up fences to prevent horses and other animals from getting on the line of the railway, and if one of their own servants destroys or removes a portion of their fence, and injury is thereby caused to an adjoining proprietor, the defendants cannot excuse themselves by shewing that the injury was caused by the wanton and unauthorised act of their servant. The fact of the servant having been the cause of the injury to the plaintiff may have been the cause of increased damages, but they are not so large that they must necessarily be characterised as excessive. On all the grounds taken it appears to me that the verdict is right, and that the appeal must be dismissed with costs.

BURNS, J.—There was no complaint made of the way in which the judge of the county court left the case to the jury. He correctly enough told them that it was necessary, in order to the maintenance of the action, that the plaintiff should be in possession of the piece of ground from which the mares escaped upon the railway. In his judgment afterwards, in disposing of the rule to set aside the verdict, he remarked that the question of possession was one of fact for the jury, and this proposition cannot be denied.

The case of *Wildbor* v. *Rainforth* (8 B. &. C. 4) very strongly supports the judge's view of this case. That was an action of trespass brought by the widow of a pauper who had been permitted to occupy a house rented by the overseers of the poor. Mr. Justice Bayley said that the plaintiff was merely an occupier by sufferance, and Lord Tenterden said the plaintiff was not tenant of the premises, but was allowed to occupy by the parish officers and that her occupation was theirs.

It would be a very hard measure of justice indeed upon this plaintiff if we should be compelled to say that the judge had done wrong in refusing to grant a new trial, for the whole cause of the accident was occasioned by the servant of the railway company putting a gate in the fence, which he ought not to have done, and then negligently either leaving it open, or in such a way that the slightest touch must have opened it, so that by it the animals escaped to the railway track. I do not think we are obliged to find fault with the manner in which the judge has dealt with it in the court below, and, as expressed by Lord Kingsdown in the case of the *North American*, (12 Moore, P. C. 338,) and repeated by Lord Chemlsford in the *Schwalbe*, (4 L. T. Rep. N. S. 160,) "In order to advise the reversal of a judgment we must not merely doubt whether it is right, but be satisfied that it is wrong." The appeal should be dismissed with costs.

Per Cur.—Appeal dismissed.

In the Matter of Simmons and The Corporation of the Township of Chatham.

By-law—School Sections—Uncertain boundaries—Coloured people.

A by-law recited that certain coloured inhabitants had petitioned for an alteration of school section No. 9, and for the establishing of two separate schools for coloured people in the township, and that it was expedient to grant their request, by defining the boundaries of said sections, so as to include the coloured inhabitants of the township; and it set out the limits of each section to be established, the last boundary of No. 1 being, "thence to include all and singular each and every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons in the front part of the said township of Chatham;" and the last boundary of No. 2, "thence to include all and singular, each and every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons in that part of the said township not included in the section No. 1, as described in the first section of this by-law."

Held, that these boundaries were indefinite and fluctuating, and that the by-law was therefore bad.

Remarks as to how far the court are bound to quash by-laws, even when moved against properly and found bad.

J. Wilson, Q.C., obtained, in Easter Term last, a rule upon the corporation to shew cause why their by-law No. 9, passed in 1854, for altering school section No. 9, and establishing two separate school sections for coloured people, in the township of Chatham, should not be quashed, on the ground that the clauses establishing school section No. 1, for coloured people, are vague and uncertain, in attempting to include in that section, beyond its specified limits, every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons in front of the said township, which leaves it always uncertain where and what the section is, making its limits contingent on the occupancy of lots by coloured persons.

This arrangement, it was contended, was not warranted by the school acts, which contain no provision for making the colour of the inhabitants a description or definition of boundary.

The by-law recited that certain coloured persons had petitioned for an alteration of school section No. 9, and for the establishing of two separate schools for coloured people in the said township, and that it was expedient and just to grant the prayer of their petition by altering section No. 9, and establishing two separate schools, and by defining the boundaries of the said sections, so as to include the coloured inhabitants of the said township and North Gore.

And it enacted that the boundaries of the then existing separate school section established for coloured people should be as follows —"Commencing at the front of the tenth concession, on the allowance for road between lots Nos. 18 and 19; thence along the said road allowance to the rear of the eleventh concession; thence along the allowance for road between the eleventh and twelfth concessions, westerly, to the allowance for road between lots Nos. 12 and 13; then south-easterly along the front of the tenth concession to the town line between Chatham and Dover; and from thence to include all and singular each and every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons, in the front of the said township of Chatham."

And it was enacted that the school section which was thus described should be designated and numbered as separate school section No. 1 for coloured people.

The by-law then proceeded to enact that the following portions as thereinbefore described should constitute and form a separate school section for coloured people, to be designated "separate school section No. 2," describing it as follows—"Commencing at the allowance for road between lots 18 and 19, at the front of the twelfth concession; then north-westerly along the said road allowance to the town line between Chatham and the Gore of Camden; and from thence to include all and singular each and every lot or parcel of land occupied, or which shall or may be occupied, by any coloured person or persons, in that part of the said township and North Gore of Chatham, not included in the separate school section No. 1, as described in the first section of this by-law."

It was provided in the by-law that the town clerk should make out a plan, shewing the boundaries of each of the separate school sections, as required by the supplementary school act of 1853, and furnish to the proper parties in each of the said sections a written statement of the boundaries of the said sections.

Prince shewed cause, and cited Consol. Stats. U. C., cap. 65, sec. 1.

Robinson, C. J., delivered the judgment of the court.

The township council seem to have intended by the by-law to make these two school sections include all the coloured people who might for the time being be found living within their respective limits, and so to make the limits expand or contract from time to time, according as any coloured person or persons should come to live within, or should depart from, the territory which they meant these limits to include.

We are not sure whether such an arrangement of the limits might not be found capable of being reconciled with the various provisions of the school law which are liable to be affected by it.

No particular evil or inconvenience was complained of in the argument as having arisen from the by-law, though it was passed so long ago as 1854; but if it be on the face of it clearly illegal, we apprehend we have hardly a discretion to allow it to stand, and at any rate the sooner the separate schools are placed on a legal footing the better.

It must be allowed, however, that the language of the statute, in its 195th section, which gives the power to quash by-laws, is not compulsory; and we would guard ourselves against laying it down in positive terms that the court are bound to quash every by-law that is properly moved against and found illegal, without regard to the frivolous nature of the objection, and to the length of time it has been in operation and submitted to, and to the increased inconvenience which on that account may follow its being quashed.

These two by-laws are exceptionable in two respects: first, they do not define intelligibly and clearly the limits within which the arrangement, such as it is, is intended to operate. The fourth or last boundary in each description is defective, being so vague and indefinite that it does not complete a description of any certain tract within which the fluctuating arrangement is to prevail. "From thence" (that is, from the point arrived at as the end of the third limit) "to include all and singular, each and every parcel of land occupied, or which shall or may be occupied, by any coloured person or persons in the front of the said township of Chatham." Those words towards the end of the description in the first by-law do not complete the description of any territory, so as to separate it from other territory, for it is not stated in what direction we are to move when we set out "from thence," whether west, east or north. The intention, we suppose, may have been that we may carry a line from thence, and proceed any where, in and out, through the front of the township, embracing every lot occupied by a coloured man. Did they mean the whole of every lot on any part of which a coloured man lives, or only the part of the lot on which he lives? and besides, what is meant by the front of the township of Chatham? Does it mean the whole of the front range of lots to No. 1 inclusive, and the rear of the lots as well as well as the front? Was the description intended to embrace the eleventh concession or only the tenth?

The same kind of defect exists in the other by-law, which was intended to define by-law No. 2, though not exactly to the same extent.

And a second exception has been urged to each by-law, that it does not *prescribe the limit of the divisions or sections of such schools*, but leaves this extent uncertain at every moment of time, by making it depend on the contingency of no coloured person having come in to occupy, or having ceased to occupy, any of the lots since the last inspection took place.

One effect of the by-law must be, we think, to exclude from a participation in the benefits of the common school system all coloured people who can, by any clear construction of the description, be brought within one or other of these sections, although they might be living at a distance altogether too remote from the school house which would best answer the convenience of the other coloured inhabitants to admit of their attendance there.

The description seems well framed for excluding all the coloured children from attending any other than separate schools, but it does not appear to be so framed as to bring all the coloured children within a practicable distance of any separate school.

The coloured people, it is recited, had petitioned for the establishment of *two separate schools* in the township of Chatham. That end would be reasonably answered by establishing two separate schools for them, each having certain limits and including a space

within which a coloured population was to be found in the greatest number.

Instead of that the by-law divides a large territory, we do not indeed see how large, into two parts, and makes each part a separate school section, which confines the coloured population within each to their own separate school, though such division may be so large that all the coloured people within it could not, on account of the distance, attend in the separate school.

This consideration, however, of the apparent inexpediency of the by-law, was one for the township council to deal with. The other objection, that the divisions are not intelligibly confined, and are based upon an arrangement fluctuating and uncertain in its nature, and which does not give to the school section any limits that can be said to be ascertained and known at any point of time, are those on which this application turns, and we think the by-law in that respect is illegal, and must be quashed with costs.

Rule absolute.

IN THE MATTER OF JOHN MCDOUGALL AND THE CORPORATION OF THE TOWNSHIP OF LOBO.

Relief of poor—Duty of municipalities—Consol. Stats. U. C., cap. 54, sec. 276.

C., a servant living in the township of London, was travelling to Komoka with a load of trees and was injured on the way by the waggon upsetting. He was taken to the tavern of M., in the township of Lobo, where his leg was amputated, and he remained several months at M.'s expense, destitute and helpless. *Held*, that the court had no power to compel the corporation to provide for his relief.

J. Wilson, Q.C., moved for a mandamus to the corporation of the township of Lobo, to make provision for the support of one James Campbell, an indigent labourer.

The rule was moved upon an affidavit of the applicant, McDougall, made on the 29th of August, 1861, to the following effect:—

That on the 28th of October, 1860, one James Campbell, being on his way from London to Komoka, with a load of trees, met with an accident, from his waggon having been upset, and was brought to his, McDougall's, inn, in the township of Lobo, where he was left at the time, under the impression that he would be in a condition to be removed in a few days: that within a day or two an artery in his thigh began to bleed, and at the end of a week after he came his leg was amputated, and he continued for some months in a very weak state: that he had never since been able to leave McDougall's house, and still remained in a helpless condition: that he was a stranger to McDougall when he was brought to his house, being at the time in the employment of one Haynes, a nurseryman, in the township of London, with whom he had lived about three months as a hired man, upon wages of six dollars a month: that he had before that time lived about two months in the township of Lobo, and before that time about two years in the township of Carradoc.

McDougall swore that he was unable to support the man: that he applied to the corporation of Lobo for payment, and was referred to the corporation of the county of Middlesex, and they referred him to the corporation of London, which refused to do any thing: that he had applied at every meeting of the corporation of Lobo for remuneration or assistance and had been refused: that they had dared him to turn the man away, and positively refused to allow him anything for having kept him. And he swore further that neither Campbell, nor any one for him, had paid him any thing whatever for his support, nor for any thing that he had done for him, or given him; and that Campbell was worth nothing, being absolutely indigent and helpless, and about 43 years of age.

ROBINSON, C. J., delivered the judgment of the court.

By the Municipal Act, (Consolidated Statutes of Upper Canada, cap. 54, sec 276,) it is enacted as follows: "Every township council may also make by-laws for raising money, by a rate to be assessed equally on the whole ratable property of the township, for the support of the poor resident in the township."

By the 16 Vic., cap. 181, sec. 9, sub-sec. 2, it had been provided that every township council should have power to pass by-laws for levying a rate to be assessed equally on the whole ratable property of such township, "for raising such moneys as may be considered necessary for the support of any indigent, infirm or helpless persons resident in such township." But it was in the same clause provided, that no by-law for such purpose should be made or passed, unless upon a written request to that effect, signed by a majority of the freeholders and householders on the assessment roll of the township, &c., nor unless notice of such request should be published in the manner set forth in the act.

In the existing provision we see that the legislature have dispensed with any such request of the inhabitants, and in a few words have enabled, but not required, the township council to raise money by rate for the support of the poor resident in the township.

We can have no doubt that, though the legislature have by this last act given full authority to the township council of their own motion to raise a rate for the resident poor, they have left a discretion to be exercised by them in regard to the necessity for such a rate.

The 43 Eliz., cap. 2, made it the duty of justices to provide for the relief of the poor—"shall and may make a rate," are the words which were used in it; and then it provided for overseers of the poor, who had power to call for and to administer the necessary funds. Here there is no such organization. We could never hold that it was competent to us to proceed upon the case of any individual applicant, for it does not rest with us to dictate to the municipal councils what particular cases of distress call for public relief. Even if it were evident that the poor man, Campbell, could be properly regarded as a *resident* of the township of Lobo, we could not, we think, entertain the application.

It is hard that McDougall has been allowed to bear all the charge and inconvenience of taking care of Campbell ever since he was disabled by the accident he met with; and it does seem a reproach to his neighbours, among whom there are no doubt some wealthy farmers, that they should not have voluntarily assisted him in his work of benevolence. We should have supposed that if they failed to do this the township council would, out of the public funds, relieve McDougall from the burthen, as it would be a trifle only that would be required, though to one individual the charge is not trifling.

We grant no rule.

Rule refused.

THE QUEEN V. PRESTON.

Assessment Roll—Forgery.

An indictment will not lie for forging or altering the assessment roll for a township deposited with the clerk.

An indictment was preferred at the spring assizes for the United Counties of Northumberland and Durham, before McLean, J., which indictment was found a true bill by the grand jury, as follows:

"*United Counties of Northumberland and Durham, to wit:*

"The jurors of our lady the Queen upon their oath present, that Porter Preston, John McGill and John Berrie, on the twenty-second day of August, in the year of our Lord one thousand eight hundred and sixty, at the township of Manvers, in the county of Durham, falsely and fraudulently did forge and alter a certain assessment roll, being the assessment roll for the said township of Manvers, for the year of our Lord one thousand eight hundred and sixty, with intent thereby to defraud."

This indictment was removed by *certiorari* into this court, and *R. A. Harrison*, for the defendants, moved to quash the same on the following grounds: 1st. Because the same is not maintainable in law. 2nd. Because it does not disclose any offence punishable by law. 3rd. Because it is in other respects insufficient and informal.

These objections were argued in Easter Term by *R. A. Harrison* for the defendant, and *Hector Cameron* for the prosecution.

R. A. Harrison contended that this indictment could not be maintained, the alleged offence of forging and altering an assessment roll being charged against the defendants as a misdemeanor at common law, and that an assessment roll being created or directed for specific purposes by statute, could not be the subject of forgery, unless made so by the statute under which it is brought into existence, or by some other statute. He cited Consol. Stats. U.C., cap. 55, secs. 19, 49, 50; cap. 54, sec. 70, sec. 97, sub-secs.

2, 7, sec. 185; Consol. Stats., C., cap. 94; cap. 99, secs. 84, 85; *Rex* v. *Wright*, 1 Burr. 543; *Anon.*, 3 Salk. 25; *Rex* v. *Harriott*, 4 Mod. 144; 1 Saund. 248, 250 *e*, note 3; *Rex* v. *James*, 1 Strs. 679; *Rex* v. *Carlile*, 3 B. & Al. 161, 164; Russell on Crimes, vol. I., 50, 51; Arch. Crim. Pl. 464.

Hector Cameron contended that, though not declared to be an offence by statute, yet that an assessment roll being sanctioned by statute, and the mode and object of its being constructed being pointed out by law, any false and fraudulent alteration of it must be regarded an offence at common law, and that any such alteration must come under the designation of forgery, for which an indictment will lie. He cited Russell on Crimes, vol. ii., 318, 357; *Rex* v. *Ward*, 2 Str. 747; Consol. Stats., U. C., cap. 55, sec. 173.

McLean, J.—By the 17th section of chapter 55, Consol. Stats., U. C., the council of every municipality, except counties, are required annually to appoint such number of assessors and collectors for the municipality as they deem necessary. By the 19th section, the assessor or assessors shall prepare an assessment roll in which, after diligent inquiry, he or they shall set down, according to the best information to be had, the names and surnames in full, if the same can be ascertained, of all taxable persons resident in the municipality who have taxable property therein, or in the district for which such assessor or assessors has or have been respectively appointed. Various other particulars to be inserted in an assessment roll are prescribed by the sub-sections which follow. The assessors are required to make and complete their rolls in every year between the 1st of February and such day, not later than the 1st of May, as the council of the municipality appoints, and they are required to attach thereto a certificate signed by them respectively, and verified upon oath or affirmation, in a prescribed form. When the roll is thus made up and verified, the assessor has to deliver it to the clerk of the municipality, with the certificates and affidavits attached; and the clerk is then required to make up a copy of every such roll, arranged in the alphabetical order of the surnames, and cause the same to be put up in a convenient and public place, and kept there till the meeting of the court of revision. Then the assessment rolls are subject to the judgment of the court of revision, composed of a majority of the township council, the decision of which court may be brought by appeal before the judge of the county court, whose decision is in all cases final.

After the assessment roll has been finally revised and corrected, the clerk of the municipality is required (sec. 69, cap. 55) without delay to transmit to the county clerk a certified copy thereof, upon which the county council may proceed in equalising the valuations in the several municipalities.

By the 97th section of the Act relating to Municipal Institutions cap. 54, Consol. Stats., U. C., when an election is to be made, the clerk of the municipality is required to deliver to the returning officer, who is to preside at the election for the same, or for any ward or division thereof, a correct copy of so much of the last revised assessment roll for the municipality, ward or electoral division, as contains the names of all male freeholders and householders rated upon the roll in respect of real property lying within the municipality, ward or electoral division, with the assessed value of the real property for which they are respectively rated, which copy is to be verified on oath as a true copy by the clerk of the municipality.

The copy of the assessment roll furnished by the clerk of the municipality to the returning officer is the authority under which the votes are taken at every municipal election; and the 185th section of the Municipal Act, cap. 54, declares that if any person steals, or unlawfully or maliciously, either by violence or stealth, takes from any deputy returning officer or poll clerk, or from any other person having the lawful custody thereof, or from its lawful place of deposit for the time being, or unlawfully or maliciously destroys, injures or obliterates, or causes to be wilfully or maliciously destroyed, injured or obliterated, or makes or causes to be made any erasure, addition of names, or interlineation of names, into or upon, or aids, counsels or assists in so stealing, taking, destroying, injuring or obliterating, or in making any erasure, addition of names or interlineation of names, into or upon any writ of election, or any indenture, poll-book, certificate or affidavit, *or any other document or paper made, prepared or drawn out according to or for the purpose of meeting the requirements of the law in regard to municipal elections*, every such offender shall be guilty of *felony*, and shall be liable to be imprisoned in the Provincial Penetentiary for any term not exceeding seven nor less than two years, or in any other place of confinement for any term less than two years, or to suffer such other fine or imprisonment, or both, as the court shall award; and it shall not be necessary to allege that the article in respect of which the offence has been committed was or is the property of any person, or that the same was or is of any value.

The first object for which an assessment roll appears to be intended by the legislature is to procure a return of the names of all taxable persons resident in each municipality who have ratable property therein, and various other purposes connected with the raising of moneys for municipal purposes.

There is no provision whatever declaring it to be an offence to add to or alter such roll in this respect, while every care appears to have been taken to have the roll made as correct in every respect as possible before it is given to the collector as his warrant to levy the rates of his municipality; but to prevent names from being inserted by or obliterated in the copy furnished by the town clerk, any such unlawful or malicious interference is declared to be felony.

It is the alteration of, or interference with, the *copy* of the assessment roll furnished by the town clerk for municipal purposes which is declared to be a felony, not of the original filed in the office of the clerk of the municipality, So that if the offence of forgery of the assessment of a municipality as delivered in by the assessors to the township clerk is not an offence at common law, this indictment cannot be maintained.

It alleges that the defendants *falsely* and *fraudulently* did forge and alter the assessment roll of the township of Manvers, for the year 1860. Now the mere statement of such a charge in an indictment, and the finding by a grand jury, is not enough to create an offence, and I do not see any law, under which the doing of what is charged in this indictment is an offence of any kind. The assessment roll of a municipality is not the roll on which the collection of rates takes place. That remains in the clerk's office, and it is his duty to make an alphabetical roll of the names, and to cause it to be exhibited in a public place for the inspection of all parties interested, and to be brought before the court of revision. When such alterations are made in the roll as the court of revision may deem necessary, and when all objections are removed or disposed of, a roll for the municipality, or for each division of it, is prepared and duly certified, for the purpose of giving to the collector the necessary authority to collect from each rate-payer the amount opposite to his name.

An assessment roll is not one of those documents which, under chapter 94 of the Consolidated Statutes, relating to forgery, can be the subject of forgery, and being framed under the provisions of an act of our own legislature, and no provision made for guarding against any unauthorised changes or alterations therein, no power appears to me to be given to our courts to entertain indictments for matters which are not even declared an offence.

My opinion, therefore, is that this indictment must be quashed, and the defendant discharged.

Burns, J., concurred.

The Chief Justice having been absent during the argument, gave no judgment.

Per Cur.—Indictment quashed.

COMMON PLEAS.

Gildersleeve v. Hamilton.

Immediate Execution—County Courts—Power of judge of to certify for—23 Vic., ch. 42, sec. 4.

Held, that in a case pending in one of the superior courts, and taken down for trial to a county court under 23 Vic., ch. 42, sec. 4, the judge of the court below has power to order immediate execution to issue.

(E. T., 24 Vic.)

This was an action pending in this court and taken down to trial at the county court of Frontenac, Lennox, and Addington,

under sec. 4, of ch. 42, 23 Vic. On application of the plaintiff, the learned judge certified for immediate execution, and judgment was entered accordingly and *fi. fa.* issued

W. H. Burns, for defendant, moved to set aside the judgment and execution, on the ground that the judge below had no power to grant any such certificate—that the statute authorising such trial before him provided that judgment might be entered on the fifth day after the verdict was rendered, unless the judge should certify that the case should stand for motion in the court in which it was brought, in which case no judgment should be entered until the fifth day of the term.

Kingsmill shewed cause.

HAGARTY, J.—Sec. 239 of the Common Law Procedure Act, declares that "the judge before whom any issue joined in any such action, or before whom damages are assessed, may certify under his hand at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith," &c.

The county court judge who tried this case under the act of 1860, is certainly in terms within the words just before cited, as the judge before whom the issue is tried or damages assessed, and unless there be something in the act of 1860 to the contrary, I can see no ground for doubting his power.

The defendant's argument rests chiefly on the direction that judgment may be entered on the fifth day after verdict rendered, and that this provision necessarily excludes the idea that the judge had the power to certify for earlier execution.

A much more formidable difficulty was surmounted by our Court of Queen's Bench in *Paterson* v. *Hall*, 11 U. C. Q. B. 358, when the county court judge exercised a similar power on a writ of trial under 8 Vic., ch. 13, sec. 51, although it was directed by sec. 53, that at the expiration of six days from filing the writ of trial in the Crown office, judgment might be signed and execution issued: the court held that notwithstanding these provisions the county court judge had such power on a fair construction of the 16 Vic., ch. 175, sec. 27, which declares that in all actions in superior courts or county courts, the judge may so certify.

The same view was taken by the Court of Common Pleas in *McKay* v. *Hall*, 4 U. C. C. P. 145, and the judgment of *Macaulay*, C. J., is express on the point.

If these cases were rightly decided, which I see no reason to doubt, the power to certify in the case before us, is, I think, clear.

Rule discharged.

DRAPER, C. J., took no part in this judgment.

POWELL v. BANK OF UPPER CANADA.

Chattel mortgage—Description of goods covered thereby—Statute 20 Vic. ch. 3, sec. 4

The property covered by a chattel mortgage was described as "The goods, chattels, furniture, and household stuff expressed in the schedule *hereunto* annexed," which schedule was headed, "An inventory of goods and chattels in the possession of one J. R.," on a certain day. It proceeded to mention certain rooms and the articles therein contained—then jewellery, blankets, household linen, silver, &c. &c.—the locality of the house in which the goods, &c., were contained not being mentioned.

Held, a sufficient description of the goods and chattels intended to be covered by the mortgage under the authority of previously decided cases referred to in the judgment of the court.

[E. T., 24 Vic.]

Interpleader issue to try whether certain goods seized on the 29th November, 1860, by the sheriff of York and Peel under a *fi. fa.* issued by the defendants against one John Ridout, were the property of the plaintiff as against the defendants.

The issue was tried at Niagara, in May, 1861, before *Richards*, J. The only point taken at the trial was whether certain goods and chattels were sufficiently described in a chattel mortgage made by the execution debtor to the plaintiff. The chattel mortgage purported to grant, bargain, sell, and assign, the goods, chattels, furniture, and household stuff expressed in the schedule thereto annexed. The schedule was headed inventory of goods and chattels in the possession of John Ridout, 7th July, 1860, referred to in the bill of sale by way of mortgage. It proceeded thus—"Drawing-room," and then followed a list of articles. Next "dining-room," and a like list, and so on, naming various rooms, and giving a list of furniture and articles in each. Then came "jewellery, 1 set pearl, 8 gold chains, 10 jewelled rings, 1 pair gold hairpins, 10 bracelets, gold, agate, and jet; 8 bracelets, do. do.; 3 gold lockets, 1 silver buckle, 1 blue opaque set, 1 gold pencil, 1 pair gold cuff pins, 2 gold seals, 1 bunch gold charms, 2 silver pencils, 1 pair of silver tweezers, 1 gold and two silver watches." Then came a list of blankets and counterpanes and of household linen, and then "silver—18 dinner forks, 1 child's spoon and fork, 6 table spoons, 18 tea do., sugar tongs, mustard and cayenne spoons, soup ladle, child's cup, and 4 salt spoons." Other articles were similarly enumerated.

The defendants' counsel contended that of these articles of jewellery, blankets, and counterpanes, silver, &c., there was no sufficient description. They were not mentioned to be in any of the rooms, nor was any specific description of them given.

Leave was reserved to defendants to move to enter a verdict as to these articles; and on other questions connected with the *bona fides*, and legal sufficiency of the transaction, the plaintiff had a verdict.

In Easter Term *W. Eccles* obtained a rule *nisi*, to enter a verdict for defendant, as to these articles which were not described as being in any room or place, on the ground that such articles were not sufficiently and fully described as required by the statute in that behalf, the said goods being under the heads of jewellery, blankets, and counterpanes, household linen, silver, electro and plated ware, cutlery, china, glass, earthenware, library [which was thus set forth in the schedule, "Library—133 volumes of standard literature, 211 vols. miscellaneous novels, magazines, &c., 53 English school books, 16 Latin do., 14 Greek do., 21 French, 7 Italian and 6 German do., 7 bibles, 4 prayer books."] The rule was also in the alternative for a new trial on the same ground.

Hurd shewed cause; he argued that the description was as particular as the nature of the articles admitted; that such things as jewellery, silver plated goods, &c., had no *habitat*. They were moved and carried about as convenience and the necessity for using them dictated—now here, now there. To describe such things as in any particular room or place, would be either to mislead or to lay the foundation for an objection to the truth of the description, as they might not be found in such place at any particular time. That the word "library" might mean the room in which books were kept, as well as the collection of books.

W. Eccles repeated his objection to the generality of the description as not complying with the statute.

No cases were referred to on either side.

DRAPER, C. J.—In almost every case that arises under the chattel mortgage registration act, Consol. Stat. U. C., ch. 45, where the proper construction of the sixth section is in question, we find difficulties and doubts which might have been obviated, or materially diminished, if somewhat more pains and consideration had been applied to the framing the instrument.

In the present case, a direct statement, that the goods, furniture, &c., in the dwelling house of the assignor, or in any other named house, is omitted. And excepting that the assignor is described as "of the City of Toronto," the locality of the apartments in which a very considerable part of the furniture, &c., are specified in the schedule, to be, is left undefined. Printed forms seem to be hastily filled up, and a litigation both protracted and expensive is the frequent result.

The section in question is very short. "All the instruments mentioned in this act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished."

In one of the first cases, in which it was considered, *Robinson*, C. J., said, "I do not find it easy to understand how a stock of goods in a shop, or furniture in a dwelling house, are to be otherwise described than by stating the shop, warehouse, or dwelling in which the goods or furniture respectively are at the time of the assignment," unless by taking a minute list of every article, and the court there held that goods not particularly described by locality or otherwise, would not pass under the words "all other personal estate whatsoever and wheresoever. *Harris* v. *Commercial Bank*, 16 U. C. Q. B. 437.

In *Wilson* v. *Kerr*, 17 U. C. Q. B. 168, the description was "all and singular the stock in trade" of the assignor, "situate on

Ontario street, in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle." The court held this an insufficient description, and the decision was affirmed in the Court of Appeal, 18 U. C. Q. B. 470, where it was held that there being no list or schedule of the stock in trade, the premises, wherein it was to be found, should be designated with greater certainty, and as to the "other goods," there was no description whatever of them, except that they were "*his*," the assignor's.

Kingston v. *Chapman*, 9 U. C. C. P. 130, was rather negative than affirmative on the question, the court refusing to pronounce that "under all circumstances, the merely describing chattels as those which were in a named building, was an efficient and full description."

Fraser v. *The Bank of Toronto*, 19 U. C. Q. B. 381, comes nearer to the present case. The assignment was of all the goods, chattels, and household stuff, particularly mentioned and set forth in the schedules B. C. and D. annexed to the mortgage. Schedule C. was headed "household furniture in Exter Walsh's residence." Schedule D. was headed "household furniture and property of J. R. McDermot," but the articles enumerated in these schedules were not described in any manner that could enable a person to distinguish them from other articles of the same kind, though they were specified as so many chairs, a piano, a sofa, &c. As in this case the locality of the house was not specified. No house was directly mentioned, but the furniture was described as in the residence of Exter Walsh, and the court held that the use of the words "household furniture" as to McDermot, warranted the assumption that the schedule referred to his dwelling house, as it referred to and specified the several apartments in which such furniture was.

In our case no objection is taken as to any of the furniture, &c., scheduled as being in a particular apartment, and the case of *Fraser* v. *The Bank of Toronto*, seems to warrant our holding that as the goods, &c., are described in the deed as the goods and chattels, furniture and household stuff, "expressed in the schedule hereunto annexed," whatever is specified in the schedules, and can be properly deemed to come within the definition of furniture and household stuff, will pass to the plaintiff.

As to the books, we may treat the word "library," as descriptive either of the collection of books, or of the apartment in which they are contained. In Johnson's dictionary the former definition is alone given. In later authorities, among them the imperial dictionary, both senses are given to the word, and it is, I think, at the present day commonly used and understood in both senses.

Then as appears to me "blankets and counterpanes," "household linen," "silver," "electro and plated ware," "cutlery," "china," "glass," and "earthenware," as heads, under each of which are detailed articles of the several descriptions, may be properly treated as coming within the general terms, "furniture and household stuff," used in the deed of assignment, all of them being described in the schedule as in the possession of the execution debtor.

There remains the things specified under the general head "jewellery." There is a list, with a descriptive statement of material or of the nature of the article or of the object for which it is designed, conceived in general terms, and yet particular enough to facilitate identification. I cannot say the description would enable a stranger positively and certainly to identify each article, but nevertheless coupled with the allegation that they were the property of the execution debtor, and were in his possession, and have been levied upon in his possession under the *fi. fa.*, I am not prepared to hold it an inefficient description, so as to make the assignment as to those things of no effect. Some weight is due to the finding of the jury that the assignment was made in good faith and upon sufficient consideration.

On the whole, I am of opinion that the rule must be discharged.

RICHARDS, J.—I only concur in this judgment as carrying out the views of the Court of Queen's Bench in the case referred to, conceiving it better to follow the principles laid down in that decision, than to dissent from them until the question is settled in appeal.

HAGARTY, J.—If this case were the first case under the statute I should at once decide that the jewellery at all events, if not the rest of the chattels, were insufficiently described; but after the decisions that have taken place, I agree with the learned Chief Justice that we can hardly hold the present description insufficient. I cannot see how we can hold it to be less in accordance with the statute than that of the "household furniture," in *Fraser* v. *Bank of Toronto*.

I decide in the plaintiff's favour wholly on the decided cases, not from my own reading of the statute.

Per cur.—Rule discharged.

CORBETT V. JOHNSTON ET AL.

Replevin—Taxes—Distress—Legal as to part.

A collector having legal authority (the tax roll) for the collection of three sums being the rates for three specific years due for taxes, distrains by his bailiff for the amount of them with other sums not properly collectable. Upon replevin, *held*, that the three legal distresses were separable from the illegal ones, and until the sums due on them were paid replevin would not lie, and that the defendants were entitled to the *postea*.

Held, also, that a collector is responsible for the acts of his bailiff holding legal authority (by warrant) from him so to act, and that an action will lie against them jointly.

(E. T., 24 Vic.)

Declaration for goods and chattels and all the household furniture of plaintiff in his house on Queen street, Kingston.

Plea, by (Consolidated Statutes for Upper Canada, ch. 126, secs. 11 and 20, public act passed in the 22nd year of her Majesty's reign,) that defendants did not take and unjustly detain the said goods, chattels and personal property in the declaration mentioned in manner and form as in the said declaration is alleged.

At the spring assizes, 1861, at Kingston, a verdict was taken for the defendants subject to the following special case:

This action was brought in respect of a distress of the plaintiff's goods, chattels, and personal property, namely, eight horses, one table, one clock, one buggy, one carriage, and all the household furniture of the plaintiff taken under the warrant produced, filed and marked A., of which the following is a copy:

1854.	432.	C. Miller, $25·00.	1858	$402 84
1854.	430.	E. Williams 40·00.	Interest on same	80·00
		$65·00.		

A.

1859. Balance.....	137·18
1860. Self & tenant.	840·60
1854. See tenants.....	65·00
	$1025·07
	137·18
	887·84

Balance 1859, $137·18, paid 15th Dec. 1860.

(Signed,) ALEX. BOWLES.

"City of Kingston. Tax warrant for 1860, and other years.

"To *Alexander Bowles*, Bailiff.

"You are hereby authorised and required to distrain the goods, chattels, and effects of Thomas A. Corbett, which you shall find upon the premises of the said Thomas A. Corbett or elsewhere in the city of Kingston, for the sum of one thousand and twenty-five dollars seven cents, (see memorandum,) rated against him and now in arrear and unpaid and in default of payment of such rate or rates, and the lawful costs and expenses of the said distress to sell and dispose of the said distress according to law for the recovery of the said rate or rates, together with the said costs and expenses according to law, and for your so doing this shall be your sufficient warrant.

"Given under my hand and seal at the city of Kingston aforesaid, this thirteenth day of December, in the year of our Lord one thousand eight hundred and sixty.

(Signed,) "CHAS. JOHNSTON,
"*Collector.*"

The plaintiff admitted the collector's rolls for the municipality for the years 1852, 1858, 1859 and 1860, and that the extracts of said rolls put in, filed and marked, C. D. E. and F., were true extracts thereof.

The plaintiff admitted that at the time of the levy the defendant Johnston had in his possession the collector's rolls of the said municipality for the said years 1852, 1858, 1859 and 1860.

The plaintiff admitted a separate demand from him by the defendant Johnston, say in October, 1860 of each of the sums of $402·34, $137·13 and $340·60, and fourteen days before distress, and that the first sum was composed of arrears of taxes for 1852 and 185-, that the second sum was arrears for 1859, and that the third sum was taxes for 1860 as per extracts of said rolls and said note.

The plaintiff admitted that at the time of the distress, the defendant Johnston was collector of the municipality of the city of Kingston, and said defendant Bowles his bailiff, and that defendant Johnston had been such collector for the years 1858, 1859 and 1860.

The plaintiff further admitted that at the time of the taking, the said goods, &c., were in the possession of the plaintiff in the city of Kingston, and that the plaintiff was a resident of the said city during the years 1852, 1858, 1859 and 1860.

The defendants admitted the taking under the warrant produced of the goods, chattels and personal property in the declaration described, and justified as for a distress for the sums of $402·34, $137 13, and $340·60. And the defendants further admitted the payment by the plaintiff after such taking and before action brought of the sum of $137·13, being the arrears for 1859; and the plaintiff admitted that no tender or payment except the said sum of $137·13 was ever made by the plaintiff on account of the said taxes $402·34, $137·13, and $340·60.

The defendants admitted the receipt of J. H. Stephens, a former collector of the city of Kingston for £11 5s., arrears of taxes for 1854, and as to this the defendants did not justify, neither did the defendants justify as to the $80·00 of interest.

If the court were of opinion that on the above case the action could be maintained the present verdict for the defendants to be set aside and a verdict for $4 to be entered for the plaintiff, and if the court were of opinion that the defendants were entitled to prevail, the present verdict to stand.

The case was argued by *Richards, Q. C.*, for plaintiff. He argued that the action was properly brought and maintainable because the corporation was not responsible for the collector's acts, that on this warrant the amounts are not distinguishable, and there is no authority to take any sum less than the whole. He cited *Gov. of Bristol &c.*, v. *Wait*, 1 A. & E., 264; *Sibbald* v. *Roderick*, 11 A &. E., 38; *Clark* v. *Woods*, 2 Ex., 395; *Skingley* v. *Surridge*, 11 M. & W., 503.

D. B. Read, Q. C., for defendants, contended that the whole distress was illegal because it was partly so, and therefore replevin would not lie; that the action should have been brought for excessive distress. He argued that replevin could not be maintained against the collector. That the warrant containing some illegal items rendered the whole void. He referred to *Gov. of Bristol, &c.*, v. *Wait*, 1 A. & E., 264; *Millward* v. *Coffin*, 2 Wm. B., 1332; *Skingley* v. *Surridge*, 11 M. & W., 503; *Allen* v. *Sharp*, 2 Ex., 352; *Cortis* v. *Kent Water Works Co.*, 7 B. & C. 314; *Spry* v. *McKenzie*, 18 U. C., Q. B., 161; *Municipality of London* v. *G. W. R. Co.*, 17 U. C., Q. B., 262; *Newberry* v. *Stephens*, 16 U. C., Q. B., 65; *Patchet* v. *Bancroft*, 7 T. R., 367; *Meller* v. *Leather*, 1 E. & B, 619; *Sturch* v. *Clarke*, 4 B. & Ad., 113.

DRAPER, C. J.—It is a part of the case that the defendant Johnston was at the time of the distress, and had been for the years 1858, 1859, and 1860, collector of taxes for the city of Kingston, and that the defendant Bowles was his bailiff, acting under the warrant set out. That Johnston as such collector in October 1860, demanded the three several sums of $402·34, (which is composed of arrears of taxes for 1852 and 1858,) of $137·13, which consisted of arrears of taxes for 1859, and of $340·60, which was the amount of taxes for 1860. Johnston at the time of making the levy had in his possession as city collector the tax rolls for 1852, 1858, 1859 and 1860.

The warrant given by Johnston to the defendant Bowles commanded him to distrain for $1027·07, and the three sums so previously demanded by the collector amounted only to $880·07. The difference between the three sums ($145) was composed, 1st, of taxes due by plaintiff for 1854, the roll for which year was not so far as we see in Johnston's possession, nor is any proof afforded that the plaintiff was liable for $65 taxes for that year as mentioned in the memorandum on the face of the warrant. 2nd, of a sum of $80, charged as interest upon the sum of $402·34.

Treating the levy by the bailiff in the same light as if the collector had been actually present doing the act himself, the case amounts to this, the collector had authority under three tax rolls, to demand, and in the event of non-payment within a limited time to distrain for three several sums. He made a proper demand; payment was not made, and after waiting as long as the law required he distrained for these three sums, and also for two other sums which he had no lawful authority to collect. The question is, whether taking the form of the warrant in connexion with the other facts—his distraining for too much avoided the whole, so that the plaintiff can replevy his goods and relieve them from the lawful demand, because another demand not lawful has been combined with it.

The cases of *Hurrell* v. *Wink*, (8 Taunt., 369,) *Millward* v. *Caffin*, (2 W. Bl., 1332,) and *Sibbald* v. *Roderick*, (11 A. & E., 38,) establish a distinction between distresses for rent and distresses for rates or other cases under statutory authority, and decide that if rates which are properly and formally charged and imposed, are joined in the same warrant with others irregularly imposed, and therefore not recoverable, and the amount of both is blended into one sum, a warrant is not sustainable for any part. *Clark* v. *Woods*, (2 Exch., 395,) to some extent, rests on a similar foundation. In that case in which a warrant had issed to arrest for non-payment of two sums and as to one the warrant was wrong, *Alderson*, B., suggested that perhaps one warrant would have been sufficient, if it had observed the proper distinction as to each sum. And so by analogy, possibly if this warrant had directed the bailiff to distrain for several sums the amount of the several rates, the warrant might have been upheld for the sums really due.

There is a difference however to be noted between those cases and the present. A warrant issued by one or more justices of the peace was necessary in each of them to authorize a distress or an arrest, and before the justices could properly act, certain information ought to have been laid before them. But under our assessment law (Consolidated Statute, U. C., ch. 55, sec. 93, *et seq.*) the collector, after calling on the person taxed and demanding payment, has authority, in case of refusal or neglect to pay, to levy the sum mentioned in the roll as payable by such person, by distress and sale of his goods, without any other intermediate proceedings. In effect, the statute makes the roll after demand and refusal equivalent to a warrant to levy.

Then as to the three sums of $402·34, $137·13, and $340·60, the collector had a separate roll, equivalent after demand and refusal, which are shewn, to a separate warrant for each. Had he gone in person to distrain I do not apprehend he need have carried the rolls with him. It would have been enough that he should have distrained for the three sums, one on each roll. If he distrained at the same time for other sums not authorized by law, no case goes the length of deciding that the distress would have been invalid. It must have been deemed severable or the goods would be considered *in custodia legis* under the first lawful seizure, and subject to the other lawful claims, and the plaintiff if he desired to relieve his goods, must have paid or tendered the three sums, and then he might have resisted payment of the residue and replevied his goods.

The warrant in this case, though necessary to enable Bowles to act for the collector, was not necessary to authorize a distress being made, and it is not therefore like those in the cases cited, without which the parties making the distress, &c., would have been mere trespassers. Moreover, on the face of it, was the very information which the collector himself would have given, if with no warrant, but three tax rolls, he had distrained the plaintiff's goods—information sufficient to enable the plaintiff to know what he was legally liable to pay.

In *Hurrell* v. *Wink*, the court says "the party rated was entitled to a precise demand of the sum actually due for the poor rate previously to the issuing of the warrant of distress." And as no such demand appeared to have been made, they held the plaintiff entitled to recover.

Here the three sums actually due were legally demanded, and in this respect the case is distinguishable, and in *Sibbald* v. *Roderick*, there was no distinction between the sums justly claimable and those not so, and no proof appears that a several demand for the different rates had been made.

Then, as to these three sums, the collector is to be treated as if acting under three separate warrants, his distraining without authority for other sums cannot vitiate the whole distress founded on the tax rolls. As each of them stood on an independent and unimpeached basis, the plaintiff cannot relieve his goods without satisfying them.

It has not been suggested on the part of the defence, that as to the rates comprised within the three sums specified, there was any want of legal authority to levy them by distress. The objection is to the other part of the demand, and the blending the whole into one sum.

I have no doubt replevin lies against the collector in this case as well as against the bailiff employed by him. In *Fraser* v. *Page*, 18 U. C. Q. B., 336, Sir J. B. Robinson, C. J., said, "of course the collector would be liable for anything done which he had authorized the bailiff to do." Here the authority was expressly given, and has been executed accordingly.

On the whole I am of opinion this case is distinguishable from the authorities cited, and that the *postea* should be delivered to the defendants. I assume three legal rates in force, and three separate tax rolls each to collect one of them. For so much I hold the distress valid, and as a consequence that the plaintiff could not replevy while those rates were unpaid.

Per cur.—*Postea* to defendants.

Dunne v. O'Reilly.

Attorney and Clerk—Agreement for proportion of profits—Validity thereof—Statute 22 Geo. II., cap. 46.

The Imperial Statute 22 Geo. II., cap. 46, among other things making regulations in respect to attorneys and solicitors is in force in Upper Canada.

Where plaintiff, an English barrister, was articled to defendant' an attorney, upon an understanding that plaintiff was to become a partner with defendant after being sworn in as an attorney, and, in the meantime, was to receive one-fourth of the profits of all business taken in the office from the time he became defendant's clerk, the agreement was held to be contrary to the provisions of 22 Geo. II., cap. 46, and void.

(T. T., 25 Vic.)

This was an action in the Common Courts. The pleas were, 1st. Never indebted; 2nd. Payment; 3rd. Set off.

At the trial at the Hamilton Assizes, on March, 1861, before Richards, J., it appeared that the plaintiff having been a member of the bar in the Mother Country, was admitted as a barrister in Upper Canada. The plaintiff was articled to the defendant, an attorney, and, as was admitted at the trial, upon an understanding that he was to become a partner with defendant after being sworn in as an attorney, and was to receive one-fourth of the profits of all business taken in the office from the time he became defendant's clerk. His articles of clerkship expired about the 17th March. He left the defendant's office, but with defendant's consent, in consequence of disagreement between the parties, about the end of June or beginning of July following.

Evidence was given to shew what defendant's business was worth, and evidence to shew that the plaintiff was not very well skilled, in common law practice. It did not appear when plaintiff was admitted as an attorney.

It was objected that notwithstanding this agreement, the plaintiff had no right to any remuneration during the time that he was a clerk under articles.

The learned judge held that if the agreement was as stated, the plaintiff would have a right to recover something according to the value of his services.

The defendant then opened evidence as to his set off, upon which the learned judge referred the taking the accounts to an arbitrator, and left it to the jury to say what amount of compensation the plaintiff was entitled to, according to the arrangement.

The first entry in the defendant's books made by plaintiff, was dated 18th October, 1858, and the last, the 27th May, 1859.

The jury found for plaintiff—damages £200, the question of set off being referred to an arbitrator.

In Easter Term *Eccles, Q. C.*, obtained a rule for a new trial for misdirection—1st. In holding that the plaintiff was entitled to recover for his services under a *quantum meruit*, for the agreement was that plaintiff should become a partner, and he had voluntarily abandoned it, and therefore could not recover anything under it. 2nd. In ruling that plaintiff was entitled to recover for services during the time he was an articled clerk to the defendant.

M. C. Cameron shewed cause, citing *Keys* v. *Harwood*, 1 C. B. 905; *Emmens* v. *Elderton*, 18 Jur 21.

R. A. Harrison on the same side, referred to *Phillips* v. *Jones*, 1 A. & E. 334; *Bryant* v. *Flight*, 5 M. & W. 114.

Eccles, Q. C., said the cases cited did dot apply, as they were cases of wrongful dismissal. That the evidence shewed the arrangement was put an end to by mutual consent. The contract was, that on a given event he should be admitted as a partner, and should have a fixed proportion of the profits of the business. He never became a partner, and agreed with the defendant to put an end to the arrangement, consequently he had no right to recover. He cited *Whyatt* v. *Marsh*, 4 U. C. Q. B. 485; *Parnell* v. *Martin*, 5 U. C. C. P. 473; *Taylor* v. *Brewer*, 1 M. & S. 290.

Draper, C. J.—The understanding between the plaintiff and defendant as admitted by both sides at the trial, and which formed the basis of the plaintiff's demand, was this as I gather from the evidence:—that the defendant being a practising attorney, took the plaintiff as an articled clerk, and it was agreed that as soon as the plaintiff had completed his service and had been admitted to practise as an attorney, he should be taken into partnership with the defendant, and should receive one-fourth of the profits of defendant's business, to be computed from the commencement of plaintiff's service under the articles to defendant. But two or three months after the expiration of the service, the parties having disagreed, parted by mutual consent. The articles expired in the vacation, the plaintiff and defendant finally separated some weeks after the first day of the following term, but it did not appear whether plaintiff was at that time, or since, admitted to practise as an attorney.

So far as is shewn, all parties seem to have overlooked the Stat. 22 Geo. II., ch. 46, which, together with the enactments respecting exactions of the occupiers of locks and weirs upon the Thames, for regulating the assize of bread, for preventing the distemper spreading among horned cattle, makes regulations in respect to attorneys and solicitors.

This act, though repealed in England by 6 & 7 Vic., ch. 73, continues in force in this province.

In the case of *Tench* v. *Roberts*, Mad. & Gel., or 6 Mad. 145 n., it seems to have been considered that an attorney who forms a partnership with an unqualified person came within the act, and also that an unqualified person assisting in the business and sharing in the profits was to be considered as a partner, as the necessary result was to enable him to practise as an attorney for his own profit. *In re. Jackson* v. *Wood*, 1 B. & C. 270, is also a very strong case to shew how the Court of Queen's Bench view such a proceeding. I may also refer to *Ex parte Whatton*, 5 B. & A. 824; *In re. Clarke*, 8 D. & R. 260; *In re. Isaacson*, 8 Moore, 214, 322; *In re. Garbutt*, 2 Bing. 74; *Sterry* v. *Clifton*, 9 C. B. 110.

The case of *Williams* v. *Jones*, 5 B. & C. 108, is, I apprehend, in principle fatal to the plaintiff's claim for services while such an agreement existed, at least during such time as elapsed before he was admitted as an attorney. *Scott* v. *Miller*, 5 Jur. *N. S.* 838, shews the law is the same under the 6 & 7 Vic., though the facts did not sustain a charge of violating its provisions.

This objection to the plaintiff's recovery was not taken at the trial or on the argument. Whether advisedly foregone or no, the Court can neither overlook nor permit an arrangement so plainly contrary to the policy of the Statute regulating attornies to be treated as binding, or as capable of furnishing a substratum for an implied promise to pay for services actually rendered in part performance of it.

Whether anything that took place after the plaintiff was admitted an attorney can uphold a claim against the defendant, we are not called upon to enquire.

The rule must be made absolute without costs.

Richards, J., and Hagarty, J., concurred.

Per Cur.—Rule absolute without costs

CHANCERY.

Reported by THOMAS HODGINS, Esq., L.L.B., *Barrister-at-law.*

BUCKLEY V. RYAN.

Act abolishing registration of judgments, 24 Vic. cap 41—construction of s. 11—Retrospective effect.

The words "suit" or "action" in stat. 24 Vic., cap. 41, sec. 11, mean suit or action to which a judgment creditor is a party, not the original action or suit in which the judgment is recovered.

Therefore, *held*, where plaintiff recovered a judgment on 5th June, 1856, registered it on the following day, defendant being then the owner of certain land in fee, which land the judgment debtor subsequently conveyed to defendant; that as there was no suit pending on the 18th May, 1861, when stat. 24 Vic. cap. 41, came into force in respect of the judgment or the land affected by it, in which plaintiff was a party, a bill by plaintiff, seeking to charge the land was not sustainable.

SPRAGGE, V. C.—The bill sets out a judgment recovered by the plaintiff against Ryan, on the 5th June, 1856, and registered on the sixth of the same month; that Ryan was at the time the owner in fee of a certain parcel of land described in the bill, and that the judgment was re-registered on the 8th April, 1859; that Ryan on the 4th July, 1856, conveyed the said parcel of land to defendants Wilson and Drewry, and that the conveyance to them was registered on the 31st of same month.

The bill was filed on the 24th July, 1861, and the question arises under the Act of last session (24 Vic. cap. 41,) repealing the law relating to the registration of judgments in Upper Canada.

If the Act had closed with the 10th section, I apprehend the effect would have been that lands would upon the passing of the Act have ceased to be affected by the registration of judgments except in the language of Lord Tenterden in *Surtees* v. *Ellison*, 9 B. & C., 752, in "transactions passed and closed," and to sustain suits thereupon, which in the language of Tindal, C. J., in *Kay* v. *Goodwin*, 6 Bing. 576, "and commenced, prosecuted, and closed, whilst it was an existing law."

The 11th section qualifies the general effect of the repeal of the pre-existing law, and saves from its application all suits and actions pending on the 18th May, 1861, (the day of the passing of the Act,) in which any judgment creditor was a party.

The plaintiff reads these words as applying to the original suit in which the judgment was recovered and registered, but to that suit no judgment creditor was a party in the sense in which the words are obviously used in the statute. The plain meaning is—a party *as* a judgment creditor. If it had been meant to apply to the original suit the ordinary proper words to have been used would have been "any action in which judgment has been recovered." The use of the word "suit" also seems to negative its application to the original action at law, and to show that what was meant was any action at law or suit in equity in which a judgment creditor as such was made a party.

I think, therefore, that there being no suit pending on the 18th May, 1861, in respect of this judgment, or the lands affected by it in which the plaintiff was a party, the bill is not sustainable.

Per Cur.—Bill dismissed.

CHAMBERS.

(*Reported by* ROBT. A. HARRISON, Esq., *Barrister-at-Law.*)

NOELL ET AL. V. PELL.

Assignment of chattels for benefit of creditors—Consideration—Description of goods—Affidavit of bona fides before whom to be sworn—Addition of assignee.

The Consol. Stat. U. C., cap. 45, respecting mortgages and sales of personal property, does not require a money consideration.

An assignment for the general benefit of creditors, as far as the effects will go in the discharge of the assignor's liability to them, together with the acceptance of the trust by the assignees, who swear they are creditors, is a sufficient consideration to support the assignment.

An assignment of "all the stock in trade, merchandise, goods and effects," in the "shop occupied by the assignor, situate on the south side of King street, in the city of Toronto, and known and numbered 77, which said goods and chattels are particularly mentioned in the schedule annexed hereto and marked A;" which schedule begins "stock in workshops," and goes on describing what is therein: and next describes what is in the front store.

Held sufficient to pass not only what was contained in the front shop first described, but what was contained in a continuous shop consisting of the front store and two workshops.

"14,415 feet of prepared moulding"—*held* a sufficient and full description under the statute.

It is no objection to the affidavit of bona fides that it is sworn before a commissioner who was the gentleman that prepared the assignment.

"Secretary of the Board of Arts and Manufactures"—*held* a sufficient addition under the statute.

[Chambers, November 18, 1861.]

This was a summons issued on application of the Sheriff of York and Peel, calling on William Edwards and John Sterling as claimants, and on the plaintiffs, to appear and show cause why they should state the nature and particulars of their respective claims to the goods seized by the Sheriff, under a *fi. fa.* in this cause.

The parties appeared on the 9th November, 1861, and called upon Draper, C. J., on the consent of the plaintiff and the claimants, to dispose of the merits of the claim and to determine the same in a summary manner, under Consol. Stat. U. C., ch. 30, ss. 3 & 8.

The facts sufficiently appear in the judgment of the learned Judge.

DRAPER, C. J.—The claimants set up a deed dated 17th Sept. 1861, between defendant of the first part and William Edwards, Secretary of the Board of Arts and Manufactures, and John Sterling, of the same place, boot and shoe maker, of the second part, which witnessed, that for the purpose of satisfying his creditors as far as his estate and assets would enable him to do so equally, share and share alike, defendant assigned to the claimants "all the stock in trade, merchandise, goods and effects, now contained in the shop occupied by the said party of the first part, situate on the south side of King street, in the city of Toronto, and known as and numbered 77 King street west, and which said goods and chattels are particularly mentioned in the schedule annexed hereto and marked A;" also some goods in Hamilton not in question on this application, "and all his household furniture specified in the schedule hereunto annexed, marked C, contained in the house occupied by him, numbered 77 on King street west, in the said city of Toronto:" to hold upon the trusts following: 1st. To sell the same in such manner as they shall think proper, for the benefit of the creditors. 2nd. Out of the proceeds to pay the costs and expenses of the assignment and the carrying out the trusts. 3rd. To pay the residue to the creditors, in equal proportions, share and share alike, so far as the same may extend in payment and discharge of their respective claims, without preference or priority to any of them. Power was given to the assignee to compromise with any debtor of the defendant, or with any of the creditors, "so as the other creditors of the said party of the first part (the defendant) shall not be prejudiced."

In the affidavit of William Edwards, one of the assignees, he is described in the deed by way of addition, as "Secretary to the Board of Arts and Manufactures."

In the schedule A, one part of the stock was headed "stock in workshop," and then followed the description and value, commencing, "14,415 feet of prepared moulding, $494 84." Then another part is headed "front store west side," another "west window," another "east window."

According to a plan of No. 77, it seems the dwelling house is above the front shop, directly behind which is a "workshop," separated from the front shop partly by a brick wall, and the centre, being half the whole width, by a temporary board partition through which is a door, and behind this again is a joiner's shop, being another workshop, over this is a gilding shop. The two workshops are separated by a brick wall, through which there is a door.

A paper purporting to be signed by three creditors of defendant assenting to the assignment was put in, but there was no proof that it was executed, or that the parties whose names were thereto were creditors of defendant. The assignees made an affidavit that they were creditors of the defendant, the first to the amount of £25, the other to the amount of £3 4s. 4d.

This was the claimant's case.

For the execution creditors it was objected—1st. That no consideration appears for making an assignment, nor does it appear that the assignees, or either of them, were creditors.

The statute does not require a money consideration; and the payment of creditors as far as the effects will go in discharge of the defendant's liability to them, together with the acceptance of

the trust by the assignees, who swear they are creditors, is, in my opinion, a sufficient consideration to support the assignment.

2nd. No proper conveyance appears thereby, nor does it appear that anything was conveyed.

It is sufficient to read the deed to answer this objection. It states that defendant hath assigned and "now doth assign" all, &c.

3rd. That it is not shewn whose property is conveyed.

This objection is extremely hypercritical, as a perusal of the whole instrument will show. Unless the property conveyed by the deed be defendants, what right have the execution creditors to seize it. The identity of the property seized with that claimed under the assignment is not in dispute.

4th. All goods *now* seized, which were in the workshops at the date of the assignment, are not conveyed thereby. If this means that there were goods seized not mentioned and described in the schedules, then the objection is good. As to such goods the Sheriff will proceed.

5th. The description of goods in the schedule and assignment is bad under the statute.

This objection was argued on two grounds. First, that the assignment conveyed such goods as were in the front shop, not in the workshops, or either of them. Second, that the goods themselves were insufficiently described.

As to the first, the assignment speaks of "all the stock in trade, merchandise, goods and effects" in the "shop occupied by the defendant, situate on the south side of King street, in the city of Toronto, and known and numbered 77." Without the aid of a schedule, there might be some difficulty in holding these words sufficient to cover the workshops as well as the shop in which goods were sold; but the assignment proceeds, "which said goods and chattels are particularly mentioned in the schedule annexed thereto and marked A," which schedule begins "stock in workshops," and goes on describing what is therein, and next describes what is in the "Front Store." Taking the two together, I have no doubt all the stock and goods in the continuous shop, consisting of the front store and the two workshops, passed. As to the other difficulty raised, nothing is shewn exterior to the language used to support it. I cannot see that "14,415 feet of prepared moulding" is not a sufficient and full description of the article that the same may be thereby readily and easily known and distinguished. And the same answer may be given to the other articles, as to which was contended the description was insufficient. In most instances there was quantity in all the nature and quality or some descriptive characteristic ex. gr. "crown and plate glass," and in all likewise locality.

7th. "The affidavits bad because sworn before Mr. Leys."

These are the very words of the objection. The affidavits of the two assignees and of the subscribing witness, were sworn before Mr. Leys, who is a duly authorized Commissioner. The objection is that the assignment was prepared by him. But the statute gives no colour for such an objection, nor is there any rule of court on the subject; nor indeed could there be, for the making assignments, mortgages, or bills of sale of chattels, is not a proceeding of which *per se* the courts take cognizance.

9th. "The affidavit of justification not sufficient, in not shewing that the sale at time of execution was *bona fide*."

I give the words here also. The affidavit is sworn on the same day as the deed was executed. Each assignee swears that "the deed of assignment or conveyance, and the sale and assignment therein mentioned and thereby made, are respectively *bona fide*, and for good consideration, as set forth in the said conveyance." The argument is, that at the time of execution the assignment may have been fraudulent though by some unexplained circumstances it may have become *bona fide* at the time of swearing the affidavit. If I could bring myself to adopt and act in the spirit of such an objection, I should be inclined to hold it badly taken, because properly speaking there is no "affidavit of justification," words having a widely different legal meaning, and because the words "at time of *execution*" might by remote possibility refer to the plaintiff's *fi. fa.* and not to the execution of the assignment. But I disclaim any such mode of argument and rest my decision in favour of the sufficiency of the affidavit on the plain and unstrained meaning of the words used.

The last objection is, that Edward's description is not the correct one. This was explained to refer to the affidavit of the *bona fide's* of the assignment in which he is described as "Secretary of the Board of Arts and Manufactures." He has the same *additions* in the assignment, and the description being the same in both we may safely assume "constat de personâ." As to its sufficiency as an addition our statute does not require any, differing from the English statute passed for a similar object.

I decide therefore in favour of the claimants, except as to any goods falling within the remarks made upon the fourth objection. In effect I am strongly inclined to think that the execution creditors anticipated this result, and preferred taking their chance of an adjudication at Chambers to the more expensive proceedings of an issue and trial by jury.

COUNTY COURT CASES.

(In the County Court for the United Counties of Frontenac, Lennox and Addington, before his Honor Judge MACKENZIE.)

MULHOLLAND v. MORLEY.

Action on a Note—Plea, Payment—Necessity for production of Note—Common counts—Plea, Payment—Necessity for evidence as to amount of Plaintiff's demand.

In an action on a promissory note though the making of the note be admitted for instance by a plea of payment, yet plaintiff must produce the note before having his verdict recorded.

In an action on the common counts for money paid, money lent, goods sold, &c., the plea of payment admits only that something not ascertained was due in respect of the causes of action sued upon, leaving plaintiff to prove the precise amount.

Particulars of demand are no part of the declaration, and are not admitted by a plea of payment on the record.

The first count in the declaration was upon a promissory note made by defendant for $235.

The second count was upon another promissory note, made by the defendant for $225 22.

There were also common counts for money paid, lent and advanced, and for money had and received, goods sold, and an account stated and interest.

The defendant pleaded one plea only, namely, payment before action to the whole declaration.

The following particulars of plaintiff's claim were annexed to the record:—

To paid your note due 27th November, 1859	$215 44
Interest on same	28 65
To paid your note due 27th May, 1860	225 22
Interest on the same	17 43
To paid your note due 27th November, 1860	235 00
Interest on the same	11 75
	$728 49
Credits, composed of sundry items	429 57
Balance due plaintiff	$298 92

There was no special count applicable to the first promissory note mentioned in the particulars.

The cause was tried at Kingston before Judge Mackenzie, at the sittings of the court in September last, 1861.

At the trial the learned counsel for the plaintiff contended that he was not bound to produce the two notes declared upon at the trial, as the plea of payment admitted them. He also declined to give any evidence on the common counts, contending that as the particulars of the plaintiff's claim had been served in detail upon defendant's attorney, and were annexed to the record, that under the plea of payment the amount of $298 92 cents was admitted, and that it was unnecessary for him to produce the notes specially declared upon, or to give any evidence on the common counts.

The judge thought that the plea of payment did not operate as an admission of the correctness of the plaintiff's particulars, although it admitted that something was due. He thought that the plaintiff was not in a better position than if the defendant allowed judgment by default, in which case some evidence would be required to be given to prove the correctness of the claim under the common counts. He thought the plaintiff should show how much he paid on account of the defendant, as to the first item in the particulars.

The counsel for defendant proposed that a verdict should pass for the plaintiff for $62 17 cents, being the balance between the amounts and interest of the two promissory notes specially declared on, and the amount credited in the particulars. The counsel for the plaintiff refused to consent to such a verdict, as he thought that the plaintiff was entitled to a verdict for $298 92 cts. as made up in the particulars.

Under these circumstances the judge non-suited plaintiff, with leave reserved to him to move in term to set the non-suit aside, and to enter a verdict for the plaintiff for $298 92 cents, in the event of the ruling of the judge being wrong.

In October Term 1861, *A. R. Morris* obtained a rule *nisi* to set the non-suit aside, and to enter a verdict for the plaintiff for $298 92 cents, pursuant to leave, or for a new trial on the ground of misdirection.

D. Macarow showed cause.

A. S. Kirkpatrick supported the rule.

MACKENZIE, Judge Co. C.—There are some English cases which countenance the position taken by the plaintiff at the trial, in reference to the non-production of the notes declared on; but the cases do not appear to be uniform in this respect.

Interest on the notes was claimed in the plaintiff's particulars. And the English cases decide that the notes must be produced before interest can be recovered.

In this country some of the judges require that the notes or bills must be filed in the court before the recording of the verdict, and others do not. The non-filing of notes and such papers upon which judgment pass leaves a door open for mischief and trouble. It is a bad practice and should not be allowed. Evils arising out of it have have been disclosed in this court before me once, and in the Division Court more than once. Such notes some way or other have found their way into irresponsible hands, and parties have been sued upon them a second time. True the nefarious attempts had been defeated by trouble and expense, unfortunate defendants having to pay a second bill of costs. In this court, unless otherwise decided by an appellate jurisdiction, it will be necessary to file such notes and such papers before the recording of the verdict.

As to the other point, whether the plea of payment admits the correctness of the plaintiff's bill of particulars annexed to the record or not, I have not been able to bring my mind to adopt the view of the matter as urged on behalf of the plaintiff at the trial and upon the argument in banc.

The plea of payment, like other pleas which do not deny the cause of action set forth in the declaration, implicitly admits the contract or cause of action declared upon, and that the plaintiff is entitled to recover something. When pleaded to the common counts it admits some contract of the nature declared on, but does not admit a particular amount, or particular items, or a bill of items.

I find it laid down in the last edition of Archbold's Practice, page 1388 "That the particulars are not to be considered as incorporated in the declaration, nor do they form any part of, nor can they have the effect of a pleading; nor can they be looked at with a view to construe the pleadings; the plaintiff may apply them to any count in the declaration to which they are applicable."

In a note in Harrison's Common Law Procedure Acts and Rules, at page 263, I find the following observations: "The office of a new assignment is particularly to explain that which is left ambiguous on the face of the declaration owing to its generality. Particulars of demand have the same effect, though they form no part of the record. One object of a bill of particulars is to control the generality of the declaration. The chief object of a bill of particulars is, to give substantial information to the defendant of plaintiff's demand, and in order to limit the proof of the latter to the cause of action in the declaration mentioned."

In the case of *Russell* v. *Bell*, 10 M. & W. 339, Lord Abinger, C. B., said:—"It is perfectly novel to say that a plea is construed by, or has any reference to a bill of particulars. The plea is to the declaration, and to nothing but the declaration."

In the present declaration it is alleged on the common counts, in general terms, that the defendant is indebted to plaintiff for money paid, for goods sold, for money lent, for money had and received for plaintiff's use; and for interest and upon an account stated. All then, that the plea of payment admits is those general allegations in the declaration, and that *something* is due or claimed on them. It does not admit the bill of particulars, nor any item in it, or any particular amount to be due. The plaintiff cannot be better off with a plea of payment on the record than he would be if the defendant had pleaded no plea at all. In this respect; a plea of payment to the common counts, admits no more than a judgment by default would admit.

In Chitty General Practice, vol. 3, page 678, I find the law laid down thus—"The suffering judgment by default (except in debt) only admits the precise allegations in the declaration, and that something is due or claimable; and where the declaration is general, as for work, and labour, and materials, the defendant on a judgment by default, is at liberty to cross-examine the plaintiff's witnesses, who are called to prove the work done as to whether the work sworn to by them was or was not done on the defendant's retainer."

In the case of *Williams* v. *Cooper*, 8 Dowl. 204, Parke, B. said—"A judgment by default admits something to be due, but disputes the amount."

It seems then, that in action of assumpsit for goods sold, or work done, or money paid, a plaintiff is not in strictness relieved by a judgment by default from the necessity of proving the delivery of each article, or the extent of the work done, or the particular sums of money paid; though, certainly, in practice, when a defendant has not by plea denied the plaintiff's action, there is generally a strong feeling on the part of the jury, when executing a writ of inquiry, to be satisfied with slighter evidence than on a trial.

In England when judgment by default is signed on the common counts, the amount due to the plaintiff in respect of the same is ascertained by means of a writ of inquiry.

In Upper Canada such amount is ascertained at the Assizes or at the sittings of the County Courts by a jury, in the form of assessment of damages.

I cannot see how the 15th section of the Common Law Procedure Act can be construed so as to help the plaintiff out of his difficulty, as was suggested at the argument. In case a defendant does not appear in due time to a writ of summons, with a special endorsement of particulars on it, as mentioned in the 15th section, the plaintiff may, under the 55th section, sign final judgment for any sum not exceeding the sum endorsed on the writ. Alderson, B., in *Rodway* v. *Lucas*, 672, said, "It seems to me that the special endorsement allowed by the statute is of a claim only, and the defendant, if so disposed, may dispute it by appearing, and then the special endorsement assumes the form of particulars of demand."

In the present case an appearance has been entered, a declaration served, and a plea pleaded; consequently, the special endorsement upon the writ has assumed the form of ordinary particulars of demand, which are not affected by the action in question.

I think that the court has no authority, under the circumstance, to order a verdict to be entered for the plaintiff in the terms of the rule; and according to the views I have just enunciated there was no misdirection, consequently there can be no new trial for misdirection.*

* Counsel for defendant afterwards consented to the rule being made absolute for a new trial on payment of costs, and the rule was issued accordingly,

ENGLISH CASES.

PRIVY COUNCIL.

(*From the "Law Times."*)

(Present—The Right Hon. Lord KINGSDOWN, Sir B. RYAN, and Sir J. ROMILLY.)

BANK OF MONTREAL V. SIMSON.

Guardian—Power of, according to law of Canada—Sale of infant's real and personal estate—Voidable sale.

A tutor or guardian, according to the laws of Lower Canada has no power without leave of the court to sell his ward's immovable property, nor any portion of the ward's mixed property, nor any part of the moveable property, except what is unproductive of revenue, or of a perishable character, and even then he cannot sell it if it is in the nature of an heirloom, as to which a hereditary pretium affectionis is attached. The burden lies on the tutor to show the property sold falls within the above description, and if he fails to do so the sale is actually void, and not merely voidable. The sub-tutor's duty is to watch over the tutor.

This was an appeal from a decision of the Court of Queen's Bench in Lower Canada.

The question involved was the extent of the authority of a tutor over the property of his ward, according to the law of Lower Canada, which is the old French law.

An infant named Eleonore Simson was born in 1835, and her property consisted of shares in the Bank of Montreal. She had a tutor and sub-tutor regularly appointed. The tutor sold these shares in 1848 and 1849. The infant, on arriving at majority, instituted proceedings, and claimed the dividends on the shares from the date of the alleged sale, seeking to treat the transfer as void. The Court of Queen's Bench held that the tutor had no power to sell the shares. An appeal was now brought to her Majesty in Council.

The *Solicitor-General* (Palmer) and *C. E. Pollock* for the applicants,

Wickens for the respondents.

Judgment was delivered up.

Sir J. ROMILLY (who, after stating the facts and authorities at length, thus summed up their result):—After carefully examining the various authorities and the writers on this subject prior to the enactment of the French Codes, and testing their opinion by the decided cases cited in their works, we are of opinion, though various passages may be found dispersed through their writings on which arguments may reasonably be founded leading to opposite conclusions, that no considerable or irreconcilable diversity of opinion appears to exist between them, and that the result of the law, so far as it is applicable to the case before us, may be thus stated: The tutor's duty is to make an inventory of all the property of his ward, and to take an administrative care in the protection and management of it; but without the sanction of a court of justice having been previously obtained, his power does not extend to selling any portion of the immovable property of his ward, or any portion of that property which is of mixed character; and further, that his power is also restricted from selling any portion of the moveable property of the ward, without the intervention and previous sanction of a court of justice having been first obtained, except such portion of it as is unproductive of revenue, and such portion also as being of a perishable character will necessarily either cease to exist, or will, from permanent causes, become deteriorated in value at the period of time when the ward shall attain his majority; and even this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of articles in the nature of heirlooms as to which an hereditary *pretium affectionis* is attached. Although this is an incomplete statement of the law, it is, we think, accurate and sufficiently comprehensive for the purposes of this case. It has been contended on behalf of the applicant, that, as in the civil law the original principle was that the tutor stood in the place of the father, and was dominus of the property of the ward, and as such had power to dispose of all of his property, the case must be considered as one in which the burden of proof lies on the respondent to establish that the property in question falls within the range of the various classes of property, which, by regulations made subsequent to the original law, should be excepted from the general rule which gave the tutor complete control: these exceptions, it is said, were of three sorts: first, immoveable property; and next, *quasi* immoveable property, which was called "*immeubles fictifs*;" and thirdly, moveable property of a peculiar value as possessing a *pretium affectionis*, and being in the nature of heirlooms: that these were the only three classes of property excepted from the control of the tutor. That all property not falling within one of these three classes is still subject to the general control of the tutor, and that bank shares do not fall within the description of any one of these classes of property, and consequently that the power of the tutor over them was absolute, and the right of the respondent to recover them gone. But this is not the view we take of this case: we think that the Edict of Constantine changed the law on this subject, and exempted all property of the ward from the saleable control of the tutor, with the exception of the property there mentioned, and that if the matter had remained as fixed by that edict, such must be considered to have been the law of France prior to the year 1560. And we also think that the Ordonnance of Orleans has only altered the law in this respect by extending the power of sale by the tutor over the moveable property of the ward there specified, and this only with the previously obtained sanction of a court of justice. Although the various authorities cited to us are susceptible of various meanings, and without some qualification of the generality of their terms are not entirely reconcilable, yet this is, we think, the general effect of them; and this view is confirmed by the cases cited and commented upon in such authorities; as an instance of which one case which was cited before us may be referred to, where an office belonging to the ward, which had during the vacancy caused by the death of her father lapsed to the profit of the State, had been disposed of by the widow as the guardian of her daughter, the sale was annulled on the ground that the office was in the nature of *immeuble fictif*. But the case proceeds to say: "Il en serait de même s'il s'agissait d'une chose purement mobillaire, mais d'une grand valeur, et qui formerait, pour ainsi dire, toute ou la majeure partie de la succession." If this be the correct view of the case, the burden of the proof falls on the applicant to show that the bank shares fell within the property which DeLisle as tutor was entitled to dispose of without the sanction of a court of justice. It is always to be borne in mind that, as the wants and exigencies of society increase new denominations of property will come into existence, to which the observations made and rules laid down in previous cases do not precisely apply; but we entertain no doubt, upon a full review of this subject, that the bank shares in question do not fall within any class of property which the tutor has power to dispose of without the sanction of a court of justice. It was not, in our opinion, open to the tutor to speculate upon, or to decide for himself or for his ward, whether such shares as these were likely to rise or fall in value. We think that no distinction can be taken in this respect, and so far as the power of the tutor is concerned, between the shares in the Montreal Bank and shares in the Company of the Bank of England, and stock in the English or foreign funds, and that the sale and realisation of such property requires the interposition and sanction of a court of justice, and the re-investment of the proceeds in property producing a permanent income, according to the terms of the Ordonnance of Orleans. It has also been argued before us, that the power of the tutor is, by all the authorities, held to include administration, and that administration necessarily includes sale. But we dissent from that argument: we think that the supposition that the adminstration of the affairs of a ward necessarily involves the sale of any portion of his property, is one derived from the ideas which in England attach to the word "administration," which, in its technical sense, applies only to a legal personal representative; but this is, in our opinion, wholly distinct from the functions of a tutor, and which, in order to avoid confusion, it is essential to keep distinct. Administration, as applicable to a tutor, includes management, but does not include sale, unless to the limited and qualified extent already pointed out. It is partly for this reason we have not thought it necessary or desirable to comment on the authorities cited from the decisions of the English tribunals, and the arguments deduced from them: they have not, in our opinion, any relevancy to the matter to be decided in this case Neither have we thought it of any moment to consider the articles in the present French code, or the discussions in the conferences, which took place when that code was framed, except so

far as these conferences illustrate any ambiguous point in the earlier law which up to that time obtained in the kingdom of France. So far as these latter have any bearing on the subject, they concur in bringing us to the conclusion already stated, that by the law of France prior to that period, and which is that now in force in Lower Canada, it was not in the power of the tutor to sell the bank shares without the assistance and sanction of a court of justice. The next question to be considered is, the effect of the sale which has actually taken place, and the transfer of these shares to persons who are strangers to the record. It is argued by the counsel for the applicant, even on the assumption that the tutor exceeded his authority, still that the sale was good; and that, assuming that the transfer ought not to have been made, still that, being made, it is valid, and that the act can only be treated as a voidable transaction, and not as one actually void, and that, if it be only voidable, the persons who bought the shares, and in whose names they now stand, ought to have been brought before the court to answer to a matter in which they were so materially interested. We are of opinion, however, that the act of the tutor, exceeding the limits of his power and the scope of his authority, is actually void. The authorities on this subject, amongst the authors cited to us, are conclusive on this head. It is not necessary to refere to them in detail, but it may be useful to refer to one passage, where the principle which governs them and the reasons for it appear to us to be well and lucidly stated by Pothier, in his Traité de Personnes, part 1, titre vi., art. iii., s. 2. (The passage indicated was here read.) That passage, besides bearing on the point now being considered, is useful also as pointing out that in the sense in which the word "administration" was employed by the French jurists on this subject, it did not include in it the idea of sale, which is derived from our English notions on this subject. The observations just read are made, it is true, by Pothier with relation to the sale of immovable property, but the principle is the same with respect to all property sold by the tutor which he had no power to sell, and which the authority of a court of justice could alone entitle him to dispose of. When this excess of power is once established, then the sale is, in fact, the sale of a stranger, and the act here complained of is as if a stranger had sold these shares, and had then, by fraud or forgery, induced the bank to make the transfer of them in their books. In that case they would still remain liable to the rights of the minor, both for the shares themselves and for the dividends which accrued on them. Though it cannot, in our opinion affect the ultimate decision of the case, which must rest on the principles already stated, it is not an immaterial circumstance in the consideration of this case, that the sub-tutor Robert Simson, on the 29th September 1846, a year and a-half before the first sale of shares took place, gave regular and formal notice to the bank that DeLisle the tutor, had no authority to sell the shares, and that the circumstances of the ward were such that the disposal of them was not required for her benefit. The distressed circumstances of DeLisle seem also to have been notorious, and likely to be known to the bank, in which case it was probable that any sale by him would be for his own sole advantage. The functions and duties of the sub tutor seem to be not very clearly defined; he has no power of actively interfering, but his duty seems to be to watch over the conduct of the tutor, and endeavour to prevent injury to be inflicted on the person or or property of the ward. Nothing could be more formal or precise than the notice served by him on the bank in that character, which is set out in the case; and as the bank have thought fit, on their own determination, without even giving notice to the sub-tutor, or to the friends of the minor, of the attempt the tutor was making to sell his ward's property, to allow the transfer in their books of all these shares by the tutor to mere strangers, they must now take the consequences, their Lordships being of opinion that the act of making that transfer was, so far as regards the minor, merely nominal, that it took away no property from her, and that the decision of the Superior Court of Lower Canada and of the Court of Queens Bench is correct, and must be affirmed with costs; and they will humbly advise her Majesty accordingly.

Decree affirmed with costs.

Applicant's solicitor, *Bischoff*, *Coze* and *Bompas*.
Respondent's solicitor, *J. H. Mackenzie*.

COURT OF ARCHES.

(From the "*Law Times*" *Reports*.)

The Office of Judge promoted by BURDER v. HEATH.

Articles of religion—Repugnant doctrines—Obligations of the clergy.

The obligations of the clergy are twofold: first, to declare assent and consent to the Book of Common Prayer; second, to subscribe the Thirty-nine Articles of Religion.

The court will not take into consideration the internal convictions or animus with which the Articles are subscribed; it will only examine the doctrines impeached, and see if they violate the plain grammatical intent and meaning of the Book of Common Prayer or the Articles of Religion.

The construction which the court will put upon those documents is a legal construction.

If the Article admits of several meanings, without any violation of the ordinary rules of construction or the plain grammatical sense, the court will hold that such opinion might be lawfully avowed and maintained.

If the doctrine in question had been held without offence by eminent divines of the Church, then though it might be difficult to be reconciled with the plain meaning of the Articles, blame will not be imputed to those who hold it.

This court will not question doctrines that have been allowed or tolerated in the Church.

In construing sermons, the court will not be bound by the strict rules which are applied to the construction of the Articles and Book of Common Prayer, but it will allow of a greater latitude of interpretation, and will permit it to be shown that the preacher did not intend to contravene the statute of Elizabeth, or to promulgate doctrines inconsistent with the Book of Common Prayer.

The court will not for this purpose assume that anything was done or intended to be done by the authority of the Legislature or of the Church, which it did not find within the four corners of the Articles and the Book of Common Prayer; and, on the other hand, it will not assume that anything therein found was not intended to have its full effect and operation.

There are many matters of doctrine dehors both the Articles and the Book of Common Prayer, as to which entire freedom of opinion is allowed. But it is settled law, admitting of no discussion, that the Articles and the Book of Common Prayer must be taken by all who have subscribed them to contain the doctrines of the Church of England, and that these are, so far as there set forth, accordant with Scripture.

In the construction of the statute 13 Eliz. the word "advisedly" means "deliberately," as contrasted with "inadvertently" or intentionally," that is to say, with an express or avowed purpose.

The intention will be gathered from examination of the acts complained of.

What doctrines are held to be in contravention of the Articles and Book of Common Prayer.

The statute leaves a locus penitentiæ to the defendant, who may retract before sentence passed.

(November 2, 1861.)

This case was argued in June last, and his Lordship took time to consider his decision. The questions involved in it, and the form in which they were raised, are fully stated in the judgment.

Dr. Twiss, *Q.C.*, and *Dr. Swabey* for the prosecutor.

Dr. Phillimore, *Q.C.*, and *Bullar* for the defendant.

DR. LUSHINGTON said:—Early in the year 1860 a suit was instituted in this court by the direction of the Bishop of Winchester, against the Rev. D. I. Heath, a clergyman beneficed in that diocese. The object of that suit was to prefer certain charges against Mr. Heath, for having printed and published several sermons, called "Sermons on Important Subjects," parts of which were alleged to contain doctrines repugnant to the Articles of Religion, in violation of the statute of Elizabeth and in derogation of the Book of Common Prayer. I must presently enter minutely into the consideration of the articles which contain these charges, but this general description will suffice for my immediate purpose—namely, to make some general observations as to the principles which I believe ought to guide the court in the consideration and decision of cases of this description. The court is fully aware of the deep responsibility which attaches to it in the exercise of this jurisdiction. Questions may arise most important to the Established Church. The abstruse nature of the subject-matter itself, the doctrines of the Church of England, may necessarily introduce considerations of great difficulty. A miscarriage by this court, even if corrected by the court above, would be a serious evil. Again, in weighing the importance of such cases, the court must never forget that the character and interests of the party proceeded against are most deeply involved. It may be meet, in the first instance, briefly to recapitulate the obligations which the clergy of the United Church are by law to undertake. They are twofold: they must declare their assent and consent to the Book of Common Prayer, and they must subscribe the Thirty-nine Articles of Religion. In the course of the argument addressed to the court on the part of Mr. Heath, much was said as to the *animus* with which a subscription to the Articles might be made, and the authority of Dr. Paley was cited upon this subject. I disclaim

entering into any examination of this argument, for I think that it does not belong to the court to discuss it. I have nothing to do with the internal convictions of any persons subscribing the Articles; neither I nor any other court can know what are the opinions of individuals when they affix their subscriptions — that is a matter to be governed by their own consciences. It may be quite right and fitting that learned divines should discuss the limits within which a person can conscientiously subscribe, but these are not questions for a court of justice. Disquisitions on this subject afford no assistance to the court, and I cannot consent to import into this case or any other similar case the words of learned divines so far as they relate to the *quo animo* with which the subscription may be affixed. The province of a court of justice, when compelled to perform the duty, is to examine the doctrines impeached, and to see that they do not violate the plain intent and meaning of the Book of Common Prayer or the Articles of Religion. I cannot disguise from myself that in discharging the duty now imposed upon me there are three difficulties which are not to be found in the ordinary course of justice. Such cases as the present are of very rare occurrence, and though the general principles which ought to guide the court may, to a certain extent, be extracted from the few preceding cases, yet there are not, and there cannot be, any institutional writers to whose authority, as in ordinary legal questions, the court could with confidence appeal; nor are there any decided cases as to the actual construction which ought to be put upon the Articles. True it is that there are a multitude of the most learned works by the most eminent divines as to the meaning of those Articles. But the court cannot venture to make much use of such assistance, and for this reason, that such works naturally and properly constantly refer to the Holy Scriptures. The court, however, ought not to enter into so wide a field of investigation, except so far as may be absolutely necessary to the discharge of its proper duty — viz., the ascertainment of the plain grammatical meaning of the Book of Common Prayer and the Articles. The construction which the court must put upon the Book of Common Prayer and the Articles is a judicial construction. I should not presume to adopt any authority, however high, even though in my own most fallible opinion supported by Scriptural quotations, unless such authority concurred with the plain grammatical meaning. With great anxiety, then, I have sought to ascertain what are the principles which should govern the court and guide its judgment in all cases in which charges of false doctrine are preferred, or similar questions demand solution. It is a satisfaction to my mind that the principles generally applied to all this class of cases have to a very considerable extent been enunciated by the court of the highest authority in these matters —I refer to the decision of the Privy Council in the *Gorham* case. The judgment therein delivered, being a decision of the Superior Court, is legally binding on me, so far as it declares principles applicable to the trial of the present cause. It is true that I was one of the judges in that memorable case; but the judgment stands upon the authority of Lord Langdale, Lord Campbell, Lord Wensleydale and Lord Kingsdown, approved by the two Archbishops of the realm. I think that the leading principles there laid down stand also, and most firmly stand, upon the stable basis of sound reason and justice. These principles must govern the present case, and would do so even if the particular decision had been erroneous. In the *Gorham* case the proceedings were civil, and concerned only civil rights, but the rule of construction of the Articles of Religion, the Book of Common Prayer, and the doctrines impugned, must be equally applicable to the present proceeding. In both cases there is the same issue, at least substantially; in both cases the question is, whether the doctrines be or be not contrary and repugnant to the Articles of Religion and the Book of Common Prayer. The following passage occurs in Mr. Moore's report of the judgment of Lord Langdale in the *Gorham* case, page 462:—"This question must be decided by the Articles and the Liturgy, and we must apply to the construction of those books the same rules which have been long established, and are by law applicable to the construction of all written instruments We must endeavour to attain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed. In our endeavour to ascertain the true meaning and effect of the articles, formularies and rubrics, we must by no means intentionally swerve from the old established rules of construction, or depart from the principles which have received the sanction and approbation of the most learned persons in times past, as being, on the whole, best calculated to determine the true meaning of the documents to be examined. If these principles were not adhered to, all the rights, both spiritual and temporal, of her Majesty's subjects would be endangered." These were the principles by which he purposed to abide, remembering, however, that this was a criminal proceeding, that the offence charged must be clearly proved, and that if doubt existed the accused was entitled to the benefit of it. His Lordship then stated the various steps which had been taken in the suit since its commencement in 1860, and added that the case was fully argued towards the end of last June. He was always, he continued, most anxious to avoid unnecessary delay in the adjudication of the causes in the courts in which he had the honour to preside, but a press of business always prevailed at that period of the year, and the subject matter of this suit was in itself so important and so difficult, the possible consequences of error so serious, not only to Mr. Heath personally, but also it might be to the interests of the Church, that he deemed it his duty to take such time for deliberation as he could only appropriate to the task during the long vacation. In considering how the principles laid down by the Privy Council were applicable to this case, he apprehended that the course to be followed was, first, to endavour to ascertain the plain grammatical sense of the Article of Religion said to be contravened, and if that Article admitted of several meanings without any violation of the ordinary rules of construction or the plain grammatical sense, then the court ought to hold that any such opinion might be lawfully avowed and maintained. If, indeed, any controversy arose whether any given meaning was within the plain grammatical construction, the court must form the best judgment it could, with this assistance—that, if the doctrine in question had been held without offence by eminent divines of the Church, then, though, perhaps, difficult to be reconciled with the plain meaning of the Articles of Religion, still a judge in his position ought not to impute blame to those who held it. That which had been allowed or tolerated in the Church ought not to questioned by that court. In construing Mr. Heath's sermons, however, the court was not bound down by the same strict rules which applied to the construction of the Articles or the Book of Common Prayer, and therefore it might be that a greater latitude of interpretation should be allowed, and the fullest possible means should be permitted for showing that Mr. Heath did not intend to contravene the statute of Elizabeth or promulgate doctrines inconsistent with the Book of Common Prayer. This was the course he was bound to follow, but there were also things to be avoided. The court must never assume for the purposes of this case that anything was done, or intended to be done, by the authority of the Legislature or of the Church of England, which it did not find within the four corners of the Articles of Religion and the Book of Common Prayer; and, on the other hand, it must never assume that anything therein found was not intended to have its full effect and operation. It was contrary to all probability, as well irreconcilable with the ordinary rules of construction in so solemn a proceeding as the establishment of the Articles of Religion or Book of Common Prayer, to presume that anything was inserted to be inoperative or rejected. For caution's sake, he would say that he fully recognised the position of the Judicial Committee, that there were many matters of doctrine *dehors* both the Articles of Religion and the Book of Common Prayer, as to which entire freedom of opinion was allowed. It must, however, be assumed as a matter admitting of no doubt, and respecting which the court could hear no discussion, that the Thirty-nine Articles and the Book of Common Prayer being established by the highest authority in this realm, must be taken by all who subscribed thereto to contain the doctrines of the Church of England, and, so far as therein set forth, to be accordant to Scripture; these were nearly the words which were used in the *Bath* case, and to which he adhered. His Lordship then read the terms of the 13th Elizabeth, and the construction which he had put upon the word "advisedly" in that statute giving judgment in the *Bath* case. One meaning of the

word was "deliberately," as contrasted with inadvertently. Another meaning was "intentionally," with an express and avowed purpose. But there was great difficulty in putting the second construction upon the word, for it was hardly possible that a clergyman who had signed the Articles would preach or publish anything with the avowed intention of contradicting them. The question of intention was of the last importance, but the court could only arrive at a conclusion upon that question by an examination of the acts complained of; for in all the transactions of life a man must be judged by the consequences of his acts, and he must be taken to intend that which was the effect of what he had deliberately done. He must apply these same principles to the present case, and hold that the printing and publishing a set of sermons was an act done "advisedly." With these observations, he proceeded to examine each of the four accusing articles. The sixth article alleged that certain passages in Mr. Heath's sermons contained doctrines contrary and repugnant to the eleventh Article of Religion. He must compare the passages with that Article. He felt this to be an arduous duty, and he should take especial care not to travel beyond the necessity which the law imposed upon him; but he must, in some part of this judgment, to a certain and limited extent, express a judicial construction of the eleventh Article; for how could he compare the passages in the sermons without so doing? The judicial construction was the plain grammatical sense of the Article It was no part of his province, and he distinctly disclaimed any attempt, to affix any meaning to this Article by any reference of his own to the Holy Scriptures; but he apprehended that, in case of doubt and absolute necessity, he should be justified in having recourse to the opinions of learned divines of the Church. The first difficulty he had to encounter was that, in ascertaining the plain grammatical meaning of the Article, he had to affix a meaning to words which had not by any commanding authority had any precise meaning affixed to them, and which words might, if Bishop Burnet were right, have been used in the New Testament in different senses. He was then, by the necessity of the case, coerced to give his own construction of the eleventh Article of Religion. First, he held, with Bishop Burnet, that by justification was meant being received into the favour of God; secondly, that the merit of our Saviour was the great cause of that reception; thirdly—and what on the present occasion was perhaps most important—that the person so to be received must have faith in the redemption of mankind through Jesus Christ. He did not enter into the consideration how far a very extended meaning might be given to the expression "by faith;" it sufficed for the present purpose to say, "faith in the redemption through Jesus Christ," and that it must be faith in the person to be justified. As to the latter part of the interpretation, he thought he was confirmed by the grammatical construction; the words which followed were, "and not for our own works or deserving;" the necessary inference was that "our *own* faith" was contemplated as well as "our *own* works." The thirteenth Article supported this construction, for there faith in Jesus Christ appeared to him clearly to denote faith in Jesus Christ in the person to be justified. If it were necessary to construe the remaining part, he should say that the words "we are justified by faith only" might mean that faith was indispensable, and without it there could be no justification. The essence of this Article was merits in the Redeemer, faith in the person to be justified. His Lordship then referred to the voluminous extracts from Mr. Heath's sermons set out in the articles, and said that the charges against them, compressed, were, that Mr. Heath affirmed that justification meant the doing strict justice to all both good and bad. and that justification by faith meant justification by the faith of our Saviour in his own Gospel, or our Saviour's trust in the future. He had duly considered these extracts, and he was of opinion that the doctrines maintained by Mr. Heath in the extracts from pages 22 and 28 did not contain the legal and correct explanation of the word "justification." He thought there was a misuse of words, and that an erroneous meaning, not permitted by law, had been attached to the word "justification," as used in the eleventh Article. He thought that every clergyman of the Established Church was bound to bear in mind the Articles of Religion in every sermon which he preached and published. He thought that if in such sermons he maintained a doctrine contrariant and repugnant to the Articles, it was no excuse for him to allege that he did not bear in mind the Articles, and had no intention of contravening them. But, although he deemed this position undoubtedly true, he was also of opinion that it ought not to be pressed with extreme rigidity. But in the passage to which he had referred it was possible that Mr. Heath might have meant, there being no reference to redemption by our Saviour, that the justification of which he was then speaking was simply that the Supreme Being would put all things to rights according to His wisdom. Much as he reprobated the passage as mischievous in every point of view, he should be very reluctant to conclude, if it were isolated, that such single passage was adequate proof of the charge laid in the sixth article. But there were other passages which he could not reconcile with any possible construction of the eleventh Article. That Article expressly declared that justification sprang from the merits of our Saviour, and in no respect whatsoever represented justification to mean the doing strict justice to all, though it might be, and he believed it to be, true that in the scheme of redemption, mercy and justice might be so combined that no violation of justice would take place. In other passages Mr. Heath introduced a new ingredient—namely, the personal faith of our Saviour, of which no mention was made in the Article, and which placed justification on a different ground. The Article declared justification to be by the merit of our Saviour, and by the faith of the person to be justified. To place justification upon the personal belief of our Saviour was, he thought, in opposition to the Article itself; for any essential addition to the Article could not be consistent with the Article, which purported to describe all that constituted justification. He could not consider it a harmless innovation, for it discarded the conditions of the eleventh Article, and substituted another instead; and this erroneous doctrine was again repeated in stronger terms. Mr. Heath said: "When I talk of justification by faith, I mean justification by our Saviour's trust in the future. The Saviour still trusts in our Father as He always did; He still has faith, and His faith still works by love; He still believes He can put the world right, and I believe so too." He was under the painful necessity of saying that he could not reconcile these doctrines with the plain grammatical sense of the eleventh Article. He thought that they were contrariant and repugnant thereto, and he must pronounce accordingly. His Lordship next examined the seventh article, wherein it was alleged that the passages extracted were repugnant to the second and thirty-first Articles of Religion. The plain meaning of the conclusion of the second Article was, that through the suffering and death of our Saviour, His Father was reconciled to us. He was well aware that very much discussion had arisen as to the meaning of the word "reconciled." The ordinary meaning of the word "reconciled," when speaking of two persons, he took to be the removal of some hostile or angry feeling which subsisted between them. When speaking of the Deity we must be careful not to attribute to him the feelings which belonged to man. The best construction that he felt himself at liberty to put upon the word "reconciled" was the removal of that obstacle which, from the sin of man, existed to his reception into the favour of God, and that being reconciled he would be so received into that favour. Upon a consideration of the second and of the thirty-first articles, he could not but think that whoever alleged that the death of our Saviour was not the means of reconciling His Father to us, or who denied that the death of Christ was a perfect propitiation for the sins of the world, must necessarily contravene those two Articles. The question therefore was, whether Mr. Heath had avowed such denial. He need not say that that he considered this question—namely, how it was effected — to be one of the mysteries which it had pleased Providence to leave incapable of being explained by man, and he was relieved by thinking that it was his duty merely to ascertain whether the doctrine therein contained had been denied or not. He was in no respect called upon to offer any explanation. His Lordship referred to passages in the sermons which, he said, appeared to him to deny that God was propitiated by the sufferings and death of our Saviour, and not only to deny that doctrine, but to allege that His blood was shed for another purpose. His Lordship next referred to the eighth article, charging Mr. Heath with having advisedly maintained doctrines repugnant to the Apostles' Creed, which declared our belief in the forgiveness of

sins, and to that part of the Nicene Creed which declared our belief in one baptism for the remission of sins. It was also charged that these doctrines were repugnant to the eighth, twenty-seventh and sixteenth Articles of Religion. After reading those portions of the Creeds which referred to those points, his Lordship said that the result of them was that forgiveness of sins was avowed and acknowledged as a part of the doctrines of the Church —forgiveness of sins through the merits of the Saviour by faith and repentance; and the question was whether this doctrine had been denied by Mr. Heath. The first passage bearing upon the question was at p. 161: "For myself I feel beaten to the very ground at the enormity of the task of persuading all England to reject totally the forgiveness of sins as having anything at all to do with the Gospel." If this passage stood alone, if it were not altogether qualified, and a construction put upon it by other parts of the sermon adverse to its *primâ facie* meaning, he did not see how it was possible that any interpretation of its meaning should not convey the doctrine that Mr. Heath denied the forgiveness of sins, nor could he entertain any doubt that a denial of the forgiveness of sins was contrariant and repugnant to the Creeds and Articles. His task, therefore was narrowed to this — whether he could find in this sermon any satisfactory explanation of the passage he had read. He could find none. The remaining charge was that contained in the tenth article, which charged that certain passages were repugnant to the second Article of Religion, that other passages were repugnant to the Creed of St. Athanasius, to the Apostles' Creed, and to the Nicene Creed, and also complained of a violation of the thirty-first, the sixth and the eleventh Articles. In considering the question whether Mr. Heath had contravened a meaning, as far as he knew, disputed by none, he confessed that he had had great difficulty in believing that Mr. Heath did really mean to express the opinions which his words conveyed, such opinions appearing to him to be entirely contrary to those which any clergyman ought to declare; but he was not able to discover any clue whereby he could venture to say that those opinions were qualified, and to be understood in a different sense from that which *primâ facie* belonged to the words used. At page 117 of the sermons was the following passage: "The more I study my Bible for myself the more astounding I find it—how many of the most fundamental ideas and phrases of modern theology have been foisted in without sanction from that all sufficing record of our religion. One after another, no less than about twenty ideas or phrases, such as guilty of sin, paying a penalty, going to heaven, going to hell, immortality of the soul, satisfaction, imputed righteousness, appropriating the work of Christ, necessary to salvation, and many others, have vanished from my system, because, as a minister of Christ, studying these matters professionally, I see them to be phrases and ideas not only absent from Scripture, but darkening and confusing the clearest of the otherwise most intelligible and comforting statements of Holy Writ." The effect of this passage was—first, that guilt of sin had vanished from Mr. Heath's system, because such a phrase and idea were absent from Scripture and darkened the most intelligible and comforting statements of Holy Writ. Now, what said the second Article? That our Saviour died to reconcile us to the Father, and to be a sacrifice not only for original guilt, but also for the actual sins of men. He really could not comprehend how any intelligible meaning could be affixed to this Article, if guilt of sin was to be removed from all Christian doctrine. He could not conceive the idea of actual sin without there being guilt of sin. He should not dwell upon the other expressions which were alleged to be repugnant to the Creeds. He viewed the whole of the passage with astonishment and regret. He thought the words used contained a doctrine, if it was to be so called, utterly irreconcilable with the Creeds. The thirty-first Article was next to be considered. Mr. Heath dismissed from his system the immortality of the soul, satisfaction, imputed righteousness, as darkening and confusing the clearest and the most intelligible and comforting statements of Holy Writ. The thirty-first Article said that the offering of Christ was a perfect satisfaction for all the sins of the world. To deny satisfaction altogether, whatever might be its meaning, as Mr. Heath had done, could not be taken in any other sense than a denial of the truth of the Article itself. The next charge was that Mr. Heath had maintained that the phrase "necessary to salvation," was not only not a Scriptural phrase but a phrase which darkened and confused Holy Writ. Passing by the Creed of St. Athanasius, he would refer to the very words with which the sixth Article commenced: "Holy Scripture containeth all things necessary to salvation." What did Mr. Heath mean by the omission of words as contrary to Scripture, which words contained the very essence of the Article itself? It is with great regret, his Lordship continued, that I have felt myself compelled by a sense of duty to declare that I have no other alternative but to pronounce a judgment condemning Mr. Heath as guilty of the charges preferred against him—namely, preaching doctrine contrariant and repugnant to the Articles of Religion cited in these proceedings. The defence has been maintained with great zeal and learning, and many ingenious arguments have been urged upon the court; but I must say that that which the court wanted from the beginning has never been supplied — namely, some kind of exposition of the doctrines preached by Mr. Heath which could by any possibility, however remote, be reconciled with the plain grammatical meaning of the Articles charged to be contravened. I would with pleasure have accepted in excuse for Mr. Heath any explanation of his doctrines which by any reasonable effort of the understanding could be reconciled with the doctrines of the Church. There has been a complete failure in that respect, not from any want of learning, diligence or ability of counsel, but because it was not possible rationally to affix any innocent meaning to those doctrines which Mr. Heath has so unfortunately promulgated. I trust I may confidently affirm that I have come to the consideration of this painful case with no disposition to press the clergy of this realm to any narrow construction of the doctrines of the Articles of Religion, but to allow every possible interpretation which would not violate their essence and spirit; to go further would be to abandon the duty of the office I hold, and to do that which the Legislature alone could do—to release the clergy of the Church of England from the obligations contained in the Aticles, and to repeal by judge-made law the provisions which Parliament has thought fit to enact by its authority. Before concluding, I think it right to explain why I do not advert to the many authorities which the zeal and learning of counsel have produced. My reason is this, that in my judgment not one of these authorities does that which was required in this case—namely, show that some divine of eminence has held without reproach from ecclesiastical authority doctrines in substance the same as those Mr. Heath has promulgated. Whatever opinions may have been held in the vast field of polemical divinity, I find none which can support Mr. Heath or justify him. In the *Gorham* case the Judicial Committee had the advantage of being able to quote in support of their judgment, and in justification of Mr. Gorham, passages from the writings of divines of the highest authority. I cannot conclude this judgment without observing that I am well aware of the fallibility of my own opinion, and especially in so peculiar a case as the present; but I have endavoured, first, to make clear the principles which I intended should govern me; and, secondly, to show plainly how I applied those principles to the case before me. If I have erred in either particular, the judgment of a Superior Court will correct me. It may be, however, that many will think that, though legally right, this judgment recognises too severe restrictions upon the clergy, and shuts the door against inquiry and disquisition, which might tend to elucidate the truth. Now, even if this were true, it is not for a court of justice to open a door which the Legislature has shut. It is contrary to all sound principle for a court to seek, as has been formerly done by some judges, ingenious subterfuges to evade or weaken the law, and that upon a notion of its own power to discover what is best and most convenient. Such a course is, I think, not only contrary to principle, but would be most injurious in its effect, for all such attempts to wrest the law according to supposed consequences invariably tend to postpone a remedy if there be a real evil. If there be bonds which press heavily upon the clergy—as to which I give no opinion — I repeat that the Legislature imposed them, and the Legislature alone can loose them. I pronounce against Mr. Heath.

Bullar asked his Lordship to allow the defendant time to consider what course he should take after the judgment that had been pronounced. Under the statute retraction was open to Mr. Heath.

His Lordship said he would allow ample time for consideration and the cause was accordingly postponed for that purpose.

GENERAL CORRESPONDENCE.

Municipal Law—Qualification of voters—Duty of Returning Officer.

TO THE EDITORS OF THE LAW JOURNAL.

29th November, 1861.

GENTLEMEN,—As the municipal elections are drawing near, and one or two points are likely to be argued at the polling place in this municipality, the same as on former occasions, I have taken the liberty of soliciting your opinion thereon, for the benefit of myself and fellow clerks.

You have herewith a copy of the heading to an assessment roll.

NAMES OF TAXABLE PARTIES.

1	2	3	5	6	7
Nos.	OCCUPANTS.	Profession. Occup'tion, &c	Home-holders.	Age.	OWNERS AND ADDRESS.
1	John Brown	Yeoman	H.	33	Alfred Jones.
2	James Brown	Yeoman	H.	33	Peter Thompson.

1. Are persons named in column 7, under the title "Owners and Address," entitled to vote; and if they are, must the amount assessed be $40 annual value (in *towns*) to entitle occupant and owner to vote; or in case the amount should be less than $40, which of the two, or can *either* of them, vote; or would $20 be sufficient to qualify both. See sec. 79 of Municipal Institutions Act (Manual); and also 1 and 2 in accompanying heading?

2. Again, must the amount to qualify be a distinct assessment? Thus—an owner may be named in column 7 as the owner of several tenements, assessed in column 2 to different occupants, one of which would not qualify the owner. Can the qualification be made of one or two assessments of that kind?

3. Again, if a person is assessed in column 2, as owner or occupant, for $12, and in another part of the roll, in column 7, sufficient to make $20, will that qualify?

4. Again, if two persons are assessed jointly for $36, neither is qualified. But half of this assessment is $18: if one of them is assessed for $2 elsewhere, making $20, is that a qualification?

5. Is a returning officer bound to administer the oath, when required to do so by a candidate or voter, when he himself *knows* that the person taking it will commit perjury?

6. If a person comes forward and represents himself as another individual and votes, can the *right* person afterwards vote upon taking the oath?

Yours respectfully,

A TOWN CLERK.

[In answer to queries 1, 2, 3 and 4 we can only refer our correspondent to the report of *Reg. ex rel McGregor* v. *Ker*, 7 U. C. L. J. 96, and ask him carefully to peruse the same.

In answer to query 5, we must refer to sec. 97, sub-sec. 9, of the Municipal Institutions Act.

In answer to query 6 we say, yes. The person legally entitled to vote is not to be disfranchised by reason of anything mentioned by our correspondent. The right person must have his vote polled. The name of the wrong person must be struck off in the event of a contest.—EDS. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. ESSELL v. HAYWARD. *June* 12.

Partnership—Solicitors—Notice of Dissolution—Breach of Trust and Embezzlement—Decree for Dissolution from date of Notice—Costs.

Where one of two persons, carrying on business as solicitors in partnership for their lives, discovers that his partner as the surviving trustee of a sum of stock, has sold it out and applied the money to his own use, he is justified in giving such partner notice of dissolution of partnership upon the ground of the embezzlement and breach of trust.

The dissolution will take effect from the time of giving notice, and not from the date of a decree made in a suit instituted to dissolve and take the accounts of the partnership.

The defendant having contested the right of the plaintiff to a dissolution was decreed to pay the costs of the suit up to the hearing.

V. C. S. HARPER v. HAYS. *May* 22, 23, 24.

Vendor and Purchaser—Trustee for sale—Duty of such Trustee to get the best price—Agreement for sale set aside.

Real estate was conveyed to H. upon trust, as soon as conveniently might be after the death of A. to sell for the best price, by public auction, or private contract, and to divide the proceeds among certain persons. On the death of A., H. and the *cestius que trusts* agreed that owing to a flaw in the title which could be cured by time, it was inexpedient to sell them, and thereupon, W. H. (one of the *cestius que trusts*) was let into possession of the rents and profits on behalf of all parties interested in the sale monies. Subsequently H., without inviting competition, entered into a negotiation for a sale of the estate to P. for £6000. W. and M. offered a larger sum, and on their offer being refused, bought in the share of one of the *cestius que trusts*, and then gave notice to H. that they objected to a sale for £6000, or to any sale without inviting competition; and at the same time they offered £7000. They also gave P. notice of their objection. H. nevertheless concluded the agreement with P. On bill filed by W. and M. the agreement was set aside, W. and M. undertaking to bid £7000.

M. R. DAVIS v. WHITMORE. *June* 30, *July* 2.

Practice—Foreclosure Suit—Disclaiming Defendant—Costs.

Where in a foreclosure suit, after a defendant has disclaimed all interest in the property, the plaintiff goes on to obtain an absolute decree of foreclosure against him, the latter is entitled to his costs from and after the disclaimer.

V. C. K. IN RE ROOTS. *July* 6.

Will—Construction—Gift of Personalty to Heirs.

A testator gives all his property, subject to the payment of debts to his wife for life, and after bequeathing various legacies, after the death of his wife, whatever property may be left equally between the heirs of his late uncle W. N., late of C. I. N., late of W., and his aunt P. F., late of B. The subject of this gift being personalty.

Held, That the word "heirs" meant heirs at law living at the death of the testator, and not next of kin.

V.C.W. MAYER v. SPENCE. *June* 12, 19.

Practice—Action at Law—Affidavit.

In a suit to restrain the infringement of patent rights, the plaintiff is entitled without moving for an injunction, to apply for leave to try his right at law, such application being supported by an affidavit showing a *primâ facie* title in the plaintiff to the patent, and alleging infringement by the defendant.

V. C. W. RE SKINNER'S TRUST. *July* 7.

Will—Specific Bequest—Failure of Purpose.

Testator, by a codicil, revoked a bequest in his will of £1000 to be applied in printing a M.S. work, with certain directions, and left the M.S. in trust for his grandson F., that the trustees might provide for the publication of the M.S. to the best advantage for the interests of F., so as to contribute towards raising a fund to assist him at the University. "Should F. die before the book is printed, and it becomes profitable, towards the printing of which I bequeath £1000, and C. has a boy, I wish him to inherit all the benefit that may be derived from this bequest."

The book had never been published as it was not thought likely to succeed.

Held, that the primary object of the codicil being benefit to F., he was entitled to the £1000, although the particular purpose to which it was to be applied had failed.

COMMON LAW.

Q. B. BAYLES v. LUNDY. *April* 15

Sale of goods—Statute of Frauds—Acceptance—Evidence.

Defendant being the holder of a delivery order for goods, sent his servant to the warehouseman to lodge the order and fetch a portion of the goods, which were removed to the defendant's premises.

Held, an acceptance of the goods by the defendant within the 17th section of the Statute of Frauds.

Ex. IN RE. FERNANDEZ. *April* 19

Commitment for contempt of Court—General warrant—Habeas Corpus.

The Courts of Assize are Superior Courts, and as such have authority to commit by general warrant.

The Court of Exchequer, therefore, will not issue a writ of *habeas corpus* to bring up the body of a prisoner committed for contempt by a judge at the Assizes, under a warrant which does not set forth the particulars of the offence.

C. C. R. REG. v. TITE. *April* 27.

Embezzlement—Commercial Traveller—Clerk or servant—Payment by commission, with liberty to take orders for others.

A person engaged by a manufacturer as a commercial traveller, to be paid by commission, with liberty to take orders for others, is a servant.

C. C. R. REG. v. JAMES BRAMLEY. *April* 27.

Larceny—Obtaining possession of goods by a trick—False pretence.

It was the course of business at a Colliery where coal was sold by retail, to take the carts when loaded to a weighing machine in the Colliery yard, where they were weighed and the price of the coal paid. The prisoner having gone to the Colliery with a fraudulent intent, a servant of the prosecutor, upon the prisoner saying he wanted a load of best soft coal, loaded prisoner's cart with soft coal and went away, leaving him to take it to be weighed and pay for it. The prisoner then fraudulently covered over the soft coal with slack, an inferior coal, and by this trick and by saying that the coal in the cart was slack, induced the weighing clerk, who did not know that the cart contained the soft coal, to weigh it as slack and charge the prisoner accordingly.

Held, that the prisoner had obtained possession of the soft coal by a trick, and that he was properly convicted of larceny.

Ex. C. CLARKE v. WRIGHT. *Feb.* 8.

Consideration—Marriage settlement—Limitation in favor of illigitimate child—27 Eliz., ch. 4.

The gift of an estate to an illigitimate child under the provisions of a marriage settlement, is not fraudulent and void against a purchaser under 27 Eliz., chap. 4.

C. P. *April* 27.

THE T. J. W. AND SHIP BUILDING CO. v. ROYAL MAIL CO.

Payment into Court—Order for particulars of appropriation of sums paid into Court.

In an action against ship owners for building and extra expenses in building two ships for them, the defendants paid a sum of money into Court in satisfaction of plaintiffs claim. *Held*, that plaintiffs were not entitled to an account of the particular items of their demand to which the said sum was paid into Court.

Q. B. REG. v. THE GUARDIANS OF THE CAMBRIDGE UNION.

Quarter Sessions—Appeal—Part heard—Power to adjourn to a subsequent Sessions.

A Court of Quarter Sessions has power to adjourn the hearing of a part heard appeal to a subsequent Sessions.

Q. B. CARR v. COOPER. *May* 7.

Error in fact—Amendment of record.

When an infant had appeared as defendant in an action by attorney instead of by guardian, and a verdict was found against him, and error was brought, upon motion to set aside the writ of error and amend the record.

Held, that the Court could not amend the record by substituting an appearance by guardian for an appearance by attorney; the Court cannot, in the exercise of its power of amendment, render the record false.

Q. B. POW v. DAVIS. *May* 7.

Breach of warranty of authority to contract as agent—Measure of damages.

When a person has contracted with a supposed agent, who in fact had not authority to contract, he cannot claim indemnity from such supposed agent for damages which did not flow directly from such breach of warranty.

Ex. HAMER ET AL. v. KNOWLES AND ANOTHER.

Mines, working of—Rights to support of land over mines—Damages to reversion.

In 1828, one F. conveyed certain lands in fee to one J. S., excepting mines and veins of coal under said lands. At the time of the conveyance there were no buildings on the land. In 1833 a loom shed, engine house, steam engine, mill, &c., were erected. This engine, &c., was worked until 1841. In that year and until 1849, the buildings were enlarged. In 1842 the hereditaments so conveyed to J. S., were conveyed to McC. in fee. McC., by will, devised the legal estate to the plaintiffs S. and M. In 1851 the plaintiffs S. and M. conveyed the same to the plaintiff H. The defendants are lessees under F., and took coals from the mines in 1849 and 1850, which caused the land on which the mill, &c., stood to subside. The foundations of the mill buildings were damaged, and the buildings drawn towards the coal workings. The mining operations which caused the damage, were carried on under land near but not immediately adjoining the plaintiff's property. The building and machinery placed on the land did not contribute to cause the subsidence of the ground.

The Plaintiffs S. and M., and the plaintiff H., brought actions against the defendants in 1855.

Held, that as the buildings did not contribute to the subsidence, the plaintiffs were entitled to damages for injury to them by the defendants' wrongful act in causing the ground on which they stood to subside.

REVIEWS.

A DIGEST of all CASES decided in the several COURTS of ERROR and APPEAL, QUEEN'S BENCH, COMMON PLEAS, & CHANCERY, in Upper Canada; with a selection of the CHAMBER CASES reported in Vols. 3 to 6, inclusive, of the *Upper Canada Law Journal*. By ROBERT A. HARRISON, Esq., B.C.L., Barrister-at-Law, and HENRY O'BRIEN, Esq., Barrister-at-Law. Toronto; Henry Rowsell, King Street.

This work, of which several of the numbers have already been issued from the press, has been anxiously looked for by the Profession for a long time past. It is now more than nine years since the publication of Robinson and Harrison's Digest (of which this now being issued is a continuation), and its great utility and labor-saving benefits have contributed to make this present work, if possible, more of a necessity to the Profession. To the junior members especially it will be a great boon, as they cannot be expected to be as familiar with the cases as their seniors, during whose time they were perhaps reported, but with whom this Digest will be as a book of reference, and a substitute, as it were, for experience.

The first Digest written under the supervision of J. Lukin Robinson, then Reporter of the Court of Queen's Bench, was credited to the labor and energy of Mr. Harrison, at the time only a student, and whose name then appearing for the first time in connection with a law publication, has since become so familiar to the Profession as a writer; and although the necessity for a continuation of the Digest has been felt for some time, no disposition has been evinced, that the writer of this notice is aware of, to take the mantle from Mr. Harrison, but on the contrary the writer, and to his knowledge many others of the Profession, have from time to time urged the matter upon him as the person who was looked to by the Profession to undertake the work. That it is no light one, any person at all familiar with the nature and requirements of such a publication, need not be told. No one having the business of his profession to attend to, could alone within any reasonable time, however diligent he might be, hope to produce the work, and accordingly we find that Mr. Harrison has associated another with him in his labors Mr. O'Brien, whom he doubtless selected as well fitted for the task—one like himself enamoured, as it were, not only of fame, but of hard work.

The Digest will be completed in about 12 numbers at $1 each. Three Dollars of the subscription to be paid in advance.

We need hardly recommend it to the Profession, as there is no one unaware of its being almost a necessity to every practising lawyer, but it might be well to suggest to those who are tardy in securing a copy, that by and by it may be difficult, if not impossible, to get one, the number of copies issued of such a work being generally limited, and a second issue not to be expected for many years.—SENIOR ED. L. J.

THE LAW MAGAZINE AND LAW REVIEW. London: Butterworths, 7 Fleet Street. The quarterly number for November is received.

Contents: 1. Jurisprudence at Dublin; 2. Religious trusts; 3. The Rules of Evidence; 4. The Constitutional History of England; 5. Extract of a Letter from Lord Brougham to the Earl of Radnor; 6. Belligerent rights at sea; 7. Journal of a Gloucestershire justice; 8. The Law of Nations; 9. Ram's Treatise on Facts; 10. Martial Law in Australia.

The *first* is an article suggested by the recent Congress of the Association for the promotion of Social Science in Dublin, and is of little interest to us in Canada. The *second* is an exposure of abuses existing among clergy of certain religious denominations. The *third* is a review of a work on Rules of evidence, recently published by Mr. John Appleton, one of the Justices of the Supreme Court of Maine. The *fourth* is an extended review of a Constitutional History of England since the accession of George III., by Thomas Erskine May, C.B. The *fifth* is a letter from Lord Brougham to the Earl of Radnor, in which the veteran law reformer takes a review of the English legislation during the last session of Parliament. The *sixth* is a letter on Belligerent Rights at sea, from Hon. W. B. Lawrence, of Rhode Island, recently ambassador to Great Britain from the United States, to Mr. John Westlake, the Secretary of the International Law department of the Social Science Association. Now that the question of belligerent rights at sea is of universal interest, the letter will be earnestly read and much valued. The *seventh*—Journal of a Gloucestershire justice—is a continuation of the diary of Rev. Francis Welles, Vicar of Prestbury, from 1715 to 1756. The *eighth* is a review upon a work entitled "The Law of Nations considered as Independent Political Communities," by Travers Twiss, D.C.L., Regius Professor of Civil Law in the University of Oxford. The *ninth* is a review of a treatise on Facts and Subjects of Enquiry by a Jury, recently published by James Ram, Esq., of the Inner Temple, Barrister-at-Law. The book reviewed is described as a novel and instructive one, "making romance and poetry the staple materials of a legal treatise." The *tenth* is a learned article in which the writer argues with great force that the exercise of martial law by the governor of a British colony is illegal, whether included in his commission or not.

GODEY'S LADY BOOK, for January, 1862, is received. Contains two original designs of great merit: the one, "Our Father who art in Heaven;" and the other, "A Slow Coach." The fashion-plate contains no less than seven well-colored figures. Nothing can excel the beauty of the fashion-plates in Godey. It is said that this magazine contains in one year 400 more pages of reading than any other magazine; twice as many engravings; and at least 50 more colored fashions. The terms are:—One copy, one year, $3; two copies, one year, $5; three copies, one year, $6; five copies, one year, and to the person sending the club, $11 25. At these prices, subscribers in the British Provinces have no United States' postage to pay.

APPOINTMENTS TO OFFICE, &c.

POLICE MAGISTRATES.

GEORGE BOOMER, of the City of Toronto, Esquire, to be Police Magistrate for the City of Toronto, in the room of George Gurnett, Esquire, deceased.—(Gazetted November 30, 1861.)

CLERKS OF THE PEACE.

RICHARD DEMPSEY, of the City of Toronto, Esquire, to be Clerk of the Peace, in the room and stead of George Gurnett, Esquire, deceased.—(Gazetted November 23, 1861.)

CLERKS OF COUNTY COURTS.

THOMAS D. WARREN, of St. Thomas, Esquire, to be Clerk of the County Court of the County of Elgin.—(Gazetted November 23, 1861.)

NOTARIES PUBLIC.

JOHN A. MACKENZIE, of Sarnia, Barrister-at-law, to be a Notary Public for Upper Canada.—(Gazetted November 16, 1861.)

GEORGE B. BOYLE, of Saint Catharines, Esquire, Attorney-at-law, to be a Notary Public in Upper Canada.—(Gazetted November 23, 1861.)

WILLIAM DOUGLASS, of Chatham, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted November 23, 1861.)

CORONERS.

CHARLES HILL, Esquire, to be an associate Coroner for the United Counties of Huron and Bruce.—(Gazetted November 23, 1861.)

PETER McLAREN, Esquire, M. D., to be an associate Coroner for the County of Bruce.—(Gazetted November 30, 1861.)

EDWARD A. PAGET, Esquire, M. D., to be an associate Coroner for the County of Perth.—(Gazetted, November 30, 1861.)

TO CORRESPONDENTS.

"D.;" "A DIVISION COURT CLERK,"—Under "Division Courts."

"A TOWN CLERK,"—Under "General Correspondence."

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